

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of DEWEY LEE SCOTT
BUTCHER, Minor.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

DAVID BUTCHER,

Respondent-Appellant,

and

ELAINA BUTCHER and JAMES WILLIAMSON,

Respondents.

UNPUBLISHED

October 22, 2009

No. 291358

Allegan Circuit Court

Family Division

LC No. 08-042980-NA

Before: Fort Hood, P.J., and Sawyer and Donofrio, JJ.

PER CURIAM.

This appeal arises from the termination of respondent's parental rights to the minor, Dewey Butcher (DOB 7/21/08), based on allegations that he physically abused another of the mother's children, Hannah Baptiste (DOB 12/12/06).¹ We affirm the termination of respondent's parental rights, vacate in part, and remand for further proceedings consistent with this opinion.

Underlying this termination is respondent's no-contest plea to second-degree child abuse after Hannah was brought to the hospital in April 2008 with symptoms of having been shaken. Respondent was taking care of Hannah at the time and he was the only adult present. Respondent claimed that Hannah had been dropped or had fallen. The trial court terminated respondent's rights after finding clear and convincing evidence supporting four statutory grounds:

¹ Respondent Williamson is Hannah's father.

MCL 712A.19b(3)(b): The child or a sibling of the child has suffered physical injury or physical or sexual abuse under 1 or more of the following circumstances:

(i) The parent's act caused the physical injury or physical or sexual abuse and the court finds that there is a reasonable likelihood that the child will suffer from injury or abuse in the foreseeable future if placed in the parent's home[,]

MCL 712A.19b(3)(g): The parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age[,]

MCL 712A.19b(3)(j): There is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent[, and]

MCL 712A.19b(3)(k): The parent abused the child or a sibling of the child and the abuse included 1 or more of the following:

* * *

(iv) Loss or serious impairment of an organ or limb.

In order to terminate parental rights, the trial court must find that at least one of the statutory grounds for termination set forth in MCL 712A.19b(3) has been proven by clear and convincing evidence. *In re Sours*, 459 Mich 624, 632-633; 593 NW2d 520 (1999). If at least one ground is so proven, the court must terminate the parent's rights if it finds termination is in the child's best interests. MCL 712A.19b(5), *In re Hansen*, ___ Mich App ___; ___ NW2d ___ (Docket No. 289903, issued July 21, 2009). We review for clear error the trial court's findings that a ground for termination has been established. MCR 3.977(J); *In re Rood*, 483 Mich 73, 90-91 (Corrigan, J.); 126 n 1 (Young, J.); 763 NW2d 587 (2009). We also review the trial court's findings regarding the child's best interest under the clearly erroneous standard. MCR 3.977(J); *Rood, supra*. A finding is clearly erroneous if, although there is evidence to support it, we are left with a definite and firm conviction that a mistake has been made. *In re JK*, 468 Mich 202, 209-210; 661 NW2d 216 (2003).

First, we note that the trial court made no finding that termination of respondent's rights was in the child's best interest. This is clear error. *In re Hansen, supra*. The court did conduct a "best interest" analysis, but only as concerning termination of the mother's rights. Nor do we find clear evidence in the record that termination was in the child's best interest. Respondent presented evidence showing that he had a history of providing appropriate care for small children. We therefore remand for the trial court to consider whether termination of respondent's rights was in the child's best interest and to identify the factual support for its conclusion.

Second, we reverse the trial court's decision that termination was appropriate under three of the four grounds it identified. However, because we conclude termination was correct under

the fourth ground, we affirm the decision that termination was supported by clear and convincing evidence. Three of the grounds, (3)(b)(i), (3)(g), and (3)(j), require a finding of a reasonable likelihood the potential for harm would continue. The court based its decision on the fact that respondent insisted Hannah's injuries occurred because she had fallen into the bathtub, despite the treating physician's testimony that the only plausible explanation in this case was that respondent had shaken Hannah significantly, and because respondent initially told the physicians that she had fallen when her playpen tipped over. The court concluded without evidence that therapy would be useless unless respondent first admitted to shaking Hannah. Nothing supported this conclusion: there was no evidence that respondent could not, through counseling or parenting classes, become able to refrain from uncontrolled outbursts, no expert testified that people who shake babies cannot learn to control themselves, and no psychological evaluation was done on respondent. In contrast, there was considerable evidence presented by respondent that he had cared for small children numerous times without problems. There was also no evidence that respondent would again conceal facts from physicians, once he understood the importance of it. He testified that he did not think the manner of the fall mattered, as long as they knew she had hit her head. Even if none of respondent's testimony is believed, the incontrovertible fact is that he immediately sought medical treatment for Hannah, despite his culpability. Only speculation leads to the conclusion of a reasonable likelihood of harm to the child if returned to respondent and therefore the trial court erred in terminating his rights based on those grounds.

However, the fourth ground for termination, (3)(k)(iv), does not require a finding that harm is likely to recur. All that the court had to find was that respondent physically abused Hannah and that the abuse caused the loss or serious impairment of an organ or limb. The court did not clearly err in finding this ground adequately supported by the evidence. The fact that Hannah continued to suffer partial peripheral blindness was undisputed; in addition, she had some paralysis that she apparently managed to overcome, and there was testimony that she had "dead matter" in her brain that could cause seizures as a result of being shaken. Even if we did not find this evidence clear and convincing, we have on occasion upheld termination under a different subsection of § 19b than the one considered by the trial court. See, e.g., *In re Powers*, 208 Mich App 582; 528 NW2d 799 (1995); *In re Kellogg*, 157 Mich App 148; 403 NW2d 111 (1987); *In re Bailey*, 125 Mich App 522, 527; 336 NW2d 499 (1983). In this case, there is no dispute that Hannah's injuries were life-threatening, and the trial court did not clearly err in finding respondent's conduct amounted to abuse. Thus, termination would be appropriate under MCL 712A.19b(3)(k)(v), as well.

We affirm the trial court's termination of respondent's parental rights, but vacate the finding that termination was in the child's best interests, and remand for the trial court to determine whether termination is in the child's best interests; the trial court shall cite evidence supporting its decision. We retain jurisdiction.

/s/ Karen M. Fort Hood
/s/ David H. Sawyer
/s/ Pat M. Donofrio

Court of Appeals, State of Michigan

ORDER

In re Dewey Lee Scott Butcher, Minor

Docket No. 291358

LC No. 08-042980-NA

Karen M. Fort Hood
Presiding Judge

David H. Sawyer

Pat M. Donofrio
Judges

Pursuant to the opinion issued concurrently with this order, this case is REMANDED for further proceedings consistent with the opinion of this Court. We retain jurisdiction.

Proceedings on remand in this matter shall commence within 28 days of the Clerk's certification of this order and they shall be given priority on remand until they are concluded. As stated in the accompanying opinion, the trial court shall determine whether termination of respondent-appellant's rights was in the child's best interests and shall cite the factual support for its conclusion.

The parties shall promptly file with this Court a copy of all papers filed on remand. Within seven days after entry, appellant shall file with this Court copies of all orders entered on remand.

The transcript of all proceedings on remand shall be prepared and filed within 21 days after completion of the proceedings.



A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

OCT 22 2009

Date

Sandra Schultz Mengel
Chief Clerk