STATE OF MICHIGAN

COURT OF APPEALS

FOR PUBLICATION
May 9, 2013

In re MOSS, Minors.

No. 311610
St. Clair Circuit Court
Family Division
LC No. 12-000052-NA

Advance Sheets Version

Before: MURRAY, P.J., and WILDER and OWENS, JJ.

WILDER, J. (*concurring*).

I join in the majority's conclusions that the trial court did not err by finding that there was clear and convincing evidence to terminate respondent's parental rights under MCL 712A.19b(3)(g) and (j) and that termination was in the best interests of the children. I disagree with the majority, however, that because the 2008 amendment of MCL 712A.19b(5) does not explicitly state a standard of proof for the trial court to use in making its best-interest determination, the due-process balancing test enunciated in *Mathews v Eldridge*, 424 US 319; 96 S Ct 893; 47 L Ed 2d 18 (1976), should apply.

In *Mathews*, the United States Supreme Court implemented a balancing test to be used to determine whether certain procedures were adequate to meet the requirements of due process:

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. [*Id.* at 335.]

In my view, *Mathews* is inapplicable here for two reasons. First, respondent did not make a due-process challenge on appeal. Instead, respondent erroneously cites MCL 712A.19b(3)[1] as support for her assertion that the best-interest determination, made under MCL 712A.19b(5), also requires a finding of clear and convincing evidence. As the majority also concludes, with the Legislature's amendment of MCL 712A.19b(5), it is plain from the language of the statute that a clear and convincing standard does *not* apply to the best-interest determination. The fact that we reject as erroneous respondent's contention regarding the applicable burden of proof does not necessarily require us to engage in a due-process analysis in order to determine the correct burden of proof.

Second, even if a due-process challenge were properly before us, *Mathews* remains inapplicable because once grounds for termination are established by clear and convincing evidence under MCL 712A.19b(3), a parent has no further liberty interest to protect and, thus, has no due process right to be affected. See *In re Parole of Hill*, 298 Mich App 404, 412; 827 NW2d 407 (2012) ("Whether the due process guarantee is applicable depends initially on the presence of a protected property or liberty interest. It is only when a protected interest has been found that we may proceed to determine what process is due.") (citations and quotation marks omitted). Our Supreme Court has held, "Once the petitioner has presented clear and convincing evidence that persuades the court that at least one ground for termination is established under [MCL 712A.19b(3)], the liberty interest of the parent no longer includes the right to custody and control of the children." *In re Trejo Minors*, 462 Mich 341, 355; 612 NW2d 407 (2000). In other words, at that point, "the parent's interest in the companionship, care, and custody of the child gives way to the state's interest in the child's protection." *Id.* at 356; see also *In re Foster*, 285 Mich App 630, 635; 776 NW2d 415 (2009).

Because a parent against whom there exists clear and convincing evidence to terminate parental rights no longer has a liberty interest including the right to custody and control of the children, I would conclude that this case should be resolved solely in accordance with the relevant statutes and court rules. The general rule in a civil case is that when an applicable statute "does not spell out a particular standard of proof," "the usual 'preponderance of the evidence' quantum of proof in civil cases is therefore considered to apply." *Residential Ratepayer Consortium v Pub Serv Comm*, 198 Mich App 144, 149; 497 NW2d 558 (1993). In the context of a termination-of-parental-rights proceeding, the Supreme Court recognized and affirmed this principle by its adoption of MCR 3.972(C)(1), which provides:

> Except as otherwise provided in these rules, the rules of evidence for a civil proceeding and the standard of proof by a preponderance of evidence apply at trial, notwithstanding that the petition contains a request to terminate parental rights.

[1] MCL 712A.19b(3) provides that the *grounds for termination* must be established by clear and convincing evidence; it does not pertain to the best-interest requirement under MCL 712A.19b(5).

Since MCR 3.977(E)(4), the court rule specifically applicable to this case, fails to provide a standard of proof relevant to a trial court's best-interest determination, the preponderance of the evidence standard provided in MCR 3.972(C)(1) does apply here.

For the reasons stated, I agree that the judgment of the trial court should be affirmed. However, rather than using the *Mathews* due-process analysis, I would affirm the best-interest findings of the trial court as having been made in a manner consistent with the plain language of MCL 712A.19b(5) and MCR 3.972(C)(1).

/s/ Kurtis T. Wilder