

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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UNPUBLISHED  
July 24, 2012

In the Matter of WORKMAN/VERTZ, Minors.

No. 308552  
Branch Circuit Court  
Family Division  
LC No. 10-004454-NA

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Before: SHAPIRO, P.J., and HOEKSTRA and WHITBECK, JJ.

PER CURIAM.

Respondent J. Weinberg appeals as of right from a circuit court order terminating his parental rights to his minor child, MV, pursuant to MCL 712A.19b(3)(g) and (j). We affirm.

**I. FACTS**

**A. BACKGROUND FACTS**

In September 2010, the Department of Human Services (DHS) filed a petition for temporary custody of MV. It alleged that R. Vertz, MV's mother, had a history of substance abuse and that she tested positive for methamphetamines and marijuana when MV was born. It alleged that Weinberg, who had not established paternity of MV, had been physically abusive toward Vertz, including in front of the children, and that Vertz had obtained a personal protection order (PPO) protecting her from Weinberg. In addition, Weinberg was on parole for a breaking and entering conviction, and had been in and out of jail for parole violations relating to assault, drug use, and absconding. Following a preliminary hearing, the trial court authorized the petition and released the children to Vertz under court supervision.

The trial court acquired jurisdiction in October 2010 when Vertz entered a plea. The trial court continued the children's placement at home pending disposition. The children were placed in Vertz's custody under court supervision. The order provided that Vertz "shall not allow contact between [Weinberg] and [MV]." Less than two weeks later, the children were removed from the home and placed in foster care because Vertz had tested positive for amphetamines and methamphetamines. Pursuant to an order entered in March 2011, MV remained in foster care.

The next day, the DHS filed a "motion for rehearing" which amounted to a supplemental petition for termination of the parents' parental rights to MV. It alleged that Vertz had failed to comply with and benefit from reunification services. Regarding Weinberg, it alleged that he had yet to establish paternity of MV; Weinberg had missed two scheduled paternity tests and Vertz

refused to sign an affidavit of parentage. Weinberg was arrested for domestic violence in February 2011, which constituted a violation of his parole, so he was incarcerated at the Tuscola Residential Re-Entry facility from March to May 2011. Weinberg was arrested again in July 2011, for home invasion and had been in jail since then. The hearing was scheduled for September 2011.

Weinberg appeared for the hearing. At that time, Vertz agreed to execute an affidavit of parentage. But Weinberg admitted that he had never met MV. The trial court believed that the “parents . . . are playing a game in an effort to slow down this proceeding.” It adjourned the hearing to give Weinberg “the opportunity to become a legal father.” Vertz executed the affidavit of parentage that day (Weinberg had signed it in October 2010). The termination hearing was rescheduled for October 2011.

Before the termination hearing, DHS filed a “motion for review.” The motion referred to an “attached amended termination petition.” The allegations against Weinberg were amended as follows:

26. . . .Weinberg was not established as the legal father of [MV] until . . .Vertz agreed to sign the affidavit of parentage on 9/14/2011. Prior to this, [Vertz] had refused to sign this document, although she had reported verbally that [Weinberg] was the biological father of [MV].

27. . . .Weinberg has not attended any hearings regarding [MV] until the originally scheduled date of the termination hearing on 9/14/2011. [Weinberg] had reported to the [DHS] that he would attend the hearing on 6/7/2011; however he failed to show up for this hearing.

28. . . .Weinberg was arrested in [sic] 2/1/2011 related to a domestic violence charge and lodged at the Branch County Jail. He was incarcerated at the Tuscola Residential Re-Entry program from 3/2/2011 to 5/12/2011 due to a parole violation related to the February arrest. . . .Weinberg was arrested on 7/7/2011 on charges of 1st degree home invasion, habitual offender. [Weinberg] reported that he tested positive for methamphetamines when he was arrested on 7/7/2011. [Weinberg] is currently lodged at the Branch County Jail. The Circuit Court Pre-Trial Conference was held on 10/24/2011. [Weinberg] is facing a maximum sentence of 40 years in prison. A trial date has not yet been set.

29. Regarding a psychological evaluation, . . . Weinberg participated with a psychological evaluation at the Branch County Jail on 9/15/2011 . . . . The evaluator noted that in terms of parenting, “there is no evidence he will become physically abusive in a parenting situation. He is although likely to be insensitive, inconsistent, and lack an empathetic understanding of his children’s needs.”

## B. TERMINATION HEARING

Julie Wright testified that Vertz and Weinberg were MV’s parents. According to Wright, MV had Indian heritage through Vertz. Wright testified that when the case began, Weinberg’s whereabouts were unknown. Wright first located Weinberg in February or March 2011.

Because Weinberg was not a legal father, he was not offered services. However, Wright stated that Weinberg was aware of the court proceedings and was encouraged to come to court hearings, but he never attended until September 14. Weinberg did not initiate a paternity action to establish paternity, but “he was set up for some paternity testing through the Department.” Weinberg did not offer to provide any support for MV; Wright noted that he was not employed.

Wright testified that Weinberg had been “incarcerated through a majority of this time[.]” He was released from the Tuscola facility in May 2011, and arrested again in July. Weinberg was presently incarcerated in the county jail on a charge of first-degree home invasion; if convicted, he would be subject to sentencing as an habitual offender. According to Wright, that case was scheduled for trial in January 2012. Wright stated that the home invasion was not Weinberg’s first offense; he had a prior felony conviction for breaking and entering and a prior misdemeanor conviction for assault.

Wright testified that Weinberg completed a psychological evaluation in September 2011. There had not been time to refer Weinberg for recommended services, but Wright said, “He has been encouraged to seek out services . . . at the jail” and to attend AA meetings. Wright testified that while Weinberg was in the Tuscola facility, he completed a domestic violence program, completed “a parenting Inside Out Dad Program,” and completed Phase One of a substance abuse treatment program.

Wright testified that Weinberg had not contacted or visited MV for approximately a year. To her knowledge, Weinberg had never met the child, noting that “[o]riginally he was ordered not to have any contact with her due to past violence with” Vertz.

Wright testified that the children were doing reasonably well in foster care and described them as “happy little kids.” Wright recommended termination of Weinberg’s parental rights because he had made no attempt to file for paternity, he had been incarcerated for most of the time, and he was facing “many, many years in prison” if convicted of home invasion.

Heidi Cotey, the ICWA monitor for the Sault tribe of Chippewa Indians, was qualified as an expert “for purposes of the Indian Child Welfare Act.” Cotey testified that the behavior of the parents was not consistent with normal parenting practices in the Indian community. Cotey opined that returning the children to the parents “would result in serious, emotional[,] and physical harm.” Cotey was satisfied from her review of the record that reasonable efforts had been tried to keep the children in the home before they were removed.

Vertz testified that she had known Weinberg for approximately three years. She and Weinberg were involved “for a period of time” and even lived together for a while; they broke up when Vertz was four to six weeks into her pregnancy with MV. Weinberg was aware of the pregnancy but did not do anything to assist her. He was not at the hospital for MV’s birth. Vertz further testified that during the time she and Weinberg were together, Weinberg became physically violent with her. At some point, Vertz obtained a PPO against Weinberg. Apparently, the PPO was in effect when MV was born, and Vertz did not have any further contact with Weinberg after that time. Because of the PPO, Weinberg was not allowed to visit.

Vertz testified that Weinberg never contacted her to inquire about MV or to be a parent, but he did send some “notes, cards, diapers, bottles” during a three-month period. Weinberg’s mother delivered the bottles and diapers; she visited MV as well.

Vertz testified that she knew Weinberg was MV’s father but did not sign the affidavit of parentage until September 2011. She gave various excuses for the delay. She eventually all but admitted that she signed the affidavit of parentage in an attempt to avoid termination of her parental rights. That completed the Department of Human Services’s proofs.

Weinberg testified that upon his release, he “want[ed] the best thing for my daughter.” He wanted a chance to participate in services and said he was willing to participate in “[a]ny services possible.” Weinberg testified that he had participated in services while in the Tuscola facility. Those services included anger management classes, “Substance Abuse Phase One,” and “an Inside Out 16-Week Program.” Weinberg also completed a psychological evaluation “for the Department” and was willing to participate in any services recommended by the psychologist. Weinberg testified that he had housing available for him upon his release. He stated that he had an “essential amount of money coming” which would enable him to purchase a trailer. Weinberg also had a job as a cook in a restaurant “waiting for me.”

Weinberg testified that he did not provide proper care and custody for MV because “I was ordered to not be around Robin or the child.” Weinberg admitted that he had been incarcerated for almost all of MV’s life, but believed that MV should not be required to wait for his next release, and believed that she “should have the right to know her other family” and “they want to know her[.]”

The trial court asked Weinberg, assuming that he was acquitted of the home invasion charge, released from jail, and went to work at the restaurant, “Would you expect that the Court would place this child in your care?” He replied:

I don’t think [MV] should be placed in my care. I think [MV] should have the right to be able to bond with me and learn—I mean, you know, it kills me the most and I’ve sat here and I didn’t know nothing about any of this. I didn’t know that my little girl’s 13 months old and can’t walk or stand or—how do you think that makes me feel?

That completed the proofs.

Explaining its ruling from the bench, the trial court found that whether to terminate Weinberg’s parental right to MV was a hard question given that he had stepped forward to acknowledge his paternity, yet he had had no other involvement with the child. The trial court noted Weinberg’s explanation that the personal protection order prevented him from having contact with MV. The trial court also noted that Weinberg had been “incarcerated most of the time.” However, the trial court also found it notable that Vertz attempted to “manipulate the system by not acknowledging paternity until she thought that it was the last gasp effort to avoid

having her rights terminated.” Nevertheless, the trial court concluded that the statutory ground for termination under MCL 712A.19b(3)(g)<sup>1</sup> was met, explaining as follows:

He is a parent without regard or intent. He hasn’t intentionally harmed this child. That’s not what this is about, but he is a parent who’s failed to provide proper care or custody for the child. And even without all these other impediments in the way, he’s incarcerated. He hasn’t been able to. There’s no reasonable expectation that he will be able to provide proper care and custody within a reasonable time considering the age of the child. I find that has been met. That is the fact.

Turning to and MCL 712A.19b(3)(j),<sup>2</sup> the trial court found that there was a reasonable likelihood based upon Weinberg’s conduct or capacity that MV would be emotionally harmed if placed in his care. Specifically, the trial court explained as follows:

Well, this child’s never been in Mr. Weinburg’s [sic] and doesn’t know Mr. Weinburg [sic]. And I’m placing myself in the position of how having a child—let’s say hypothetically that Mr. Weinburg [sic] is found not guilty of his present charge and is released. And that takes place in January when the trial is set. [MV] will then be 16, 17 months old. What then? We start to establish a relationship with that child in an effort to reunify that child with the parent? Mr. Weinburg [sic] indicated that’s not what he’s asking. He said under oath that’s not what—no, he wouldn’t expect that to be done. He wants [MV] to be able to maintain a relationship with family members. I don’t have that option. That’s not an option that’s available to me.

According, the trial court entered an order termination Weinberg’s parental rights to MV. Weinberg now appeals.

## II. STATUTORY GROUNDS FOR TERMINATION

### A. STANDARD OF REVIEW

To terminate parental rights, the trial court must find that the DHS has proven at least one of the statutory grounds for termination by clear and convincing evidence.<sup>3</sup> We review for clear

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<sup>1</sup> MCL 712A.19b(g) provides a statutory ground for termination when “[t]he 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.”

<sup>2</sup> MCL 712A.19b(j) provides a statutory ground for termination when “[t]here 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.”

<sup>3</sup> MCL 712A.19b(3); MCR 3.977(H)(3)(a); *In re Sours Minors*, 459 Mich 624, 632; 593 NW2d 520 (1999).

error a trial court's decision terminating parental rights.<sup>4</sup> A finding is clearly erroneous if, although there is evidence to support it, this Court is left with a definite and firm conviction that a mistake has been made.<sup>5</sup> We give regard to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it.<sup>6</sup>

## B. ANALYSIS

Initially, we disagree with Weinberg's claim that termination was premature because he was not provided with services. "Reasonable efforts to reunify the child and family must be made in all cases," except those involving aggravated circumstances,<sup>7</sup> and there was no evidence that any of the enumerated aggravating circumstances were present in this case. However, as noted in *In re LE*,<sup>8</sup> the Department of Human Services is only required to provide reunification services to a "parent," and for a man to be a parent, he must be "the father of the child as defined by MCR 3.903(A)(7)." Therefore, until a putative father establishes legal paternity, he is not entitled to services.<sup>9</sup> Although Weinberg signed an affidavit of parentage in October 2010, that alone does not establish legal paternity. The man and the mother must both sign the form,<sup>10</sup> and Vertz refused to sign it. Weinberg took no other action to establish paternity and did not become the legal father until Vertz signed the affidavit of parentage in September 2011. By that time, a termination petition was pending because Weinberg had done nothing to establish paternity during the previous year.

Turning to MCL 712A.19b(g), Weinberg failed to provide proper care and custody for MV; he did nothing to establish a relationship with MV and was not involved in her upbringing. Further, he allowed Vertz to retain custody even though she was not a fit custodian due to her drug abuse. Weinberg learned that MV had been removed from Vertz in November 2010, but there is no evidence that he offered to make alternative arrangements for her care. Even with that said, though, the evidence did not clearly and convincingly show that he would not be able to provide proper care and custody within a reasonable time given MV's age.

At the time of the termination hearing, Weinberg was incarcerated and awaiting trial on criminal charges. However, "[t]he mere present inability to personally care for one's children as a result of incarceration does not constitute grounds for termination."<sup>11</sup> Further, it was not

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<sup>4</sup> MCR 3.977(K); *In re Trejo Minors*, 462 Mich 341, 356-357; 612 NW2d 407 (2000); *In re Sours Minors*, 459 Mich at 633.

<sup>5</sup> *In re JK*, 468 Mich 202, 209-210; 661 NW2d 216 (2003).

<sup>6</sup> MCR 2.613(C); *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989).

<sup>7</sup> MCL 712A.19a(2).

<sup>8</sup> *In re LE*, 278 Mich App 1; 747 NW2d 883 (2008).

<sup>9</sup> *Id.* at 18-19.

<sup>10</sup> MCR 3.903(A)(7)(e).

<sup>11</sup> *In re Mason*, 486 Mich 142, 160; 782 NW2d 747 (2010).

known whether Weinberg would be convicted and sentenced to prison, or acquitted and released. There was no evidence regarding Weinberg's minimum sentence if convicted. And there was no evidence regarding how long it would take Weinberg to establish a relationship with MV and prove himself a fit custodial parent if acquitted and released. Therefore, the pendency of the criminal charges did not establish that Weinberg would be unable to provide proper care and custody within a reasonable time. But any error was harmless because the trial court did not clearly err in finding that termination was warranted under § 19b(3)(j).<sup>12</sup>

The term "harm" as used in MCL 712A.19b(3)(j) includes emotional as well as physical harm.<sup>13</sup> Weinberg and Vertz ended their relationship several months before MV was born. Weinberg took little action to establish paternity and his only relationship with MV was a biological one; he never met MV. Because Weinberg never took an active interest in MV, and thus was a stranger to her, we conclude that the trial court did not clearly err in finding that MV was reasonably likely to be emotionally harmed if placed in Weinberg's home.

We conclude that the trial court did not clearly err in finding that DHS established by clear and convincing evidence sufficient grounds for termination of Weinberg's parental rights under MCL 712A.19b(3)(j).

### III. BEST INTERESTS DETERMINATION

#### A. STANDARD OF REVIEW

Weinberg contends that the trial court erred in its best interests analysis because the court proceeded to termination too quickly. Once DHS has established a statutory ground for termination by clear and convincing evidence, if the trial court also finds from evidence on the whole record that termination is in the child's best interests, then the trial court is required to order termination of parental rights.<sup>14</sup> There is no specific burden on either party to present evidence of the children's best interests; rather, the trial court should weigh all evidence available.<sup>15</sup> We review for clear error the trial court's decision regarding the child's best interests.<sup>16</sup>

#### B. LEGAL STANDARDS

In determining the child's best interests, a trial court may consider a variety of factors including the parent's history, unfavorable psychological evaluations, the child's age,

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<sup>12</sup> *In re Powers*, 244 Mich App 111, 118; 624 NW2d 472 (2000).

<sup>13</sup> *In re Hudson*, 294 Mich App 261, 268; \_\_\_ NW2d \_\_\_ (2011).

<sup>14</sup> MCL 712A.19b(5); MCR 3.977(H)(3)(b); *In re Trejo Minors*, 462 Mich at 351.

<sup>15</sup> *In re Trejo Minors*, 462 Mich at 353.

<sup>16</sup> *Id.* at 356-357.

inappropriate parenting techniques, and continued involvement in domestic violence.<sup>17</sup> A trial court may also consider the strength of the bond between the parent and child, the visitation history, the parent's engaging in questionable relationships, the parent's compliance with treatment plans, the child's well-being while in care, and the possibility of adoption.<sup>18</sup> A trial court may also consider the child's need for permanence and the length of time the child may be required to wait for the parent to rectify the conditions, which includes consideration of the child's age and particular needs.<sup>19</sup>

### C. ANALYSIS

Considering that Weinberg took little interest in MV during her life, that MV had never met Weinberg and thus had no bond with him, and that Weinberg was not in a position to take care of MV in light of his incarceration and lack of housing, termination of Weinberg's parental rights was in MV's best interests. We conclude that the trial court did not clearly err in finding that termination of Weinberg's parental rights was in MV's best interests.

We affirm.

/s/ Joel P. Hoekstra  
/s/ William C. Whitbeck

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<sup>17</sup> See *In re Jones*, 286 Mich App 126, 131; 777 NW2d 728 (2009).

<sup>18</sup> See *In re BZ*, 264 Mich App 286, 301; 690 NW2d 505 (2004); *In re AH*, 245 Mich App 77, 89; 627 NW2d 33 (2001).

<sup>19</sup> See *In re McIntyre*, 192 Mich App 47, 52-53; 480 NW2d 293 (1991).