

STATE OF MICHIGAN  
COURT OF APPEALS

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*In re* SPENGLER, Minors.

UNPUBLISHED  
September 13, 2016

No. 332377  
Saginaw Circuit Court  
Family Division  
LC No. 14-034275-NA

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Before: MURRAY, P.J., and HOEKSTRA and BECKERING, JJ.

PER CURIAM.

Respondent appeals as of right from an order terminating her parental rights to her three children, KS, AS, and CS, under MCL 712A.19b(3)(c)(i) (conditions that led to adjudication continue to exist), MCL 712A.19b(3)(g) (failure to provide proper care and custody), MCL 712A.19b(3)(h) (parent is imprisoned for more than two years), and MCL 712A.19b(3)(j) (reasonable likelihood of harm). We affirm.

I. FACTUAL BACKGROUND

In November of 2014, all three children were removed from the care of their father, who had been granted full custody of the children in 2013, after allegations that he had abused his girlfriend's daughter, who had been residing with him and the three children at the time. Respondent was incarcerated in the Oakland County Jail at the time of removal. Respondent participated in several hearings via telephone conference, including an adjudication hearing on July 21, 2015, where she pleaded to allegations in the petition that the children had been removed from their father's home due to child abuse and she was unable to parent them due to her incarceration. Respondent was also present via telephone conference at the initial dispositional hearing, where she was encouraged to participate in all services that were offered to her in jail. Respondent was released from the Oakland County Jail shortly before the May 6, 2015 review hearing but was not present either in person or by telephone at that hearing. Respondent's attorney acknowledged that he had not personally informed her of the hearing that day, but petitioner's foster care worker advised that she had reminded respondent of the hearing the previous day. The Lawyer-Guardian Ad Litem ("LGAL") revealed at that hearing that the children did not want reunification with respondent at the time.

Respondent was not present during the next review hearing on July 29, 2015; her attorney understood that she was in the Livingston County Jail but he had not made arrangements for her participation. The trial court stated that "there was an effort to try to figure out -- to try to reach

her to participate by telephone before the hearing began,” but it did not give any specifics as to what those efforts were. Ultimately, respondent was sent to the Huron Valley Correctional Facility for “assaulting and resisting, obstructing a police officer.”

Respondent was present by way of video conference at the termination hearing on February 9 and 10, 2016. The foster care worker testified that the previous worker had attempted to set up services with respondent when she was out of custody and that services could not be provided to respondent while she was in prison, although respondent had told him that there were services available in prison. He testified that respondent had provided documentation of the services she was doing in prison and that he was not aware of any services that she could be but was not doing. Respondent testified that she had completed two substance abuse classes, was attending “seeking safety,” and had taken parenting classes at which they discussed how to interact and reconnect with her children. Respondent stated that she had also attended Alcoholics Anonymous meetings as well as a program called “Celebrate Recovery.” Respondent also testified that she had an acceptance letter from a place called “Emmaus House” where she could go on her June 16, 2016 anticipated release date; respondent anticipated being paroled because she had not been involved in any incidents at the prison. There was evidence that the father and respondent had a history of domestic violence that went back and forth, and that respondent had spent time in jail because of disputes.

The foster care worker testified that AS, who had autism and was in a special needs classroom, was residing with her maternal grandmother and needed the stability she provided, and that KS and CS were residing with their maternal uncle and aunt. CS’s therapist testified that CS felt safe in her current home and is fearful of being taken from there, and that she had revealed past trauma from watching her parents fight and from feeling neglected. The foster care worker testified that all three children were consistent in expressing their fear of respondent and their father, that the children became upset upon receiving letters from respondent and never wrote her back, and that counseling was provided to the children to address their frustrations regarding respondent’s letters.

The trial court found statutory grounds for termination of respondent’s parental rights under MCL 712A.19b(3)(c)(i),(g) and (j), stating that respondent had substance abuse issues and continued to be incarcerated, that it would “be months, if not years, before she could provide a home for a child,” and that the children were traumatized at the prospect of returning to their parents. The trial court also found grounds for terminating respondent’s parental rights under MCL 712A.19b(3)(h), finding that respondent had been in jail or prison for the previous 14 months and, given that her maximum release date was June 16, 2019, could be in prison an additional three years. The trial court concluded that termination of respondent’s parental rights would be in the children’s best interests, noting that respondent had re-offended shortly after her release from jail, would not be out of prison for at least four months, and would then need to go to a residential treatment program. The trial court noted that respondent had been a “model prisoner” but further noted that she had not had custody of the children for years and again noted their fear of her.

## II. STANDARD OF REVIEW

Respondent argues that the failure to provide services, as well as the failure to secure respondent's presence at a few hearings, violated due process. Since defendant did not object on constitutional grounds below, the issue is unpreserved. See *In re TK*, 306 Mich App 698, 703; 859 NW2d 208 (2014).

Generally, whether child protective proceedings complied with a respondent's substantive and procedural due process rights is a question of law that this Court reviews de novo. *In re Rood*, 483 Mich 73, 91; 763 NW2d 587 (2009) (opinion by Corrigan, J.). However, because the issue presented is an unpreserved claim of constitutional error, this Court will review for plain error affecting substantial rights. [*Id.*]

This Court reviews an order terminating parental rights, including a best interests determination, under the clearly erroneous standard. MCR 3.977(K); *In re Olive/Metts Minors*, 297 Mich App 35, 40; 823 NW2d 144 (2012). A decision is clearly erroneous if "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made." *In re JK*, 468 Mich 202, 209-210; 661 NW2d 216 (2003).

### III. ANALYSIS

#### A. REASONABLE EFFORTS & DUE PROCESS

Respondent initially argues that she was deprived of her constitutional right to procedural due process when (1) two review hearings were held in her absence and (2) petitioner and the trial court did not provide reasonable efforts to help her achieve reunification.

Prior to termination, petitioner must show that reasonable efforts were made to "rectify the conditions that led to its involvement in the case." *In re Terry*, 240 Mich App 14, 25-26; 610 NW2d 563 (2000). Reasonable efforts usually involve the adoption of a service plan. *In re Fried*, 266 Mich App 535, 542; 702 NW2d 192 (2005). "While the [DHHS] has a responsibility to expend reasonable efforts to provide services to secure reunification, there exists a commensurate responsibility on the part of respondents to participate in the services that are offered." *In re Frey*, 297 Mich App 242, 248; 824 NW2d 569 (2012). "Not only must respondent cooperate and participate in the services, she must benefit from them." *In re TK*, 306 Mich App at 711.

In *In re Mason*, 486 Mich 142, 152-160, 166; 782 NW2d 747 (2010), the Court reversed an order terminating parental rights where the trial court violated several statutes and court rules related to the respondent's participation at hearings and involvement in a service plan. There, the respondent was incarcerated and was allowed to participate via telephone in an adjudication hearing but then was not given the opportunity to participate in review hearings for over a year even though his attorney was present at hearings. *Id.* at 147-148. The respondent had completed some services in prison. *Id.* at 148-149. However, the trial court terminated his parental rights and this Court affirmed. *Id.* at 151. The Supreme Court held that the failure to inform the respondent of his right to participate in hearings from prison by telephone violated MCR 2.004. The Supreme Court specifically noted that the respondent was not given an opportunity to participate in hearings "during the review period when the DHS made efforts to reunify the

children with their parents,” *id.* at 155, and that neither the petitioner nor the trial court facilitated the respondent’s access to services while he was in prison or updated the service plan to reflect the respondent’s incarceration. *Id.* at 157-158.

Here, the two hearings where respondent was not present by telephone were during the review period. Additionally, it appears that the services that respondent engaged in were ones that she initiated while incarcerated and were not arranged by petitioner. Indeed, there is no indication in the record that petitioner attempted to help respondent look for services while she was in the Oakland County Jail, the Livingston County Jail, or Huron Valley Prison. Nevertheless, this case is distinguishable from *In re Mason*. While respondent was absent at two review hearings, only one of those absences, at the July 29, 2015 hearing, was due to her incarceration. Respondent was not in custody during the May 6, 2015 review hearing, and the foster care worker stated that she had reminded respondent of the hearing the previous day.<sup>1</sup> Additionally, unlike in *In re Mason*, the trial court’s decision to terminate respondent’s parental rights was not based on any failure on the part of respondent to participate in services, but on respondent’s re-incarceration after she was released, as well as the children’s trauma at the prospect of a return to her custody.

We find the present case sufficiently distinguishable from *In re Mason* and conclude that the trial court’s decision did not amount to clear error. Respondent’s presence was secured by telephone or video conference at the vast majority of the hearings. Of the two hearings where respondent was not present, only one occurred while she was incarcerated and there is at least some indication that the trial court made an attempt to contact her for that hearing. Petitioner also provided the children with counseling that addressed respondent’s letters with them. Respondent’s participation in services while in prison was documented, but the children’s fear of returning to her due to past trauma, coupled with her continued incarceration, limited her ability to work with petitioner to help heal past wounds with her children.

Concerning respondent’s due process challenge, the due process requires a balancing of “the private interests affected by the proceeding; the risk of error created by the State’s chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure.” *Santosky v Kramer*, 455 US 745, 754; 102 S Ct 1388; 71 L Ed 2d 599 (1982) citing *Lassiter v Dep’t of Social Servs*, 452 US 18, 27-31, 37-48; 101 S Ct 2153; 68 L Ed 2d 640 (1981). The private interest would be respondent’s interest in her children as well as being present at a review hearing where her progress would be evaluated by the trial court. The governmental interest in conducting the hearings in respondent’s absence would be the need for judicial economy and the avoidance of having to reschedule the hearing. While the private interests would appear to outweigh the public interest in this sense, the risk of error created by respondent’s absence at these two hearings, only one of which occurred while she was

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<sup>1</sup> Respondent’s appellate counsel argues that in a letter written after the termination hearing respondent disputed that she was ever informed about how to participate by telephone at that hearing. However, this letter is not part of the lower court record and the claims made in the letter were never made before the trial court.

incarcerated, is relatively small. Again, this is not a case where respondent's successful performance with respect to a service plan would have led to a different outcome. This was a case where the evidence clearly showed that the children had experienced past trauma while in respondent's and the father's custody and were fearful of a return to respondent. Regardless of respondent's success with services, her continued incarceration prohibited her from having the parenting time with her children that would have been necessary to restore her relationship with the children. Petitioner did seek to address this damaged relationship by allowing respondent to write letters and by providing the children with counseling to address these letters, but such efforts were ultimately unsuccessful. Given those facts, it does not appear that respondent's presence at the two review hearings or the completion of further services would have had an effect on the outcome. Accordingly, there was no plain error.

## B. STATUTORY GROUNDS

Petitioner bears the burden of proving the existence of at least one of the Legislature's enumerated conditions to terminate a parent's parental rights by clear and convincing evidence. *In re JK*, 468 Mich at 210. "[R]egard is to be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). To overturn the trial court, this Court must find that its decision was "more than just maybe or probably wrong." *In re Sours*, 459 Mich 624, 633; 593 NW2d 520 (1999). Only one statutory ground is necessary to support terminating parental rights. *In re Powers Minors*, 244 Mich App 111, 118; 624 NW2d 472 (2000). "The mere present inability to personally care for one's children as a result of incarceration does not constitute grounds for termination." *In re Mason*, 486 Mich at 160.

The trial court first found that termination was proper under MCL 712A.19b(3)(c)(i), which provides for termination if the conditions that led to the initial adjudication continue to exist 182 days after the initial dispositional order and "there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age." The issue that was present at the time of the initial adjudication was that respondent was unable to parent her children due to incarceration. No mention of the children's past trauma or fear of returning to the care of respondent was made at the adjudication. At the time of the termination hearing, respondent was again incarcerated and had only been out of custody for about nine days during the pendency of this case. However, because the Supreme Court has expressly stated that "[t]he mere present inability to personally care for one's children as a result of incarceration does not constitute grounds for termination," *In re Mason*, 486 Mich at 160, and there was no other grounds identified for adjudication at the time of the adjudication, the trial court erred in finding that MCL 712A.19b(3)(c)(i) was an appropriate statutory ground for termination.

The trial court also found that termination was appropriate under MCL 712A.19b(3)(g), which states that termination shall occur if "[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." If the trial court's conclusions on this statutory ground were solely based on respondent's incarceration and her present inability to provide care and custody due to that incarceration while her children were placed with relatives, then *In re Mason* could support a conclusion that the trial court's decision was erroneous. However, the trial court determined that this statutory ground

was met due to trauma the children had at the prospect of returning to respondent's care. There was testimony from counselors that respondent and the children's father had a history of domestic violence that traumatized the children so much that they feared the prospect of returning to their care and did not want to receive respondent's letters. This evidence was undisputed by respondent. Given that the children did not want to read respondent's letters and got upset when those letters were written, the trial court did not clearly err in concluding that respondent would not be in a position to provide her children with proper care and custody within a reasonable time given the children's ages.

Termination was also found appropriate under MCL 712A.19b(3)(h), which states that termination is appropriate if "[t]he parent is imprisoned for such a period that the child will be deprived of a normal home for a period exceeding 2 years" and if "the parent has not provided for the child's proper care and custody, and there is no reasonable expectation that the parent will be able to provide proper care within a reasonable time considering the child's age." Although there were some short breaks in respondent's incarceration indicating that she was not incarcerated for a consecutive two-year period, the statute merely requires that imprisonment deprive the child of a normal home for at least two years, not that the actual time in prison be at least two years. Given the total time that respondent was incarcerated, the trial court did not clearly err in concluding that the children would be deprived of a normal home for at least two years. We note the evidence of trauma and the fear that the children had of respondent, and the inability of respondent to work on these issues with her children due to her incarceration. The trial court reasonably concluded that respondent's incarceration would result in it taking at least two years before the children would be able to have a normal home with respondent. Coupled with its earlier conclusion that respondent would not be able to provide proper care and custody within a reasonable time, the trial court's conclusions on this statutory factor was not clearly erroneous.

The trial court also concluded that termination was appropriate under MCL 712A.19b(3)(j), which states that termination is appropriate if "[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." This statutory factor also requires a look at emotional harm. *In re Hudson*, 294 Mich App 261, 268; 817 NW2d 115 (2011). There was substantial testimony regarding respondent's history of domestic violence and the fear that this instilled in the children. The fear and trauma was so great that the children became upset just upon receiving respondent's letters. The trial court's conclusion that the children would be emotionally harmed if returned to respondent was not clearly erroneous.

### C. BEST INTERESTS

"If the court finds that there are grounds for termination of parental rights and that termination of parental rights is in the child's best interests, the court shall order termination of parental rights and order that additional efforts for reunification of the child with the parent not be made." MCL 712A.19b(5). The trial court must find by a preponderance of the evidence that termination is in the best interests of the children. *In re White*, 303 Mich App 701, 713; 846 NW2d 61 (2014). "[R]egard is to be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." *In re Miller*, 433 Mich at 337. The children's bond to the parent, the parent's parenting ability, and the children's need for

permanency, stability, and finality are all factors for the court to consider in deciding whether termination is in the best interests of the children. *In re Olive/Metts Minors*, 297 Mich App at 41-42.

In the present case, the trial court concluded that termination was in the children's best interest because of their need for stability, their fear of respondent and their father, and the length of time that respondent would be in either prison or residential treatment. While the record did not specify the exact amount of time respondent would be at "Emmaus House," it also did not definitively establish that respondent would be released on July 16, 2016. There was testimony that both AS and CS had emotional struggles and needed permanence and stability. When combined with the foster care worker's testimony that the children were fearful of respondent and did not want contact, the trial court did not clearly err in finding that the children were in need of a stable and permanent environment and that there were simply too many inconsistencies regarding when respondent would be able to begin what most certainly would have been a very lengthy road towards regaining her children's trust and establishing a relationship with them. The trial court did not err in concluding that termination of respondent's parental rights was in the children's best interests.

Affirmed.

/s/ Christopher M. Murray

/s/ Joel P. Hoekstra

/s/ Jane M. Beckering