STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of THEODORE JAMES BRANTMAN, Minor.

JAMES RONALD BRANTMAN and JULIE MAY BRANTMAN,

Petitioners-Appellees,

v

MICHELE MARIE BRANTMAN,

Respondent-Appellant.

UNPUBLISHED
April 10, 2008

No. 280402
Muskegon Circuit Court
Family Division
LC No. 2007-007209-AY

Before: Zahra, P.J., and Whitbeck and Beckering, JJ.

PER CURIAM.

Respondent Michele Brantman appeals as of right from the trial court order terminating her parental rights to the minor child, Theodore James Brantman (hereinafter "T.J.").[1] We affirm.

I. Basic Facts And Procedural History

Petitioners James and Julie Brantman desired termination of Michele Brantman's parental rights to allow Julie Brantman to adopt the 13-year-old minor child, T.J. He was born in September 1993, during the marriage of James Brantman to Michele Brantman. James Brantman and Michele Brantman divorced in Kent County in February 1999 and shared T.J.'s legal custody, but Michele Brantman was awarded physical custody of him until he reached the age of 18.

While Michele Brantman had sole physical custody of T.J., James Brantman married Julie Brantman (formerly, Julie Moore). Julie Brantman had divorced her husband in 1999 in Leelanau County, and she was awarded physical custody of her two sons, who were three and four years younger than T.J.

[1] MCL 710.51(6) (petition for termination and stepparent adoption).

In 2002, the Kent County Circuit Court changed T.J.'s physical custody to James Brantman, and T.J. began residing full time with James and Julie Brantman. On a date in 2002 or 2003 not disclosed in the lower court record, Michele Brantman pleaded guilty to and was convicted of attempting to solicit the murder of James Brantman. The trial court sentenced her to five to 30 years in prison. Her earliest release date was August 2008, with a maximum release date 30 years after her conviction, in 2033. At a time not revealed in the lower court record, Michele Brantman was transferred to the Camp Valley Huron Correctional Center in Ypsilanti. On January 5, 2005, James Brantman obtained an order granting him full legal and physical custody of T.J.

James Brantman, Julie Brantman, T.J., and Julie's two boys, resided in Muskegon County. In February 2007, James and Julie Brantman petitioned the Muskegon County Circuit Court for termination of Michele Brantman's parental rights and Julie Brantman's stepparent adoption of T.J., alleging Michele's failure to regularly and substantially support or visit T.J. for two years before the filing of the petition, T.J.'s residence with James and Julie Brantman for 54 months, and the trauma to T.J. and destruction of the parent-child relationship caused by Michele Brantman's criminal act.

The lower court record contains a May 8, 2007 Proof of Service, pursuant to which James and Julie Brantman served the Notice of Hearing for Termination of Parental Rights and Stepparent Adoption on June 1, 2007, by ordinary mail on Michele Brantman at the Huron Valley Correctional Facility. The lower court record also contains a proof of service dated June 8, 2007, for the Order Requesting Prisoner Be Allowed to Participate in Court Proceedings at the July 12, 2007 hearing.

Michele Brantman or her family retained attorney Rob German, and he attended the June 1, 2007 hearing. He requested and obtained an adjournment until July 12, 2007, but thereafter did not enter an appearance, file pleadings or motions, or attend the July 12, 2007 hearing. Neither German nor any other counsel represented Michele Brantman, but she participated by speakerphone at the July 12, 2007 hearing. Testimony presented at the hearing and contained in the lower court record revealed the following facts.

With regard to Michele Brantman's visits, communication, or contact with T.J. during the past two or more years, they last had face-to-face contact with one another at the Kent County Jail in May 2003, when T.J. was nine years old. Michele Brantman notified the Friend of the Court in writing in December 2003 that James Brantman was not facilitating her supervised visits with T.J. as required, and he was not allowing T.J. to receive her letters and gifts, but no further information is contained in the lower court record regarding whether Michele Brantman communicated further with the Friend of the Court, whether the order allowing visits was changed, when Michele Brantman was transferred to the Camp Valley Huron Correctional Center in Ypsilanti, or how visits were to be accomplished there.

Michele Brantman testified to remaining in contact with T.J. by mail until March 20, 2006, and to receiving cards and pictures from T.J. at Christmas in 2004 and 2005, but she stated that James Brantman's attorney contacted the Michigan Department of Corrections in March 2006 demanding that further communication from her cease. James Brantman's attorney also contacted Michele Brantman by letter dated March 27, 2006, implying that if she continued to communicate with T.J., he would request that her incarceration be extended. Michele Brantman

testified that the Michigan Department of Corrections ordered her to cease communication with T.J. until she obtained a court order stating that she could have communication. She obeyed that order and did not write letters after March 20, 2006.

Michele Brantman testified that she attempted to telephone T.J. twice, to no avail, and that her father had made repeated telephone calls during the last three years in an effort to contact T.J., had attempted to see T.J., and still had the box of gifts for Christmas 2006 she had sent for T.J. Her parents had not filed grandparents' petitions because they had been involved with her mother's long-term illness until she passed away on June 14, 2007. Michele Brantman stated that she had attempted many times to remain in contact with T.J. and that that she loved him very much. She questioned the grounds on which James and Julie Brantman were seeking to terminate her parental rights.

In his testimony, James Brantman admitted that Michele Brantman had communicated with T.J. by mail since her incarceration, writing letters and sending pictures that did not degrade himself or Julie Brantman, but which nevertheless caused T.J. trauma, and which in turn disrupted their household. T.J. had received counseling for the anger and frustration he felt, and the counselor supported stopping communication between Michele Brantman and T.J. T.J. had not had problems since James Brantman took action to direct his attorney to stop the communication, and James Brantman stated that he felt he was acting in T.J.'s best interests in preventing contact between T.J. and Michele Brantman. He noted that T.J. desired to be adopted by Julie Brantman, and the home study report confirmed that desire.

With regard to T.J.'s support during the two or more years before filing the petition, James Brantman had been required to pay child support for T.J. under the 1999 Judgment of Divorce, which was modified at a time not noted in the lower court record requiring Michele Brantman to pay child support. By February 2007, Michele Brantman had incurred a child support arrearage in excess of $6,000, which she paid in a lump sum by taking out a loan against her education trust that she was required to repay in the future.

Michele Brantman testified that she had not received an opportunity to participate in the hearing in 2005 pursuant to which James Brantman was granted T.J.'s sole physical and legal custody. She stated that in the current proceeding she had received only a notice of hearing and the request that prisoner participate in the proceeding by phone conference, and she had not received the supplemental petition and affidavit, noting that this was true because all of her legal mail was logged by the prison.

The trial court found that the primary consideration was the child's best interests, and that "although the arrearages have been paid, there has been no support paid for a period of two years or more, and there has been no contact, physical contact for a period of two years or more . . . ." It noted that Michele Brantman's release one year hence in August 2008 was uncertain. The trial court stated, "[T]he Court finds that the statutory basis for terminating the parental rights of Michelle [sic] Brantman exists, and the Court will find that it is in the best interest of the child that her parental rights be terminated." The trial court later elaborated,

> The Court will find actually both grounds, because I am not clear on the support order. There's been no support paid in the past two years and also she does have some ability to pay support, and no current support has been paid. And also the

> Court finds the grounds adequately met for failure to substantially visit, contact, or communicate with the child.

Julie Brantman testified regarding her desire to adopt T.J., and T.J. testified that he wanted to be adopted. The trial court, therefore, ordered that the adoption proceed.

In July 2007, Michele Brantman filed a motion for rehearing, objecting to the trial court's decision on the ground that MCR 2.004(B)(2) had been violated by James and Julie Brantman's failure to serve her with the petition and filing proof of service of the same, and that MCR 2.004(E)(2) had been violated by failing to allow appointment of counsel to assure her access, as an incarcerated party, to court.

In August 2007, the trial court issued a written opinion in response to Michele Brantman's motion for rehearing, finding that Michele Brantman was served with the petition before the initial June 1, 2007 hearing date and had forwarded it to her family or attorney, and that subsequent service and proof thereof was not necessary for the adjourned date. In addition, the trial court found that Michele Brantman was represented by retained counsel at the June 1, 2007 hearing and that she did not request appointed counsel at either the June 1, 2007, or July 12, 2007 hearings.

An order terminating Michele Brantman's parental rights was entered on July 12, 2007. Michele Brantman now appeals.

II. Statutory Grounds For Termination

A. Standard Of Review

> A petitioner in an adoption proceeding must prove by clear and convincing evidence that termination of parental rights is warranted. This Court reviews the probate court's findings of fact under the clearly erroneous standard. A finding is clearly erroneous if; although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake was made.[2]

B. Analysis

The trial court did not clearly err in finding that the statutory ground for termination of Michele Brantman's parental rights[3] was established by clear and convincing evidence. Michele Brantman was incarcerated for five to 30 years for attempting to solicit the murder of T.J.'s father, James Brantman.

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[2] *In re Hill*, 221 Mich App 683, 691-692; 562 NW2d 254 (1997).

[3] MCL 710.51(6)(a) and (b).

The applicable two-year statutory period commences on the filing date of the petition and extends backwards from that date for a period of two years or more.[4] Both MCL 710.51(6)(a) and (b) describe the relevant statutory period as two years or more, and the inclusion of the words "or more" indicates a legislative intent that circumstances beyond the applicable two-year statutory period may be considered.[5] Michele Brantman was incarcerated, but there is no exception to the statutory requirements for an incarcerated parent.[6]

The evidence showed Michele Brantman failed to regularly and substantially support T.J. for two years or more before James and Julie Brantman filed the petition for termination of her parental rights. James and Julie Brantman were not required to prove Michele Brantman had the current ability to financially support T.J. The trial court had previously entered a support order, and Michele Brantman's ability to pay had already been factored into that order.[7] Although Michele Brantman's child support order was suspended after her incarceration, she had accumulated an arrearage exceeding $6,000 during the time she had been under order to pay. Her payment of the arrearage in a lump sum after the petition was filed did not constitute regular or substantial support during the statutory period.

Although Michele Brantman had no physical contact with T.J. for four years because of her incarceration, the evidence did not show that she regularly and substantially failed to communicate with T.J. for two years or more. Michele Brantman stopped writing letters to T.J. 16 months before the termination hearing only after James Brantman took action with the Michigan Department of Corrections to prevent further communication. Michele Brantman's letters, although not in any way improper, caused T.J. emotional distress. Although James Brantman should not be allowed to refuse or prevent communication between Michele Brantman and T.J., and then use lack of communication against the Michele Brantman in a petition for stepparent adoption,[8] a fact unique to this case was the nature of Michele Brantman's crime. It severely damaged her relationship with T.J., and communication from Michele Brantman caused T.J. distress, thus necessitating James Brantman's action to suspend Michele Brantman's letters. Given the nature of Michele Brantman's crime and its impact on T.J., it was very unlikely that the trial court would order communication reinstated. Therefore, although the trial court erred in finding that Michele Brantman had failed to communicate with T.J. for a period of two years or more, the error did not result in substantial injustice to Michele Brantman because communication would not likely have been reinstated before the two-year statutory period had elapsed.

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[4] *Hill*, *supra* at 689.

[5] *Id*. at 692.

[6] *In re Caldwell*, 228 Mich App 116, 120-121; 576 NW2d 724 (1998).

[7] *Id*. at 122.

[8] *In re ALZ*, 247 Mich App 264, 277; 636 NW2d 284 (2001).

We conclude that the trial court did not clearly err in finding that statutory grounds for termination of Michele Brantman's parental rights were established by clear and convincing evidence.

III. Best Interests Determination

A. Standard Of Review

Once a petitioner has established a statutory ground for termination by clear and convincing evidence, the trial court shall order termination of parental rights, unless the trial court finds from evidence on the whole record that termination is clearly not in the child's best interests.[9] 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.[10] We review the trial court's decision regarding the child's best interests for clear error.[11]

B. Analysis

We conclude that the trial court did not err in determining that termination of Michele Brantman's parental rights was in T.J.'s best interests.[12] Michele Brantman's noncustodial acts such as letter writing caused T.J. distress. The trial court did not clearly err in determining that T.J.'s best interests were served through adoption by his stepmother so that he would be provided the presence of a legal parent if his father became unable to care for him. In addition, the adoption study showed that the best interest factors in MCL 710.22(g) weighed in favor of T.J.'s adoption by his stepmother.

IV. Special Notice Requirement

Michele Brantman argues that reversal is warranted for failure to comply with the special notice requirements for incarcerated persons pursuant to MCR 2.004. Although the lower court record did not contain proof of service of the petition upon Michele Brantman as required by MCR 2.004(B)(2), and Michele Brantman stated that she did not receive a copy of the petition, privately retained counsel appeared at the June 1, 2007 hearing on Michele Brantman's behalf to request adjournment with a copy of the petition in hand, thus clearly showing that service had been effected upon Michele Brantman or her attorney.[13]

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[9] MCL 712A.19b(5); *In re Trejo*, 462 Mich 341, 350; 612 NW2d 407 (2000).

[10] *In re Trejo*, *supra* at 354.

[11] *Id*. at 356-357.

[12] MCL 710.22(g); *Hill*, *supra* at 691.

[13] MCR 3.802(A)(2).

V. Appointment of Counsel For July 12, 2007 Hearing

When Michele Brantman's counsel did not appear at the adjourned termination hearing on July 12, 2007, the trial court did not inquire whether appointed counsel was necessary or assess whether Michele Brantman was capable of representing herself, as was the purpose of compliance with MCR 2.004(E)(2) and (3). However, MCR 2.004(F) states that the trial court was authorized to grant termination of Michele Brantman's parental rights as requested by James Brantman even though it did not comply with the telephone call requirements of MCR 2.004(E)(2) and (3) if Michele Brantman actually participated in a telephone call, which she did.

Although the trial court possessed the discretion to sua sponte appoint counsel for Michele Brantman, it was not required to do so.[14] This Court reviews for an abuse of discretion the trial court's decision whether to appoint counsel for the nonconsenting, noncustodial parent in a proceeding brought under MCL 710.51(6).[15] An abuse of discretion has been found in certain cases where the trial court failed to consider factors showing whether a party had the ability to present a case properly without counsel, but this Court stated in *In re Fernandez*,[16] that it was not willing to create a rule requiring trial courts to, in all cases, consider sua sponte the appointment of counsel in adoption proceedings involving termination of parental rights.

Michele Brantman did not comment on her counsel's absence, request adjournment to allow for retention of another attorney, request court-appointed counsel, indicate that she was not able to represent herself, or express reluctance to proceed in propria persona. The issues of Michele Brantman's lack of contact with T.J. and her lack of support were factual and uncomplicated, and the parties agreed on most key facts. There were no procedural complexities. Therefore, we conclude that the trial court did not abuse its discretion in failing to sua sponte inquire into Michele Brantman's need for counsel or appoint counsel on her behalf.

Affirmed.

/s/ Brian K. Zahra
/s/ William C. Whitbeck
/s/ Jane M. Beckering

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[14] *In re Sanchez*, 422 Mich 758, 767-771; 375 NW2d 353 (1985).

[15] *Sanchez, supra* at 771.

[16] *In re Fernandez,* 155 Mich App 108, 112; 399 NW2d 459 (1986).