

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

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UNPUBLISHED  
May 10, 2012

In the Matter of J. Z. BALKIN, Minor.

No. 307161  
Berrien Circuit Court  
Family Division  
LC No. 2009-000051-NA

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Before: WHITBECK, P.J., AND SAWYER AND HOEKSTRA, JJ.

PER CURIAM.

Respondent J. L. Main appeals as of right the trial court's order terminating his parental rights to his minor child, J. Z. Balkin, under MCL 712A.19b(3)(g) (failure to provide proper care or custody). We affirm.

**I. FACTS**

In April 2009, petitioner, the Department of Human Services (DHS), petitioned to remove the one-month-old minor child and his half-brother, N. Rice, from the care of their mother, A. Balkin, and to terminate her parental rights. DHS further petitioned to terminate the parental rights of the children's putative fathers. The petition listed three putative fathers for the minor child, including Main. DHS later filed a petition to terminate the parental rights of all putative fathers.

The trial court held a termination hearing in June 2010. Main had been served at the Berrien County Jail, and the trial court noted that Main had requested DNA testing to determine whether he was the minor child's biological father. The trial court terminated A. Balkin's parental rights to the children, but declined to consider termination of the putative fathers' parental rights at that time. A DHS worker testified that the minor child and N. Rice had been living with the same foster care family for almost the entire length of the proceedings. The children were very happy, and it was a possible permanent placement for them.

At a review hearing in August 2010, Main participated over the telephone from the Mid-Michigan Correctional Facility. He had been in prison for methamphetamine possession for approximately three months and his earliest release date was March 2013. At a November 2010 review hearing, the trial court noted that DNA testing had established Main as the minor child's biological father. The trial court ordered that the proceedings be adjourned to allow Main to perfect paternity.

In December 2010, the trial court held a hearing on the petition to terminate Main's parental rights. Main participated in the hearing over the telephone. DHS withdrew its petition to terminate Main's parental rights, and the trial court stated that it would treat the hearing as a review hearing. Main had signed a letter of intent indicating that he desired to be treated as the minor child's legal father.

DHS worker Kristen Harte testified that she sent Main a questionnaire regarding his background, strengths, and weaknesses to assist her in developing a service plan for him. Main was participating in a living skills program and working on obtaining a GED while in prison. He was also on a waiting list for an assaultive offenders program and a substance abuse program. Main's mother, A. Main, was present for the hearing. She desired visitation with the minor child and was interested in having the minor child placed in her care. The trial court ordered DHS to make reasonable efforts, including developing a service plan, to reunite Main with the minor child. The trial court ordered Main to comply with his service plan once developed. The trial court did not grant Main visitation and ordered that the minor child remain in his current foster placement.

At a review hearing in March 2011, the children's guardian ad litem stated that N. Rice and the minor child were still placed together with the same foster care family, were doing wonderfully, and were very bonded to each other. The permanency planning goal for the minor child continued to be reunification with Main.

The trial court subsequently held a permanency planning hearing in June 2011. Main participated in the hearing over the telephone. He testified that on April 11, 2011, he signed a document giving A. Main power of attorney pertaining to the care and custody of the minor child. Main explained that he signed the document because he was unable to care for the minor child during his incarceration. Main conceded that he had never met the minor child. Main had completed a substance abuse program, and he was close to completing another substance abuse program and obtaining his GED. He hoped to participate in parenting classes, and he was on waiting lists for an assaultive offenders program and a violence prevention program. Main planned to live, upon his release from prison, with his mother, A. Main. He hoped that the minor child could be placed with A. Main and that he could live with them in her house. Main testified that A. Main was already caring for his other son, who was five years old. Main offered that, if the trial court placed the minor child with A. Main but would not allow Main to live with them, then he would live with his father. Main did not yet know what he would do for employment upon his release from prison. Main further testified that he was aware the minor child was bonded to N. Rice, and he did not object to them having regular contact once the minor child was placed with him or A. Main.

The trial court admitted the power of attorney signed by Main into evidence, noting that it was not being considered for its legal authority, but as it pertained to Main's intent to have A. Main care for the minor child until he was able to do so himself. The trial court also admitted a positive home study of A. Main's house into evidence. The trial court further acknowledged, however, that placing the minor child with A. Main would require moving him from N. Rice, with whom he was very bonded, and that A. Main had raised Main, at least for a time, in an abusive environment. The trial court also noted A. Main's own statement that although she would provide the minor child with a stable, loving home until he could be placed with Main,

if the minor child needed to be permanently placed out of Main's care, it would be better for him to be adopted by their relatives in Arkansas, given her age. (The home study indicates that A. Main was born in 1947, making her approximately 64 years old at the time of the hearing. The minor child was two years old at that time.) The trial court stated that A. Main was not totally foreclosed as a possible placement, but that the minor child should remain in his current placement for the time being. The trial court ordered that reasonable efforts for reunification continue.

DHS filed a petition to terminate Main's parental rights in August 2011. The trial court held a review and permanency planning hearing in September 2011. Main participated by telephone. The trial court noted that, although Main had been participating in services, termination proceedings should be initiated given the length of time that the minor child had been in his foster care placement, that Main was not scheduled to be released from prison for approximately a year and a half, and the amount of time it might take Main to be able to care for the minor child after his release. The trial court authorized the petition for termination.

Main participated in the termination hearing by telephone. Main confirmed that his earliest release date was March 2013, and his latest release date was in 2030. But he had "no clue" when he would actually be released. Main recounted that while in prison, he had completed several substance abuse programs, a pre-release class, and a parenting class. He was working on obtaining a GED and was on a waiting list for the assaultive offenders class. Main testified that he was imprisoned from 1997 to 2004. During that prison term, he completed a substance abuse program and an assaultive offender program, but he admittedly had not fully benefited from those services. Main testified that he has another son who he was not financially supporting because he was in prison. Main had never had custody of that son. He was not able to financially support the minor child while in prison, and he did not yet know what he would do for employment upon his release. Main wanted the minor child to be placed with A. Main until he was released from prison and was able to care for the minor child himself. He believed that A. Main was an appropriate person to care for the minor child, and he did not have a problem with the minor child having visitation with N. Rice. However, Main testified that he barely knew A. Balkin and that he did not know the minor child was his child until the DNA test established paternity.

Harte testified that the minor child had recently undergone a bonding assessment. The assessor recommended that the minor child remain with his current caregivers and N. Rice. According to Harte, once Main was released from prison, it would be at least nine months before the minor child could be placed in his care. During those nine months, Main would be required to remain sober, establish stable housing and employment, comply with services, and begin forming a bond with the minor child. Harte recommended, however, that Main's parental rights to the minor child be terminated. Although A. Main's home was suitable for children, it was concerning that when A. Main was raising Main, she was involved in an abusive relationship. The abuser lived with A. Main, and she temporarily sent Main to live somewhere else rather than ending her relationship with the abuser. There was also a significant concern about the minor child's emotional well being if he was separated from his foster parents and N. Rice.

The trial court terminated Main's parental rights under MCL 712A.19b(3)(g) and held that termination was in the minor child's best interests. The trial court stated that this was a very

difficult decision, acknowledging that once paternity was established, Main participated in all of the services available to him and that A. Main could care for the minor child until Main was able to do so. The trial court noted that Main had never independently cared for his other son, spent the majority of his adult life in prison, would not be released from prison for a minimum of 16 to 17 months, and would need a significant amount of time thereafter to demonstrate the ability to properly care for the minor child. The trial court stated that it had carefully considered placing the minor child with A. Main until Main could care for him, noting that a home study was conducted of A. Main's home and that she was willing and able to care for the minor child. The trial court further noted, however, that the conclusions in the home study and bonding assessment showed that it would be very detrimental to the minor child to remove him from his foster family and N. Rice. The trial court ultimately terminated Main's parental rights because of the length of time that the minor child would be required to wait before he could be placed with Main and because it was in the minor child's best interests not to separate him from N. Rice and place him with his grandmother, who he had never met, for an indefinite period of time.

Main now appeals as of right.

## 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>1</sup> We review for clear error a trial court's decision terminating parental rights.<sup>2</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>3</sup> We give regard to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it.<sup>4</sup> Whether a party's right to due process was violated is a question of constitutional law that we review de novo.<sup>5</sup>

### B. ANALYSIS

Main's parental rights were terminated under MCL 712A.19b(3)(g), which provides: "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

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<sup>1</sup> MCL 712A.19b(3); MCR 3.977(H)(3)(a); *In re Sours Minors*, 459 Mich 624, 632; 593 NW2d 520 (1999).

<sup>2</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>3</sup> *In re JK*, 468 Mich 202, 209-210; 661 NW2d 216 (2003).

<sup>4</sup> MCR 2.613(C); *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989).

<sup>5</sup> *In re Rood*, 483 Mich 73, 91; 763 NW2d 587 (2009).

within a reasonable time considering the child's age." We note that Main asserts on appeal that the trial court terminated his parental rights under MCL 712A.19b(3)(a)(ii), (c)(i), and (g). But, because the trial court only terminated his parental rights under subsection (g), and the need to find only one statutory ground for termination, we need not address subsections (a)(ii) and (c)(i).

Main was incarcerated when his parental rights were terminated, and he acknowledges that he was not able to care for the minor child at that time. Main asserts, however, that he could have provided proper care and custody by placing the minor child with A. Main until he could care for the minor child himself and that the trial court's decision to terminate his parental rights violated the Michigan Supreme Court's decision in *In re Mason*.<sup>6</sup> In that case, the respondent father was incarcerated, and the Supreme Court reversed the trial court's termination of his parental rights.<sup>7</sup> But this case is distinguishable from *In re Mason*. Main was able to participate in the proceedings by telephone and was provided with a service plan and the opportunity to participate in services.<sup>8</sup> Moreover, the trial court did not terminate Main's parental rights based solely on his incarceration or fail to consider the possibility of relative placement or of placing the minor child with Main in the future.<sup>9</sup>

The minor child and N. Rice were placed with a foster family, where they remained for approximately 2-1/2 years. The minor child had never met Main. Even if Main was released from prison on his earliest release date and demonstrated the ability to properly parent the minor child just nine months later—the minimum amount of time petitioner indicated it would wait before considering placement with Main—the minor child would still have been required to wait approximately an additional 25 months after the termination hearing to be placed with Main. Given the minor child's young age and need for stability and permanence, requiring him to wait 25 months or longer to be placed with Main was unreasonable.

Moreover, placing the minor child with Main's mother would not have provided the requisite stability and a sense of permanence. Unlike the children in *In re Mason*, the minor child was not already placed with his grandmother at the time of the termination hearing. Relative placement would have required uprooting him from N. Rice and the only caretakers he had known and placing him with a relative he had never met. The undisrupted stability referenced by the Supreme Court in *In re Mason* would not be present in the minor child's life.<sup>10</sup> The trial court did not clearly err by concluding that the minor child would be required to wait an unreasonable length of time for stability and permanence.

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<sup>6</sup> *In re Mason*, 486 Mich 142; 782 NW2d 747 (2010).

<sup>7</sup> *Id.* at 146.

<sup>8</sup> Cf. *id.*

<sup>9</sup> Cf. *id.*

<sup>10</sup> See *id.* at 168.

Additionally, we note that Main's due process argument is without merit. His argument amounts to a procedural due process claim, but he does not assert any specific error in the procedure implemented in this case.

In sum, 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 Main's parental rights under MCL 712A.19b(3)(g).

### III. BEST INTERESTS DETERMINATION

#### A. STANDARD OF REVIEW

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>11</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>12</sup> We review for clear error the trial court's decision regarding the child's best interests.<sup>13</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, inappropriate parenting techniques, and continued involvement in domestic violence.<sup>14</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>15</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>16</sup> A trial court may terminate parental rights in lieu of placement with relatives if termination is in the child's best interests.<sup>17</sup>

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<sup>11</sup> MCL 712A.19b(5); *In re Trejo Minors*, 462 Mich at 351.

<sup>12</sup> *In re Trejo Minors*, 462 Mich at 353.

<sup>13</sup> *Id.* at 356-357.

<sup>14</sup> See *In re Jones*, 286 Mich App 126, 131; 777 NW2d 728 (2009).

<sup>15</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>16</sup> See *In re McIntyre*, 192 Mich App 47, 52-53; 480 NW2d 293 (1991).

<sup>17</sup> *In re IEM*, 233 Mich App 438, 453; 592 NW2d 751 (1999).

### C. ANALYSIS

Here, the trial court concluded that it was in the minor child's best interests to allow him to remain with N. Rice, rather than placing him with relatives he had never met. The siblings had a strong bond, and there was evidence that separation would be detrimental.<sup>18</sup> Further, as noted, considering the minor child's young age and need for stability and permanence, the length of time he would be required to wait to be permanently placed if the trial court did not terminate Main's parental rights was unreasonable.

Accordingly, we conclude that the trial court did not clearly err in finding that termination of Main's parental rights was in the minor child's best interests.

We affirm.

/s/ William C. Whitbeck

/s/ David H. Sawyer

/s/ Joel P. Hoekstra

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<sup>18</sup> See *Foskett v Foskett*, 247 Mich App 1, 11; 634 NW2d 363 (2001) (stating that, in most cases, it is in the child's best interests to avoid separation from siblings).