

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

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*In re* KOBEL, Minors.

UNPUBLISHED  
December 2, 2014

No. 321624  
Roscommon Circuit Court  
Family Division  
LC No. 12-721083-NA

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Before: K. F. KELLY, P.J., and SAWYER and METER, JJ.

PER CURIAM.

Respondent appeals as of right from an order terminating his parental rights to his minor daughter, SK, and his minor son, JK, pursuant to MCL 712A.19b(3)(c)(i) (conditions leading to adjudication continue to exist), MCL 712A.19b(3)(g) (failure to provide proper care or custody), and MCL 712A.19b(3)(j) (reasonable likelihood of harm). We affirm.

**I. BACKGROUND**

Starting in 2012, before JK was born, respondent and the children's mother began to receive preventative services from petitioner. For several months, Department of Human Services worker Caryn Painter would visit their home to try and help them with maintaining a clean house and developing a budget. Painter testified that respondent was not present at the house when the services were offered, or he was sleeping or working on cars and would not participate. Respondent testified that he did attend one meeting with Painter and that he even left work early to do so. Painter testified that the cleanliness problem with the house was not rectified by the time she stopped providing services. She also testified that she never saw respondent cleaning or preparing a budget.

At some point, SK was bit by one of respondent's two pit bulls. Respondent disagreed that SK was bitten, but agreed that the dog's tooth had left SK with a scar. Petitioner advised respondent to get rid of the dogs, but respondent believed it was sufficient to have a fence and a half-door leading into the house. He explained that it was because the children's mother left the door open that the dog was able to get to SK.

After the biting incident, respondent was referred for a psychological evaluation. Dr. Wayne Simmons, who performed the evaluation, testified that respondent's IQ was on the lower end of average, but he did not believe that would prevent respondent from being an appropriate caregiver. However, he concluded that there was a chronic pattern of bad judgment, poor social

skills, and a lack of sustained relationships in respondent's history. He noted that respondent was likely not able to anticipate negative and potentially catastrophic consequences because he did not pay enough attention to the world around him. Dr. Simmons opined that respondent had displayed poor judgment in handling the dog incident and that, based on his history of driving under the influence and losing his license for street racing, the episode of bad judgment was not an isolated incident.

The events leading to respondent's most recent incarceration were the catalyst for the children being removed from the home. On November 7, 2012, respondent became highly intoxicated and got into an argument with the children's mother. He explained that she told him she wished he was dead, and he told her he could "make that happen." Respondent said he retrieved a gun and placed it under his chin, but that when he saw his daughter he said, "I can't do this." In a copy of a 911 tape of the call placed by the children's mother, she is heard saying that respondent was shooting a gun in the house while she and the children were present, that he had torn apart the kitchen, that he had hit her with a fire extinguisher, and that respondent had pointed the gun at her and her daughter. Respondent could be heard in the background saying, "I want to hurt my family." Respondent was arrested and charged with multiple offenses. He pleaded no contest to assault with a dangerous weapon, MCL 750.82; felon in possession of a firearm, MCL 750.224f; discharging a firearm at a building, MCL 750.234b; and fourth-degree child abuse, MCL 750.136b. He remained incarcerated throughout the duration of the case.

While incarcerated, respondent participated as fully in the case-service plan and the case as he could. He attended each court hearing, either by telephone or Skype. He took classes in the prison, including programs for anger management and substance abuse. However, obstacles to reunification remained. Foster-care worker Katie Ofeno testified that a single visit between the children and respondent at the prison was difficult and not beneficial for the children. She explained that the children did not recognize respondent. When asked about how he planned to provide care and custody for the children while incarcerated, respondent told Ofeno that the children could continue in the foster-care placement until his release. When asked about how he planned to provide care and custody for the children upon his release, respondent was initially unable to provide a plan. He subsequently sent Ofeno a letter with an address where he planned to live, a place he planned to work, a babysitter's name, and the names of a Child Protective Services (CPS) worker and two attorneys who were going to help him. Attempting to confirm the information, Ofeno learned that it was not accurate. Respondent testified that after Ofeno told him that, he realized that he had fallen for a prison scam. He explained that he was given the information by another inmate who had indicated that he could get respondent a job, a house, furniture, and legal help. Respondent testified that upon release he planned to live with his mother, sell some real estate that he owned to generate money, obtain employment, refrain from drinking, and attend a parenting class.

Dr. Simmons opined that there "was nothing in the way that [respondent] represented himself to indicate that he has the capacity, or is likely to gain the capacity, to be able to meet the needs of those young kids." He explained that respondent was "marginal at best in terms of his ability to care for young children, probably sub-marginal . . . ." Dr. Simmons explained that there would be no benefit to the children "to wait and go months and months to see whether [a] bond" could be established with respondent.

## II. STATUTORY GROUNDS

Defendant argues that the statutory grounds for termination were not established by clear and convincing evidence. We review for clear error a trial court's finding of whether a statutory ground for termination has been proven by clear and convincing evidence. MCR 3.977(K); *In re BZ*, 264 Mich App 286, 296; 690 NW2d 505 (2004). "A finding of fact is clearly erroneous if the reviewing court has a definite and firm conviction that a mistake has been committed, giving due regard to the trial court's special opportunity to observe the witnesses." *In re BZ*, 264 Mich App at 296-297. Only one ground is required for termination. MCL 712A.19b(3); *In re Olive/Metts*, 297 Mich App 35, 41; 823 NW2d 144 (2012).

A parent's parental rights may be terminated pursuant to subsection (c)(i) if 182 or more days have elapsed from the initial dispositional order and the "conditions that led to the adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age." It is undisputed that more than 182 days passed between the initial dispositional order and the termination hearing.

The conditions leading to adjudication were improper care and custody for the children and the November 7, 2012, incident. The record shows that the pertinent conditions continued to exist. Although respondent appears to have participated in the programs available to him while incarcerated, he was unable to show benefit from the services provided. Thus, there is no evidence that his problems with domestic violence and alcohol abuse have been rectified. There is also nothing in the record to suggest that those problems can be rectified in a reasonable time when considering the children's ages. SK is currently under four and JK is about two years old. Respondent's incarceration will continue until at least November 2014. After that, the record shows, he will need additional services, including (by respondent's own testimony) parenting classes. The trial court found that his history indicated uncertainty surrounding respondent's potential for rehabilitation. For instance, the record shows that respondent had previously completed a program for substance abuse and then continued to abuse alcohol. In fact, the November shooting incident stemmed from respondent's continuing alcohol abuse. Based on this record, we are not left with a definite and firm conviction that the trial court erred in finding that the ground in MCL 712A.19b(3)(c)(i) was proven by clear and convincing evidence.

The trial court also terminated respondent's parental right pursuant to MCL 712A.19b(3)(g), which provides that termination is proper 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." The record shows that respondent was unable to provide proper care and custody for the children while incarcerated. An incarcerated parent need not personally care for his or her children. *In re Mason*, 486 Mich 142, 161; 782 NW2d 747 (2010). Instead, a parent can provide proper care and custody by arranging for someone else to care for their children. However, the record shows that respondent was unable to offer anyone suitable to care for the children while he was in prison. Instead, his plan for their care was to allow the children to remain in foster care until his release.

Further, before the termination hearing, respondent was unable to offer a plan for his children for after he was released. On one occasion, he provided false information about a job, a

place he could live, and people who would help him. Even assuming that he gets out on his early release date, obtains housing with his mother, obtains employment, and manages to sell property to generate funds to care for his children, the record shows that he would be unable to provide for the children within a reasonable time considering the ages of the children. Dr. Simmons testified that, at present, respondent has only a marginal or sub-marginal ability to care for young children, which would exacerbate the difficulties the children would face. Further, Dr. Simmons testified that respondent had Post-Traumatic Stress Disorder (relating to an incident during which his sisters were killed and his father was shot) that would require years of treatment. Dr. Simmons also testified that it was common for prisoners to complete classes while incarcerated, but opined that it would be “some extended period of time” before anyone could know the benefit respondent had from the classes. Accordingly, on this record, the trial court did not err in finding termination was proper pursuant to MCL 712A.19b(3)(g).

Finally, the trial court found that termination was proper pursuant to MCL 712A.19b(3)(j), which provides that termination is proper 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.” Here the trial court looked at respondent’s entire history, paying special attention to his history of receiving treatment or criminal sanctions for certain behavior and then proceeding to continue engaging in that behavior. The record shows that respondent had numerous convictions for driving on a suspended license after his initial conviction and that he had numerous convictions involving alcohol or drug use after he had received treatment. Moreover, respondent’s history of alcohol abuse stretched back many years, culminating in the events of November 7, 2012, when, intoxicated, he took a gun and fired in the house while his children were present.

Further, the trial court found, and the record supports, that respondent knew the children’s mother had other children taken away by petitioner. However, he continued to allow her to have childrearing responsibility. He did not participate in the help being provided by petitioner for keeping his home clean and preparing and living under a budget. Dr. Simmons testified that the children would be damaged psychologically by living with respondent. On these facts, we are not left with a definite and firm conviction that the trial court erred in terminating respondent’s parental rights pursuant to subsection (j).

### III. BEST INTERESTS

Respondent also argues that the trial court erred in finding that termination of his parental rights was in the best interests of the children. We review a trial court’s best-interests decision for clear error. *In re Jones*, 286 Mich App 126, 129; 777 NW2d 728 (2009). “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). “[W]hether termination of parental rights is in the best interests of the child must be proven by a preponderance of the evidence.” *In re Moss Minors*, 301 Mich App 76, 90; 836 NW2d 182 (2013). “In deciding whether termination is in the child’s best interests, the court may consider the child’s bond to the parent, the parent’s parenting ability, the child’s need for permanency, stability, and finality, and the advantages of a foster home over the parent’s home . . . .” *In re Olive/Metts*, 297 Mich App at 41-42 (citations omitted). The trial court may also consider an

unfavorable psychological evaluation, the child's age, continued involvement in domestic violence, and a parent's history. See *In re Jones*, 286 Mich App at 131.

The record shows that the children had been removed from respondent's care when they were very young. The children had no bond with respondent; indeed, during jail visitation, they were unable to even recognize him. Dr. Simmons opined that it would be detrimental to move the children to respondent's home. Further, respondent's history casts into doubt his ability to regain custody of the children within a reasonable time considering their ages. The children need stability and permanence and nothing on this record indicates that that is something respondent can provide to them anytime soon. Accordingly, the trial court did not err in finding that termination of respondent's parental rights was in the children's best interests.

Affirmed.

/s/ Kirsten Frank Kelly

/s/ David H. Sawyer

/s/ Patrick M. Meter