

STATE OF MICHIGAN  
COURT OF APPEALS

---

*In re* J.A. WEBER, Minor.

UNPUBLISHED  
March 15, 2018

No. 339509  
St. Joseph Circuit Court  
Family Division  
LC No. 2015-000365-NA

---

Before: O’CONNELL, P.J., and HOEKSTRA and SWARTZLE, JJ.

PER CURIAM.

Respondent-father appeals as of right the order terminating his parental rights to the minor child, JW, under MCL 712A.19b(3)(g) (failure to provide proper care and custody) and MCL 712A.19b(3)(j) (reasonable likelihood child will be harmed). Because the trial court did not clearly err by terminating respondent’s parental rights, we affirm.

JW was removed from respondent’s care in April 2015. At that time, respondent was engaged in the use of methamphetamine while JW was in the home. Respondent had a history of substance abuse that included marijuana, cocaine, and methamphetamine. Respondent also had a history of domestic violence, including acts that led JW to refer to respondent as “mean daddy” and to demonstrate during a psychosocial play assessment how “mean daddy” hurt his mother. Soon after JW’s removal, respondent was arrested and he spent the entirety of this case in either jail or prison. While the case was ongoing, respondent underwent a psychological evaluation that revealed a long history of emotional instability, problems with anger management, a lack of “self-correction,” a history of poor decision-making as evinced by respondent’s numerous adult criminal offenses, and an overall poor prognosis for change. At the time of the termination hearing in August of 2017, respondent was in jail in Indiana. JW had been living with the same foster care family since his removal, with the exception of approximately three months in 2016 when JW was returned to his mother<sup>1</sup> before being removed again. By the time of the termination hearing, JW had not seen respondent since his removal more than two years earlier. JW had also been diagnosed with post-traumatic stress disorder (PTSD), necessitating a stable home and caregivers who were “trauma informed.”

---

<sup>1</sup> In February of 2017, JW’s mother voluntarily released her parental rights to JW.

As noted, the trial court terminated respondent's parental rights under MCL 712A.19b(3)(g) and (j). In particular, the trial court determined that respondent was unable to provide proper care and custody for JW, either personally or with a relative, and that there was a reasonable likelihood that JW would be harmed if returned to respondent's care, particularly given JW's PTSD diagnosis and his "fragile" state. The trial court also concluded that, given respondent's history, the child's young age, the length of time he had been in foster care, and the child's particular need for stability and security, there was no reasonable probability that respondent would be able to provide proper care and custody within a reasonable time considering the child's age. Respondent now appeals as of right.

On appeal, respondent argues that the trial court erred by terminating his parental rights. According to respondent, it is mere conjecture to assume that JW will be harmed if returned to his care and the trial court erred by focusing on respondent's present incarceration without properly considering whether respondent could care for JW in the future, either personally or with the help of relatives. In asserting that he could care for JW in the future, respondent emphasizes his participation in services while in jail and prison, and he maintains that, if given the opportunity, he could learn the trauma skills needed to parent JW.

"In order to terminate parental rights, the trial court must find by clear and convincing evidence that at least one of the statutory grounds for termination in MCL 712A.19b(3) has been met." *In re VanDalen*, 293 Mich App 120, 139; 809 NW2d 412 (2011). We review the trial court's findings for clear error. *In re Schadler*, 315 Mich App 406, 408; 890 NW2d 676 (2016). "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 286, 296-297; 690 NW2d 505 (2004).

In this case, the trial court terminated respondent's parental rights under MCL 712A.19b(3)(g) and (j), which state:

(3) The court may terminate a parent's parental rights to a child if the court finds, by clear and convincing evidence, 1 or more of the following:

\* \* \*

(g) 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 within a reasonable time considering the child's age.

\* \* \*

(j) There 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.

By its plain terms, MCL 712A.19b(3)(g) "permits termination where (1) the parent fails to provide proper care or custody for the child and (2) there is no reasonable expectation that the parent will be able to do so within a reasonable time given the child's age." *In re JK*, 468 Mich

202, 213-214; 661 NW2d 216 (2003). The second criteria “is forward-looking; it asks whether a parent ‘will be able to’ provide proper care and custody within a reasonable time.” *In re Mason*, 486 Mich 142, 161, 164-165; 782 NW2d 747 (2010). Accordingly, a parent’s present or past inability to provide care because of incarceration is not decisive. *Id.* Rather, the trial court must evaluate “whether respondent could care for his children in the future, either personally or through his relatives.” *Id.* at 165. Likewise, incarceration alone does not justify termination under MCL 712A.19b(3)(j); rather, the court must consider the likelihood of harm if the child were returned to the parent’s home after the parent’s release. *In re Pops*, 315 Mich App 590, 600; 890 NW2d 902 (2016). “Significantly, just as incarceration alone does not constitute grounds for termination, a criminal history alone does not justify termination” under MCL 712A.19(3)(j). *In re Mason*, 486 Mich at 165. More generally, the trial court cannot merely assume that the child is at risk in his parent’s care. *In re Rood*, 483 Mich 73, 115; 763 NW2d 587 (2009) (opinion by CORRIGAN, J.). However, in assessing the likelihood of future harm under MCL 712A.19b(3)(j), the trial court can properly consider the risk of emotional harm. *In re Hudson*, 294 Mich App 261, 268; 817 NW2d 115 (2011).

In this case, the trial court did not clearly err by finding clear and convincing evidence to support termination under MCL 712A.19b(3)(g) and (j). Respondent had a long history of substance abuse, domestic violence, emotional instability, and criminality. As a result of respondent’s conduct, JW suffered serious emotional harm, leading to a diagnosis of PTSD and a noticeable “fragility” necessitating stability and “trauma informed” caregivers. The evidence indicates that respondent has not addressed his domestic violence problems and does not have the ability to provide trauma-informed care for JW. The caseworker for JW testified that respondent had not engaged in any services while incarcerated to address domestic violence or parenting skills.<sup>2</sup> Indeed, respondent testified that he did not believe he had an issue with anger management.<sup>3</sup> While respondent participated in various services to address his substance abuse problems, he had not demonstrated sobriety outside of a prison setting and he lacked insight into the significance of his substance abuse problem. For instance, even after engaging in services while incarcerated to learn about the impact of methamphetamine use on individuals and families, respondent asserted that JW was never harmed by his use of controlled substances and that use of methamphetamine did not affect his cognitive abilities when it came to parenting JW. Given these statements, the trial court questioned whether respondent benefited from the services he had received. Further, rather than take every opportunity to participate in services while in jail or prison, respondent made the choice to stop participating in services in December of 2016.

---

<sup>2</sup> On appeal, respondent asserts in passing that appropriate services were not made available to him. However, based on the evidence, the trial court determined that the Department of Health and Human Services made reasonable efforts to engage respondent and provide respondent with services based on what was available to respondent in jail and prison. See *In re Mason*, 486 Mich at 152. This finding was not clearly erroneous.

<sup>3</sup> In the trial court, respondent questioned whether he was the “bad daddy” who traumatized JW. However, the trial court rejected this assertion and found that respondent was “bad daddy.” This finding was not clearly erroneous given evidence that JW had pointed to a picture of respondent and said “bad daddy” before throwing the picture away.

Moreover, at the time of the termination hearing, JW had already spent more than two years, over half of his life, in foster care. Based on the severity of JW's anger and fear toward respondent, a Children's Trauma Assessment Group (CTAG) clinician testified that it would take an "extensive period of time" for JW to feel safe returning to respondent's care. Further, respondent hoped for an early release date in December 2017, but this would require a modification of respondent's sentence and, if his sentence were not modified, he would not be released until late 2018.<sup>4</sup> Once released, respondent would have to demonstrate a period of sobriety and engage in additional services before there was even a possibility of his providing proper care for JW. In these circumstances, the trial court did not clearly err in finding that the additional amount of time that JW would have to wait for respondent to be released, engage in services, and work through the trauma that JW experienced prior to respondent's incarceration represented an unreasonable amount of time before respondent could properly care for his child. Therefore, the trial court did not err by concluding that grounds for termination were established under MCL 712A.19b(3)(g).

These same facts support the trial court's conclusion that termination was appropriate under MCL 712A.19b(3)(j). JW was diagnosed with PTSD and exhibited severe emotions of anger and fear toward respondent. JW acted out this trauma in his play, demonstrating how "mean daddy" hurt his mother and showing himself hiding from "mean daddy." The CTAG clinician opined that the worst scenario for JW would be to deprive him of stability by removing him from his foster family, to whom JW had become attached and with whom JW felt safe. This evidence demonstrates that respondent had subjected JW to emotional trauma prior to respondent's incarceration, that respondent's incarceration had already deprived JW of a stable home for more than two years, and that JW would experience emotional harm if returned to respondent. Thus, the trial court did not clearly err in finding that the statutory ground under MCL 712A.19b(3)(j) was also met. See *In re Hudson*, 294 Mich App at 268.

---

<sup>4</sup> In the trial court, there was discussion about the possibility of placing JW with one of respondent's relatives, and the trial court considered this possibility as required by *In re Mason*, 486 Mich at 164. However, the trial court concluded that respondent's relatives were not appropriate placements. Visits with respondent's sister and respondent's mother had to be stopped because of the negative effect they had on JW. Further, respondent's sister completed the process to have placement of JW out-of-state but then JW was returned to his mother's care. When JW was again removed, respondent wanted JW placed with his mother. However, the process for the out-of-state placement was not completed (in part because respondent's mother's husband had a criminal history) and, more generally, the trial court was concerned about respondent's mother as a placement given that she minimized respondent's substance abuse. The trial court properly considered whether respondent or his relatives could provide proper care and custody in the future but determined that they could not.

Affirmed.

/s/ Peter D. O'Connell

/s/ Joel P. Hoekstra

/s/ Brock A. Swartzle