

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

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In the Matter of CALDWELL, Minors.

UNPUBLISHED  
March 20, 2014

Nos. 317709; 317710  
Washtenaw Circuit Court  
Family Division  
LC Nos. 2011-000115-NA;  
2011-000116-NA;  
2011-000117-NA

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Before: RONAYNE KRAUSE, P.J., and FITZGERALD and WHITBECK, JJ.

PER CURIAM.

In these consolidated appeals, respondent-mother, D. Frand, and respondent-father, S. Caldwell, each appeal as of right the trial court's order terminating their parental rights to their three minor children. In Docket No. 317709, Frand asserts that the Department of Human Services (the Department) failed to provide reasonable efforts to prevent the children's removal and to reunite her with them. In Docket No. 317710, Caldwell asserts that the trial court erred by admitting hearsay evidence and by terminating his parental rights under MCL 712A.19b(3)(c)(i), (c)(ii), (g), and (j). We affirm.

**I. FACTS**

**A. THE PARENTS' DRUG USE AND DOMESTIC VIOLENCE**

Both Frand and Caldwell began using drugs at a young age. In 2004, Frand gave birth to the oldest child, who tested positive for marijuana at birth. Frand and Caldwell's middle child was born in 2005. In December 2007, Frand gave birth to the youngest child, who tested positive for cocaine at birth.

In 2009, Caldwell pleaded *nolo contendere* to domestic violence against Frand. Frand and Caldwell both testified that, in 2010, they began using heroin. In August 2010, Caldwell punched Frand in the face and ribs while the youngest child was present.

**B. THE CHILDREN'S REMOVAL**

In August 2010, Child Protective Services went to Frand and Caldwell's home and discovered that it was unkempt. In September 2011, Child Protective Services received a report that the home was "a mess" and that Frand and Caldwell looked like "zombies." Child

Protective Services returned to the home for an unannounced visit. A worker found syringes on the floor and several large knives in areas that the children could reach. Caldwell was in the home, and the officer accompanying the Child Protective Services worker arrested him on pending domestic violence charges. Child Protective Services removed the children from the home and the Department petitioned the trial court for temporary wardship.

#### C. PROCEEDINGS AFTER REMOVAL

The trial court held a preliminary hearing on October 13, 2011, at which the parties waived a probable cause determination. The trial court placed the children with a relative. On October 27, 2011, Caldwell pleaded *nolo contendere* to charges of domestic violence and resisting and obstructing and was sentenced to serve two years' probation.

At a pretrial hearing in November 2011, Frand and Caldwell both admitted that the children were in a home where syringes were left on the floor, that Frand and Caldwell were addicted to opiates, and that Caldwell repeatedly engaged in domestic violence. However, they denied the Department's allegation that the children played with the syringes and had witnessed Frand and Caldwell injecting themselves.

On the basis of Frand and Caldwell's pleas, the trial court found that the home was unsafe as a result of Frand and Caldwell's drug use and placed the children with the Department. The trial court found that the Department had previously offered Frand and Caldwell services and had made reasonable efforts to prevent the children's removal.

#### D. PROCEEDINGS AFTER ADJUDICATION

In November 2011, the trial court held the initial dispositional hearing. Caldwell was not present, and his counsel moved for an adjournment. Counsel expressed that Caldwell was having transportation issues. Jochebed Swilley, the children's foster care specialist, stated that she had provided Caldwell with bus tokens and that he had not contacted anyone before the hearing about a transportation issue. The trial court denied Caldwell's request for an adjournment.

The trial court ordered Frand to participate in outpatient treatment and attend drug screenings, parenting classes, and parenting times. It ordered Caldwell to participate in a substance abuse assessment, and to attend drug screenings, parenting classes, and parenting time. It ordered both parents to participate in a psychological evaluation.

Over the course of the proceedings, Frand lost her job, frequently tested positive for alcohol and substances, frequently failed to attend drug screens, was evicted from her apartment, and engaged in an abusive relationship with another man.

#### E. CALDWELL'S PROGRESS

In December 2011, Caldwell declined to attend parenting time. In January 2012, Caldwell was arrested for violating his probation by failing to attend substance abuse treatment. He pleaded guilty to violating his probation, and the trial court sentenced him to serve six months in a substance abuse treatment facility.

In February 2012, New Pass terminated Caldwell's participation and returned him to jail to complete the remainder of his sentence. Caldwell testified that he signed up for every available service, but that he was never called to attend services.

At the April 2012 review hearing, Swilley testified that Caldwell had not been able to participate in services in jail. Caldwell's attorney expressed concern that Elizabeth Firestone, the children's new foster care specialist, had not visited Caldwell in jail. The trial court found that the Department had made reasonable efforts to reunify Frand and Caldwell with their children, but ordered Firestone to meet with Caldwell before he was released from jail. Firestone subsequently visited Caldwell to discuss his service plan.

In May 2012, Caldwell was released from jail and placed on probation. Caldwell participated in one parenting session and attended two of six parenting classes. Caldwell tested positive for Clonazepam, for which he alleged that he had a prescription.

In June 2012, Caldwell attended one parenting time session. Caldwell missed eleven drug screenings. He tested positive for Vicodin and Ativan on one occasion, for which he had prescriptions. The Department offered to pay for Caldwell's substance abuse assessment, but he did not participate in an assessment. Caldwell stopped reporting to his probation officer.

Caldwell telephoned Firestone in the early morning hours of June 20, 2012, to report that Frand had come home drunk and attacked him while he was sleeping. Frand reported that Caldwell had overdosed on "dope" and she had tried to revive him by "slapping him around." Caldwell left the apartment. Caldwell briefly moved into a homeless shelter, but was kicked out on June 27, 2012.

Caldwell was not allowed to attend parenting visitation with Frand after the incident, but he did not set up his own parenting visitation. In July 2012, Caldwell was arrested for violating his probation. The trial court suspended Caldwell's parenting time.

In August 2012, Caldwell pleaded guilty to violating his probation and was sentenced to serve 12 to 24 months' imprisonment. Caldwell was transferred to Cotton Correctional Facility, where he remained for 40 days before he was transferred to Pugsley Correctional Facility. After two weeks at Pugsley, Caldwell was transferred to Parnall Correctional Facility. Caldwell began participating in individual and group counseling at Parnall. In September 2012, Firestone spoke with Caldwell at Parnall about services to address his emotional stability and substance abuse issues.

## F. TERMINATION PROCEEDINGS

At a review hearing in September 2012, the trial court ordered the Department to petition to terminate Frand and Caldwell's parental rights. In October 2012, the Department petitioned to terminate Frand and Caldwell's parental rights under MCL 712A.19b(3)(c)(i), (c)(ii), (g), and (j).

In January 2013, Swilley returned to the children's care and visited Caldwell in Parnall. She also contacted Parnall's warden, who told her that Caldwell was on a waiting list for services. In February 2013, Caldwell was transferred from Parnall to a facility in Adrian, Michigan. After Caldwell arrived in Adrian, he received three misconduct citations in ten days.

In April 2013, Caldwell was transferred to Bellamy Creek Correctional Facility. Swilley testified that she spoke with the prison, but was informed that the long waiting list for services and Caldwell's poor behavior prevented him from participating in some services.

The trial court heard testimony at termination hearings on April 19, April 22, and July 19, 2013. Much of the testimony reiterated the parents' history and lack of progress. According to Caldwell, he did not participate in services at the beginning of the case because he did not believe that he could "do it on his own." Caldwell testified that in November 2011, he "gave up," but in July 2012, he ended his relationship with Frand and became motivated to participate in services. He wanted to participate, but had only been able to participate in counseling while in prison. Caldwell also testified that he believed that his caseworkers failed to communicate with him because they believed that the trial court would terminate his parental rights.

## G. THE TRIAL COURT'S DECISION

The trial court found that clear and convincing evidence supported terminating Frand and Caldwell's parental rights under MCL 712A.19b(3)(c)(i) and (g) and that termination was in the children's best interests. The trial court found that Frand had failed to address her substance abuse problems, despite numerous opportunities to do so.

The trial court found that Caldwell had failed to participate in services before his incarceration in prison and that he was more concerned with his own emotional state than with the children's needs. It found that Caldwell's hopes that he could do better on release did not lead it to believe that he could rectify his conditions within a reasonable time.

## II. REASONABLE EFFORTS (DOCKET NO. 317709)

### A. STANDARD OF REVIEW

We review for clear error whether a trial court engaged in reasonable efforts to reunify a child with his or her parent.<sup>1</sup> A finding is clearly erroneous if "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made."<sup>2</sup>

### B. REASONABLE EFFORTS TO PREVENT REMOVAL

Frand contends that the trial court denied her due process when it failed to make reasonable efforts to prevent the children's removal from her home. We conclude that Frand may not collaterally attack the trial court's assumption of jurisdiction over the children.

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<sup>1</sup> *In re Mason*, 486 Mich 142, 152, 166; 782 NW2d 747 (2010).

<sup>2</sup> MCR 3.977(K); *In re Mason*, 486 Mich at 152, quoting *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989).

At the preliminary hearing in a child protective proceeding, the trial court determines whether there is probable cause to believe that the facts in the petition are true.<sup>3</sup> The trial court may only place children in foster care if it finds that the Department has made reasonable efforts to prevent the child's removal from the parent's home.<sup>4</sup>

A parent may challenge the trial court's decision by appealing the decision, or the parent may raise an incorrect exercise of jurisdiction through other review procedures.<sup>5</sup> However, a parent may not collaterally attack the trial court's decision to assume jurisdiction over the children.<sup>6</sup>

Here, Frand challenges the trial court's finding, following the preliminary hearing, that the Department made reasonable efforts to prevent the children's removal from her home. Frand did not challenge this decision by appealing it or raising it during the case's review proceedings. Instead, Frand seeks to invalidate the trial court's termination of her parental rights by attacking its initial assumption of jurisdiction. This is precisely the type of collateral attack that *In re Hatcher* does not allow. Therefore, we decline to review the propriety of the trial court's initial assumption of jurisdiction.

### C. REASONABLE EFFORTS TO REUNIFY

Frand contends that the trial court did not make reasonable efforts to reunify her with her children because it did not provide sufficient services. We conclude that Frand did not timely raise this issue.

The time for a parent to challenge a service plan is when the trial court initially adopts it.<sup>7</sup> Here, Frand challenged the adequacy of her service plan and the trial court's execution of the plan for the first time during arguments on the petition to terminate her parental rights. We conclude that Frand has not timely raised this issue.

Further, we note that the record indicates that the Department *did* attempt to provide Frand with the treatment, housing, and other services that she asserts that she should have received, but that she simply failed to participate in them.

## III. STATUTORY GROUNDS (DOCKET NO. 317710)

### A. STANDARD OF REVIEW

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<sup>3</sup> MCR 3.965(B); *In re Hatcher*, 443 Mich 426, 434-435; 505 NW2d 834 (1993).

<sup>4</sup> MCL 712A.13a(9)(d).

<sup>5</sup> MCR 3.993(A)(1); *In re Hatcher*, 443 Mich at 438.

<sup>6</sup> *In re Hatcher*, 443 Mich at 444.

<sup>7</sup> *In re Terry*, 240 Mich App 14, 27; 610 NW2d 563 (2000).

This Court reviews for clear error the trial court's factual findings and ultimate determinations on the statutory grounds for termination.<sup>8</sup> The trial court's factual findings are clearly erroneous if the evidence supports them, but we are definitely and firmly convinced that it made a mistake.<sup>9</sup> This Court reviews de novo questions of law related to the admissibility of the evidence, and reviews for an abuse of discretion the trial court's decision whether to admit evidence.<sup>10</sup>

## B. ADMISSIBILITY OF EVIDENCE

Caldwell asserts that the trial court erred by relying on hearsay evidence to support its findings and conclusions. Caldwell has not sufficiently supported this argument.

Generally, at a hearing to terminate a parent's parental rights, "[t]he Michigan Rules of Evidence do not apply, other than with respect to privileges . . . ."<sup>11</sup> However, the rules of evidence do apply if the trial court seeks to terminate a parent's parental rights on the basis of new or different circumstances.<sup>12</sup>

Here, Caldwell pleaded to a history of substance abuse and domestic violence. Thus, the trial court could properly consider hearsay evidence concerning Caldwell's substance abuse and domestic violence and, by relation, his ability to comply with and benefit from services regarding those conditions. Thus, the distinction between evidence regarding those conditions and evidence regarding new conditions is crucial.

Caldwell does not indicate which documents that the trial court admitted were related to new or different circumstances. If an appellant does not assert the factual basis for his position, he has abandoned it on appeal.<sup>13</sup> We conclude that Caldwell has abandoned this assertion by failing to support it.

## C. MCL 712A.19b(3)(c)(i) AND (g)

### 1. LEGAL STANDARDS

MCL 712A.19b(3)(c)(i) provides that the trial court may terminate a parent's rights if there is clear and convincing evidence that

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<sup>8</sup> MCR 3.977(K); *In re Mason*, 486 Mich at 152.

<sup>9</sup> *In re Mason*, 486 Mich at 152.

<sup>10</sup> *People v Layher*, 464 Mich 756, 761; 631 NW2d 281 (2001).

<sup>11</sup> MCR 3.977(H)(2).

<sup>12</sup> MCR 3.977(F)(1)(b); *In re Gilliam*, 241 Mich App 133, 137; 613 NW2d 748 (2000).

<sup>13</sup> MCR 7.212(C)(7); *People v Petri*, 279 Mich App 407, 413; 760 NW2d 882 (2008).

[t]he 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.

MCL 712A.19b(3)(g) provides that the trial court may terminate a parent's rights 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.

## 2. APPLYING THE STANDARDS

Caldwell contends that the trial court erred by finding that MCL 712A.19(b)(3)(c)(i), (ii), (g), and (j) were supported by clear and convincing evidence. We disagree.

As an initial matter, we note that the trial court terminated Caldwell's parental rights under MCL 712A.19b(3)(c)(i) and (g). Therefore, we will not address Caldwell's arguments under MCL 712A.19b(3)(c)(ii) and (j).

We disagree with Caldwell's contention that the trial court's decision not to adjourn the initial dispositional hearing affected the progress of this case and its ultimate decision that the Department supported MCL 712A.19b(3)(c)(i). Termination under MCL 712A.19b(3)(c)(i) is appropriate when the conditions that brought the children into foster care continue to exist despite "time to make changes and the opportunity to take advantage of a variety of services."<sup>14</sup>

Here, Caldwell pleaded to substance abuse and related neglect. Given his plea, the trial court's decision to order Caldwell to attend a substance abuse assessment, a psychological evaluation, drug screens, parenting classes, and parenting time was appropriate. Caldwell does not explain how his presence at the hearing would have altered the trial court's decision to order the specific, appropriate services. Therefore, we reject Caldwell's assertion that the trial court's decision not to adjourn the initial dispositional hearing somehow affected its decision under MCL 712A.19b(3)(c)(i).

We also disagree with Caldwell's contention that this case is similar to the Michigan Supreme Court's decision in *In re Mason*.<sup>15</sup> In *In re Mason*, the State failed to involve the respondent-father in the proceedings and essentially terminated his parental rights "solely because of his incarceration."<sup>16</sup> The trial court in part based its termination of the respondent-

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<sup>14</sup> See *In re Powers Minors*, 244 Mich App 111, 119; 624 NW2d 472 (2000).

<sup>15</sup> *In re Mason*, 486 Mich 142; 782 NW2d 747 (2010).

<sup>16</sup> *Id.* at 159-160.

father's parental rights on his failure to comply with the service plan, but did not give him any opportunity to participate in services or comply with the plan in the future.<sup>17</sup>

We conclude that this case is distinguishable from *In re Mason*. Here, Caldwell had the opportunity to participate in the service plan, but he simply failed to do so. Between May 2012, when Caldwell was released from jail, and August 2012, Caldwell did not attend parenting visits, did not participate in a psychological evaluation, did not participate in a substance abuse assessment, attended only two of six parenting classes, and violated his probation.

Caldwell had the opportunity to participate in services, but failed to do so. We are not definitely and firmly convinced that the trial court made a mistake when it found that Caldwell failed to participate in services before his second incarceration. This finding supported its conclusion that Caldwell could not rectify the conditions leading to this case within a reasonable time.

Finally, we disagree that the evidence of Caldwell's parenting skills rendered the trial court's decision under MCL 712A.19b(3)(g) erroneous. A parent's failure to participate in and benefit from a service plan is evidence that the parent will not be able to provide a child with proper care and custody.<sup>18</sup> As described above, Caldwell failed to participate in the service plan despite having the opportunity to do so. Child Protective Services found the children in a home in which needles were on the floor and knives were in their reach. This unsafe condition resulted in part from Caldwell's drug use. Caldwell did not participate in services designed to address his drug use. Therefore, we conclude the trial court did not clearly err in finding that the Department proved this ground by clear and convincing evidence.

#### IV. CONCLUSION

In Docket No. 317709, we affirm the trial court's order terminating Frand's parental rights because Frand's challenges are not timely. In Docket No. 317710, we affirm the trial court's order terminating Caldwell's parental rights because the trial court did not clearly err in finding that the Department supported MCL 712A.19b(3)(c)(i) and (g) by clear and convincing evidence.

We affirm.

/s/ Amy Ronayne Krause  
/s/ E. Thomas Fitzgerald  
/s/ William C. Whitbeck

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<sup>17</sup> *Id.* at 159.

<sup>18</sup> *In re JK*, 468 Mich 202, 214; 661 NW2d 216 (2003).