# STATE OF MICHIGAN

# COURT OF APPEALS

*In re* D. BALDWIN, Minor.

UNPUBLISHED
March 15, 2018

No. 340157
Ingham Circuit Court
Family Division
LC No. 16-000247-NA

Before: SAWYER, P.J., and BORRELLO and SERVITTO, JJ.

PER CURIAM.

Respondent-father appeals as of right the trial court's order terminating his parental rights to his minor child, the minor child, pursuant to MCL 712A.19b(3)(g) (failure to provide proper care and custody), (h) (parent incarcerated), (j) (reasonable likelihood that child will be harmed if returned to the parent), and (n)(*ii*) (parent convicted of a specified crime). For the reasons set forth in this opinion, we affirm.

## I. BACKGROUND

The minor child was removed from respondent-mother's care on February 16, 2016, within days of his birth. At the time of the minor child's birth, respondent-mother was already involved in an ongoing child protective proceeding involving the minor child's sibling, who remained out of mother's care, and she had still not adequately addressed her barriers to reunification, which involved substance abuse, emotional stability, parenting skills, and employment.[1] Additionally, father had not been established as the legal father of the minor child.[2] Mother indicated that she believed that father was the biological father of the minor child, and she also stated that father was "one of the possibilities" regarding the minor child's biological father. The referee indicated that father would be treated as a putative father.

The court proceedings focused entirely on mother as the case proceeded over the course of 11 months. Then, at the dispositional review and permanency planning hearing on January 25, 2017, the minor child's foster-care worker, Sandra Newburry, testified that she had been

[1] The record indicates that mother's parental rights to DB were eventually terminated. Mother is not a party to the instant appeal, and DB's sibling is not a subject of this appeal.

[2] A different individual was alleged to be the father of DB's sibling.

informed that father was incarcerated within the Michigan Department of Corrections (MDOC). The trial court ordered a DNA test to be provided to father in order to establish whether he was the minor child's father.

Father participated from prison in the pretrial hearing that was held on March 15, 2017, and he indicated that he had taken the DNA test but had not yet received the results. The record indicates that father was subsequently recognized as the legal father of the minor child as a result of an affidavit of parentage that was signed by both father and mother on April 19, 2017. Mother's parental rights to the minor child were terminated.

Subsequently, a supplemental petition was submitted naming father as a respondent, which was authorized following a preliminary inquiry on July 25, 2017. This petition sought termination of father's parental rights to the minor child, and it alleged that father was unable to meet the minor child's basic needs and that father was currently incarcerated as a result of his serious criminal offenses. More specifically, the petition alleged that father had a substantial criminal history that dated from the present back to 1996, that father was aware that the minor child had entered foster care but did not come forward for DNA testing until his recent incarceration, that father failed to appear for a DNA test that had been scheduled by the foster-care manager on March 22, 2016, that the minor child could not currently be placed with father because his earliest potential date for release from prison was October 31, 2031, and that there was a concern that father's extensive criminal history would lead to exposing the minor child to criminality upon father's release from prison.

At the August 23, 2017 hearing on the petition to terminate father's parental rights, the parties stipulated to the admission of father's record in the MDOC Offender Tracking Information System (OTIS). Newburry testified that father was given the opportunity to establish that he was the minor child's legal father at the time of the minor child's birth, when father was not incarcerated. Newburry testified that there had been a DNA test scheduled, which father failed to attend. Newburry explained that following the minor child's birth, father was incarcerated for approximately four days beginning on March 7, 2016, and that he was incarcerated again beginning in November 2016. According to Newburry, father did not have any further contact with the agency between February 2016 and November 2016 after he missed the scheduled DNA test. Newburry further testified that father's criminal history began in 1996 and that it included four prison terms and eight jail terms for six felonies and five misdemeanors. Father's OTIS record showed that his prior convictions included operating and maintaining a methamphetamine lab, delivery and manufacture of methamphetamine, and carrying a concealed weapon. Newburry explained that father was currently serving two concurrent prison sentences. Father had been sentenced on December 19, 2016, for his felon in possession of a firearm conviction, and he had been sentenced on March 20, 2017, for his assault with intent to rob while armed conviction. His earliest release date was October 31, 2031.

Newburry also opined that terminating father's parental rights was in the minor child's best interests for the following reasons:

> [the minor child] is 18 months old, and he has been in care for his entire young life. He has a right to permanency. He has a right to a stable, safe, secure home. . . . [Father], due to his poor choices and criminal history is not making it

> possible for him to provide that for him. With his earliest release date of 10-31-2031, [the minor child] will be 15 ½ years of age, and it's really not likely that [father] would be able at that time, even, to provide [the minor child] stability, safety, and security that he needs, and permanency.

Newburry further testified that father had never met the minor child before becoming incarcerated and that there was no bond between the minor child and father.

The trial court first addressed the adjudication of father by finding "by a preponderance of the evidence that the child comes within the Court's jurisdiction because the father's home is an unfit home by reason of criminality." The trial court then proceeded to the dispositional phase. The trial court found statutory grounds existed to support termination because MCL 712.19b(3)(g), (h), (j), and (n)(*ii*) had been established by clear and convincing evidence, and the trial court also found that termination was in the minor child's best interests. Father's parental rights to the minor child were terminated, and this appeal followed.

## II. ANALYSIS

### A. STATUTORY GROUNDS

On appeal, father first raises various challenges to the trial court's findings that there were statutory grounds to support terminating father's parental rights.

"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). This Court "review[s] for clear error [] the court's decision that a ground for termination has been proven by clear and convincing evidence . . . ." *In re Trejo*, 462 Mich 341, 356-357; 612 NW2d 407 (2000), abrogated by statute on other grounds as stated in *In re Moss*, 301 Mich App 76, 83, 88; 836 NW2d 182 (2013). " '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.' " *In re Rood*, 483 Mich 73, 91; 763 NW2d 587 (2009) (citation omitted; alteration in original).

In this case, although father challenges the trial court's reliance on MCL 712A.19b(3)(g), (h), and (j), father does not make any argument that the trial court erred by relying on MCL 712A.19b(3)(n)(*ii*) as a statutory ground to support termination. "The failure to brief the merits of an allegation of error is deemed an abandonment of an issue." *In re JS & SM*, 231 Mich App 92, 98; 585 NW2d 326 (1998), overruled in part on other grounds by *In re Trejo*, 462 Mich at 353, 353 n 10; see also *Froling v Carpenter*, 203 Mich App 368, 372-373; 512 NW2d 6 (1993) (concluding that an issue was abandoned where the plaintiffs failed to address the merits of their claim of error in their appellate brief); *People v Iannucci*, 314 Mich App 542, 545; 887 NW2d 817 (2016) ("The failure to brief the merits of an allegation of error constitutes an abandonment of the issue.") (Quotation marks and citation omitted). Furthermore, this Court may assume for purposes of the instant appeal that that the trial court did not clearly err by finding clear and convincing evidence supported reliance on a statutory ground that is not challenged on appeal. See *In re JS & SM*, 231 Mich App at 98-99, overruled in part on other grounds by *In re Trejo*,

462 Mich at 353, 353 n 10. "Only one statutory ground for termination need be established." *In re Olive/Metts Minors*, 297 Mich App 35, 41; 823 NW2d 144 (2012).

However, based on our review of the record, we nonetheless conclude that the trial court's reliance on MCL 712A.19b(3)(n)(*ii*) was not clearly erroneous. That provision permits a trial court to terminate parental rights if it finds by clear and convincing evidence that

> (n) The parent is convicted of 1 or more of the following, and the court determines that termination is in the child's best interests because continuing the parent-child relationship with the parent would be harmful to the child:
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> * * *
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> (*ii*) A violation of a criminal statute that includes as an element the use of force or the threat of force and that subjects the parent to sentencing under section 10, 11, or 12 of chapter IX of the code of criminal procedure, 1927 PA 175, MCL 769.10, 769.11, and 769.12.

In this case, the record reflected that father was convicted of assault with intent to rob while armed, in violation of MCL 750.89. "The elements of assault with intent to rob while armed are: (1) an assault *with force and violence*; (2) an intent to rob or steal; and (3) the defendant's being armed." *People v Akins*, 259 Mich App 545, 554; 675 NW2d 863 (2003) (quotation marks and citation omitted; emphasis added). The record also reflects that father was sentenced for this conviction as a second-offense habitual offender pursuant to MCL 769.10. Accordingly, father was convicted of an offense that included the use of force as an element and that subjected him to sentencing under MCL 769.10, satisfying the first requirement of MCL 712A.19b(3)(n)(*ii*). Furthermore, the record supports the conclusion that continuing a relationship between father and the minor child—or, more aptly, allowing one to develop—would be harmful to the minor child based on the nature of father's criminal history. There was evidence that father's criminal history dated back to 1996 and included convictions for operating and maintaining a methamphetamine lab, delivery and manufacture of methamphetamine, carrying a concealed weapon, and felon in possession of a firearm. Based on the record evidence, the trial court did not clearly err by finding that allowing a relationship between father and the minor child to continue would be harmful to the minor child because of father's lengthy history of criminal activity that included crimes involving violence, weapons, and controlled substances. MCL 712A.19b(3)(n)(*ii*).

Therefore, contrary to father's appellate arguments, the trial court's decision to terminate father's parental rights was not based solely on his incarceration, and it was not clearly erroneous for the trial court to conclude that MCL 712A.19b(3)(n)(*ii*) had been established as a statutory ground to support terminating father's parental rights. *In re Rood*, 483 Mich at 91. Because this statutory ground was properly established, we need not evaluate the other grounds relied upon by the trial court. *In re HRC*, 286 Mich App 444, 461; 781 NW2d 105 (2009).

## B. BEST INTERESTS

"Once a statutory ground for termination has been proven, the trial court must find that termination is in the child's best interests before it can terminate parental rights." *In re*

*Olive/Metts Minors*, 297 Mich App at 40. "[W]hether termination of parental rights is in the best interests of the child must be proved by a preponderance of the evidence." *In re Moss*, 301 Mich App at 90. We review a trial court's best-interests determination for clear error. *In re Trejo*, 462 Mich at 356-357.

At the best-interest stage, the focus is on the child and not the parent. *In re Moss*, 301 Mich App at 87. "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 Minors*, 297 Mich App at 41-42 (citations omitted). A court may also consider the length of time that the minor child was in foster care or placed with relatives and the likelihood that the child could be returned to the parents' home within the foreseeable future. *In re Frey*, 297 Mich App 242, 248-249; 824 NW2d 569 (2012).

In this case, there was testimony that father had never met the minor child before becoming incarcerated and that no bond existed between father and the minor child. The minor child has never been in father's care, and there is no evidence that father ever established, or even attempted to establish, a parent-child relationship. Further, the minor child's need for permanency, stability, and finality would be severely hampered if he were forced to wait until he was more than 15 years old for father to be released from prison and available to fully function as a parent. Thus, the trial court did not clearly err by concluding that termination of father's parental rights was in the minor child's best interests. *In re Olive/Metts Minors*, 297 Mich App at 41-42; *In re Frey*, 297 Mich App at 248-249.

## C. REUNIFICATION EFFORTS

Finally, father argues that reasonable efforts at reunification were not made with respect to him because the reunification efforts focused on mother. Assuming, without deciding, that this issue is preserved, we reject this argument.

This Court generally reviews a trial court's finding "that reasonable efforts were made to preserve and reunify the family" for clear error. *In re Fried*, 266 Mich App 535, 542-543; 702 NW2d 192 (2005). Our review of the application of statutes and court rules is de novo. *In re Sanders*, 495 Mich 394, 404; 852 NW2d 524 (2014).

"In general, petitioner must make reasonable efforts to rectify conditions, to reunify families, and to avoid termination of parental rights." *In re LE*, 278 Mich App 1, 18; 747 NW2d 883 (2008); see also MCL 712A.18f; MCL 712A.19(7); MCL 712A.19b(5). However, it is only "require[d] that services be provided to *a parent*, not to a putative parent." *In re LE*, 278 Mich App at 18. As this Court explained in *In re LE*, a father who has not perfected his legal paternity is not yet a "parent" as defined for purposes of child protective proceedings in MCR 3.903(A),[3]

[3] MCR 3.903(A)(18) provides in pertinent part that a "parent" is "the mother, the father as defined in MCR 3.903(A)(7), or both, of the minor." MCR 3.903(A)(24) defines "putative

and a father who is not yet a legal father is not entitled to services before establishing legal paternity. *Id*. at 19. Additionally, "the petitioner is not required to provide reunification services when termination of parental rights is the agency's goal," and "the petitioner can request termination in the initial petition." *In re Moss*, 301 Mich App at 91 (quotation marks and citation omitted); see also MCL 712A.19b(4) (stating that "[i]f a petition to terminate the parental rights to a child is filed, the court may enter an order terminating parental rights under subsection (3) at the initial dispositional hearing"); MCR 3.961(B)(6) (stating that a petition must contain the nature of the relief requested and that a "request . . . for termination of parental rights at the initial disposition must be specifically stated"). Furthermore, the "interval, if any, between the trial and the dispositional hearing is within the discretion of the court," MCR 3.973(C), and the dispositional hearing may occur "immediately after the trial," MCR 3.973(B); *In re AMAC*, 269 Mich App 533, 538; 711 NW2d 426 (2006). Pursuant to MCR 3.977(E), the trial court is required at the initial disposition to order termination of parental rights and that no additional reunification efforts be made if:

> (1) the original, or amended, petition contains a request for termination;
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> (2) at the trial or plea proceedings, the trier of fact finds by a preponderance of the evidence that one or more of the grounds for assumption of jurisdiction over the child under MCL 712A.2(b) have been established;

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father" to mean "a man who is alleged to be the biological father of a child who has no father as defined in MCR 3.903(A)(7)." MCR 3.903(A)(7) defines "father" to mean:

> (a) A man married to the mother at any time from a minor's conception to the minor's birth, unless a court has determined, after notice and a hearing, that the minor was conceived or born during the marriage, but is not the issue of the marriage;
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> (b) A man who legally adopts the minor;
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> (c) A man who by order of filiation or by judgment of paternity is judicially determined to be the father of the minor;
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> (d) A man judicially determined to have parental rights; or
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> (e) A man whose paternity is established by the completion and filing of an acknowledgment of parentage in accordance with the provisions of the Acknowledgment of Parentage Act, MCL 722.1001 *et seq.*, or a previously applicable procedure. For an acknowledgment under the Acknowledgment of Parentage Act, the man and mother must each sign the acknowledgment of parentage before a notary public appointed in this state. The acknowledgment shall be filed at either the time of birth or another time during the child's lifetime with the state registrar.

(3) at the initial disposition hearing, the court finds on the basis of clear and convincing legally admissible evidence that had been introduced at the trial or plea proceedings, or that is introduced at the dispositional hearing, that one or more facts alleged in the petition:

(a) are true, and

(b) establish grounds for termination of parental rights under MCL 712A.19b(3)(a), (b), (d), (e), (f), (g), (h), (i), (j), (k), (l), (m), or (n);

(4) termination of parental rights is in the child's best interests.

In this case, the record shows that father did not establish himself as the minor child's legal father until April 19, 2017, even though the minor child had been removed from mother's care shortly after his birth in February 2016. The record further indicates that father did nothing to gain recognition as the minor child's legal father until sometime after he became incarcerated in November 2016, even though he was given an opportunity to establish his status as the minor child's legal father at the time of the minor child's birth, when father was not incarcerated, and was scheduled for a DNA test to establish his paternity, which he did not attend. There was also testimony that father had no contact with the agency between February 2016 and November 2016 after he missed his scheduled DNA test and that father never met the minor child before father was incarcerated. Therefore, father was not entitled to be provided services before he perfected his legal paternity on April 19, 2017.[4] *In re LE*, 278 Mich App at 18-19. Furthermore, after father was established as the minor child's legal father a supplemental petition was filed that named father as a respondent and sought the termination of his parental rights. Thus, because termination was the petitioner's goal, there still was no obligation to provide father with services. *In re Moss*, 301 Mich App at 91. Finally, it was not erroneous for the trial court to order termination of father's parental rights because all of the requirements in MCR 3.977(E) were satisfied: the amended petition requested termination of father's parental rights, the trial court found that a ground for jurisdiction had been shown by a preponderance of the evidence, and as previously discussed, the trial court found that MCL 712A.19b(3)(n)(*ii*) had been established by clear and convincing evidence to support a statutory ground for termination and that termination was in the child's best interests. Therefore, father's argument with respect to reunification efforts is without merit.

Nonetheless, father relies on *In re Mason*, 486 Mich 142, 146; 782 NW2d 747 (2010), in which our Supreme Court concluded that the respondent-father was erroneously denied the opportunity to participate in the child protective action by telephone while he was incarcerated, that he was not provided with reunification services as required by statute, and that the trial court

[4] Father does not argue that he meets any of the other definitions of "father" contained in MCR 3.903(A)(7), nor is there record evidence to support any such contention. There is no dispute that father's status as DB's legal father was not established until the affidavit of parentage was signed.

essentially terminated his parental rights based solely on his incarceration during the proceedings.

However, father's reliance on *In re Mason* is misplaced. In that case, the father had been involved in caring for the older of the two minor children until he was jailed shortly before the birth of the younger child, the children's mother brought the children to visit the father while he was in jail, and the father pleaded no contest to allegations of neglect made against him in the original petition. *Id*. at 146-147. The case then progressed for well over a year while the father remained incarcerated and without the father being included in a series of hearings that occurred during that time. *Id*. at 147-149. It was finally arranged for the father to participate by telephone at a permanency planning hearing. *Id*. at 148. The trial court terminated the father's parental rights following the termination hearing that occurred two months later. *Id*. at 148, 150-151. Our Supreme Court determined that the "circuit court committed several legal errors" and that the Department "failed in its duties to engage respondent in the proceedings against him." *Id*. at 146. Here, in contrast, father did not establish that he was the legal father of the minor child until after the minor child was one year old, after which a supplemental petition was filed naming father as a respondent and seeking to terminate his parental rights to the minor child. Thus, *In re Mason* is clearly distinguishable from the instant case where, as previously discussed, father was not entitled to reunification efforts when he had failed to perfect his legal paternity and when petitioner's goal was termination rather than reunification. The issues in *In re Mason* did not involve the question of whether the father had established his status as a legal father. Moreover, unlike *In re Mason*, termination of father's parental rights in this case was not based solely on his incarceration but was instead predicated on the fact that, as previously set forth, the additional requirements in MCL 712A.19b(3)(n)(*ii*) had been established.

Affirmed.

/s/ David H. Sawyer
/s/ Stephen L. Borrello
/s/ Deborah A. Servitto