

STATE OF MICHIGAN  
COURT OF APPEALS

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*In re* R. HERNANDEZ, Minor.

UNPUBLISHED  
September 15, 2015

No. 324359  
Arenac Circuit Court  
Family Division  
LC No. 14-012626-NA

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Before: BORRELLO, P.J., and HOEKSTRA and O'CONNELL, JJ.

PER CURIAM.

Respondent-father appeals as of right an October 17, 2014, circuit court order removing his minor child, (DOB 12/04/07), from his custody pursuant to MCL 712A.2(b)(1). For the reasons set forth in this opinion, we affirm.

I. FACTS

In May 2014, the minor child, respondent's daughter, was removed from her mother's custody and respondent was awarded full custody. In July of 2014, the minor child disclosed that she had been sexually abused by her stepfather while she was staying with her mother. Respondent took the minor child to his family doctor, Dr. April Tyler, D.O., for an examination, and Dr. Tyler notified Child Protective Services (CPS) and law enforcement. The following day, CPS personnel visited respondent home to investigate, but respondent did not allow CPS to interview the minor child or take her to a sexual assault examination or forensic interview. Respondent-father testified that he did not allow CPS to take the minor child to a forensic interview and sexual assault examination because an interview had already been scheduled and he did not want the minor child to repeatedly have to discuss the situation.

The following day, CPS filed a petition to remove the minor child from respondent's custody. The primary basis for removal was the assertion that Dr. Tyler reported that there was active bleeding in the minor child's vaginal area, and respondent's wife reported that the minor child was actively bleeding. Respondent's wife and Dr. Tyler later denied stating that the minor child was actively bleeding. CPS personnel knew that the minor child had not seen her stepfather for two and a half months and believed that the minor child's injury must have occurred more recently while she was in respondent's sole custody. The circuit court granted the petition and issued an ex-parte order allowing CPS to remove the minor child from respondent's custody.

After the minor child was removed from respondent's home, Shayne Wheeler, a sexual assault nurse examiner, performed a physical exam of the minor child on August 1, 2014. In addition, on August 6, 2014, the minor child participated in a forensic interview that was recorded.

The circuit court held an adjudication hearing on September 22, 2014. At the hearing, Wheeler testified that she examined the minor child on August 1, 2014. Wheeler testified that the abrasions she observed were an indication that there was penetration. She testified that she could not determine when the penetration occurred, and she agreed that it could have "possibly" occurred two and a half months ago. However, Wheeler testified that the abrasions were "fresher," "redder," and "more open." Wheeler testified that she would have expected the abrasions to be healed if they were that old. When asked whether the abrasions indicated fresh sexual trauma, Wheeler explained that the minor child gave her no history to indicate recent trauma. However, Wheeler agreed that notwithstanding the absence of patient history, she believed that the abrasions indicated fresh trauma.

CPS workers testified that when they went to remove the minor child from respondent's home, they observed a hole in the minor child's bedroom door and a hole in the wall of a hallway. Respondent-father explained that he punched the wall when he discovered that the minor child's stepfather had sexually abused her. Respondent-father also explained that he punched the hole in the minor child's door when he discovered that the minor child had been removed from her mother's home and placed in foster care. CPS workers also testified that respondent-father punched a stairwell and head-butted a door when they came to remove the minor child from the home. Specifically, CPS worker Amie Parkinson testified that after taking the minor child from the home, the minor child stated that respondent-father punched a hole in her door "because she told a half-truth." Parkinson testified that respondent-father "exploded" when he found out that the minor child would not be returned the next day, punched a railing, and head-butted a door when returning to the inside of the house. She explained that respondent's reaction caused the minor child to cry, and another worker had to try to comfort the minor child.

The circuit court found respondent failed to protect the minor child from her stepfather's abuse given that he had suspected since 2012 that the stepfather was abusing the minor child. The judge further found that respondent's displays of violence harmed the minor child's health and mental well-being.

Respondent appealed the trial court's subsequent order removing the minor child from his custody. Respondent also filed a motion to remand to allow the trial court to view a recorded forensic interview of the minor child that was not made available before adjudication. He also filed a second motion to remand to develop the testimony of Dr. Tyler. This Court granted both motions and remanded to allow respondent to develop the evidentiary record and to make an appropriate motion as to whether the court should return the minor child to his custody based on the newly presented evidence. *In re R Hernandez Minor*, unpublished order of the Court of Appeals, entered January 29, 2015 (Docket Nos. 324359).

On remand, at the evidentiary hearing, the trial court noted that it had viewed the recorded forensic interview. The court proceeded to hear testimony from Dr. Tyler. Dr. Tyler

explained that she examined the minor child's genitalia on July 29, 2014, and found that her hymen was not intact, there was scar tissue on the remnants of the hymen, and the vaginal vestibule was "almost raw looking in appearance." Dr. Tyler clarified that by "raw" she meant that the vaginal area was bright red, but not swollen. Dr. Tyler also explained that the minor child's genitalia was "hypervascular," which she explained was an indicator of chronic sexual abuse. She explained that "hypervascular" meant that there was an increase in the number of blood vessels in the area caused by constant trauma. When asked whether the injuries she saw were fresh, Dr. Tyler replied that she "wouldn't necessarily call it an injury" and that "it was more chronic changes." Dr. Tyler testified that the scar tissue she saw could be "very old" and acknowledge that it could even be several years old. Dr. Tyler explained that there would still be swelling, tears, or lacerations even if abuse occurred one or two months ago.

Dr. Tyler explained that the minor child had a tear that was "very small . . . almost like a paper cut." She later explained that she would not call the injury a tear, but rather a "breakdown of tissue." Dr. Tyler explained that there was no indication of how fresh the tear/breakdown of tissue was, and she elaborated that it looked like it was the result of the area being "so raw and hypervascular that the tissue had just sort of split a little." She admitted that the tear/breakdown of tissue could possibly be caused by trauma and testified that she did not know the approximate age of the tear/breakdown of tissue, but she offered an estimate of a month or less.

Dr. Tyler testified that she did not think sexual abuse occurred within a month before her examination because she did not notice any "acute changes" to the vaginal area. However, when asked whether she believed that the sexual trauma happened more than a month before her last exam, Tyler responded, "I can't say that." She testified that the inflammation she observed could be caused by trauma, but she did not believe it was the result of recent trauma. When asked whether the vaginal area could stay inflamed for more than two and a half months, Dr. Tyler replied that it could. Dr. Tyler testified that Wheeler's examination of the minor child was "consistent with what I found," and she would not refute the conclusions of the nurse.

Dr. Tyler testified that the minor child never disclosed any sexual abuse until her examination on July 29, 2014. She explained that she reported the possible abuse to CPS and called the sheriff, who came to her office that day. Dr. Tyler testified that she was aware that after her examination of the minor child on July 29, 2014, CPS removed the minor child from respondent-father's care. She explained that she did not believe that the minor child was in danger when she was with respondent-father, and she called the social workers that took the minor child away. Dr. Tyler testified that the social workers told her that they took the minor child away because she had told them that the minor child was actively bleeding and because respondent-father punched a hole in a wall. She testified that she explained to the social workers that she had never said there was active bleeding, but they believed the injuries must have occurred while the minor child was in respondent-father's care.

At a continuation of the evidentiary hearing, Parkinson testified that respondent's lack of cooperation with DHS in regard to the investigation was a valid basis to file the removal petition. Parkinson stated that respondent was not cooperative because he declined to allow a sexual assault exam or forensic interview of the minor child. Parkinson acknowledged that respondent denied the interviews because he did not want the minor child to have to be interviewed more than once. She agreed that failure to talk with a CPS worker is not a valid reason to petition for

removal of a child if the person is not under the jurisdiction of the court. Parkinson testified that when she filed the petition, she understood that respondent's wife reported to a CPS worker that the minor child had active bleeding.

At the close of the evidentiary hearing, the circuit court again found that there were statutory grounds to exercise jurisdiction over the minor child. The court indicated that it viewed the video of the minor child's forensic interview and felt "somewhat that [the minor child] was coached," and her statements seemed "somewhat practiced." The court found that sexual assault nurse Wheeler's testimony was "more convincing" than Dr. Tyler's testimony. The court emphasized that Dr. Tyler admitted that she was not an expert in the area of sexual trauma. The court acknowledged Dr. Tyler's testimony that there was not fresh bleeding when she examined the minor child, however, the court reiterated that Wheeler testified that the minor child's trauma was fresh, which indicated that it occurred while the minor child was in respondent's custody. The court found that respondent's physical violence, including punching holes in walls and the violence when CPS came to take the minor child was a statutory basis for exercising jurisdiction.

The court also found that there were two bases for finding that respondent failed to protect the minor child. The court concluded that respondent failed to protect the minor child by failing to get her into counseling in 2012 after respondent suspected that the minor child was being abused. The court also found that respondent failed to protect the minor child by failing to examine other possible explanations for the minor child's injuries aside from blaming the stepfather whom the minor child had not seen for two and a half months. The court stated that it was "unmoved" by the evidence offered on remand, and reincorporated all of its previous findings and conclusions. This appeal ensued.

## II. ANALYSIS

Respondent contends that the circuit court erred when it exercised jurisdiction over the minor child.

We review a circuit court's decision to exercise jurisdiction for clear error in light of the court's findings of fact. *In re BZ*, 264 Mich App 286, 295; 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." *Id.* at 296-297. For a decision to be clearly erroneous, it must be "more than just maybe or probably wrong." *In re Williams*, 286 Mich App 253, 271; 779 NW2d 286 (2009).

To exercise jurisdiction over a minor child, a circuit court must find that a statutory basis for jurisdiction exists. *In re PAP*, 247 Mich App 148, 152-153, 640 NW2d 880 (2001). "To acquire jurisdiction, the factfinder must determine by a preponderance of the evidence that the child comes within the statutory requirements of MCL 712A.2." *In re Bock*, 442 Mich 101, 108-109; 499 NW2d 752 (1993). MCL 712A.2 provides in relevant part as follows:

The court has the following authority and jurisdiction:

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(b) Jurisdiction in proceedings concerning a juvenile under 18 years of age found within the county:

(1) Whose parent or other person legally responsible for the care and maintenance of the juvenile, when able to do so, neglects or refuses to provide proper or necessary support, education, medical, surgical, or other care necessary for his or her health or morals, *who is subject to a substantial risk of harm to his or her mental well-being*, who is abandoned by his or her parents, guardian, or other custodian, or who is without proper custody or guardianship. (Emphasis added).

On appeal, respondent first challenges the court's finding that his alleged lack of cooperation with DHS officials was a valid ground for taking jurisdiction. Failure to cooperate with DHS in general is not directly implicated in the language of MCL 712A.2(b)(1) and this conduct cannot therefore serve as a basis for exercising jurisdiction. However, even without considering whether respondent adhered to the dictates of a governmental agency, the statute provided the court authority to exercise jurisdiction where a child is "subject to a substantial risk of harm to his or her mental well-being." MCL 712A.2(b)(1). In addition to its finding of respondent's failure to cooperate with DHS officials, the circuit court found that respondent's violent outburst in front of the minor child and his inability to control himself in front of her caused direct harm to the minor child's mental well-being. Respondent testified that the minor child did not see him make either the hole in the wall or in the door, but he admitted that the minor child was in the home when he punched the wall. Parkinson testified that the minor child saw respondent's violent outburst after Parkinson and another worker removed her from the home. The minor child became upset and needed comforting. Respondent testified that he did not allow CPS workers to interview the minor child when they appeared at his home on July 31, 2014, ostensibly to protect her from emotional trauma of having to discuss the sexual abuse on more than one occasion. However, the record reveals that contrary to respondent's assertion that he was protecting the minor child from emotional trauma, respondent created it. Hence, on this issue, we find that the circuit court did not clearly err in finding that respondent's violent outbursts subjected the minor child to a substantial risk of emotional harm.

Second, respondent challenges the two grounds on which the circuit court found that he failed to protect the minor child. The circuit court found that respondent had concerns that the minor child was being abused since 2012, but had only recently taken the initiative to secure full custody. The court also noted that, although respondent testified that he took the minor child to eight counseling sessions in 2012, he did not attempt to take the minor child to different counselors after the prior counselor indicated that the minor child was not revealing anything. We agree with respondent that, standing alone, this evidence could not form the legal conclusion that respondent failed to protect the minor child. There was un rebutted testimony that respondent took the minor child to counseling and that the counselor recommended stopping therapy sessions because the minor child was not revealing anything. The circuit court was seemingly requiring respondent to go to additional lengths and try to obtain different counselors. However, we cannot find respondent unreasonably relied on the professional recommendation of the counselor whom he obtained for the minor child. As such, the circuit court's assertion that respondent should have taken the minor child to different counselors cannot be construed as a failure by respondent to protect the minor child. Moreover, the court erred as a matter of law in

failing to take into account the multiple times that respondent attempted to contact CPS and the Genesee County Friend of the Court. Despite respondent's contacts, and despite receiving information from Dr. Tyler, there is no indication that CPS looked into the potential of abuse in a timely manner.<sup>1</sup>

However, there was additional testimony that the circuit court considered relative to respondent's failure to protect the minor child while she was in his care primarily based on the testimony of Wheeler, a sexual-assault nurse examiner. Wheeler testified that the minor child was sexually abused and suffered a penetration injury. She testified that she could not determine when the penetration occurred, and she agreed that it could have "possibly" occurred two and a half months ago. Wheeler testified that the abrasions she observed were not two and a half months old because they were "fresher," "redder," and "more open." Wheeler testified that she would have expected the abrasions to be healed if they were that old. When asked whether the abrasions indicated fresh sexual trauma, Wheeler agreed that notwithstanding the absence of patient history, she believed that the abrasions indicated fresh trauma. Dr. Tyler's testimony did not conflict with Wheeler's testimony. When asked whether she believed that the sexual trauma happened more than a month before her July 29, 2014, examination, Dr. Tyler responded, "I can't say that." The circuit court found credible Wheeler's testimony that abuse could have occurred during the two months that the minor child did not have any contact with her stepfather. The circuit court considered that Wheeler had more experience than Dr. Tyler in sexual abuse cases. Given the totality of the circumstances, and considering that there was no clear answer as to when the minor child's injuries occurred, we are not left with a definite and firm conviction that the circuit court erred in finding that respondent failed to provide proper care for the minor child while she was in his exclusive custody. *In re BZ*, 264 Mich App at 295-296.

On appeal, respondent seemingly requests this Court parse the various factual findings of the circuit court in a vacuum. Rather, our standard of review mandates that we review the circuit court's decision to exercise jurisdiction for clear error in light of the court's findings of fact. *In re BZ*, 264 Mich App at 295. Reviewing the totality of the testimony this Court does not have 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. *Id.* at 296-297. Further, as previously cited, in order for this Court to find that the circuit court's decisions was clearly erroneous, it must be "more than just maybe or probably wrong." *In re Williams*, 286 Mich App at 271.

Here, the circuit court correctly found that the emotional outbursts of respondent in front of and while the minor child was at his home, caused the minor child emotional harm. Further, the circuit court heard evidence from a sexual assault nurse examiner that the minor child could have suffered harm while under the care of respondent. Additionally, the circuit court made a factual finding that the minor child had "probably" been coached prior to the minor child's forensic examination. We cannot find any clear error in any of these factual findings.

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<sup>1</sup> The record is devoid of any rationale that CPS relied on in failing to take action on behalf of the minor child at an earlier date.

Additionally, considered in their totality, these findings offered legally sufficient evidence for the circuit court to exercise jurisdiction over the minor child pursuant to MCL 712A.2(b)(1).

Given our conclusion with respect to the jurisdictional issue, we need not address respondent's argument that the court erred in issuing the ex-parte order for removal. See *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998) ("An issue is deemed moot when an event occurs that renders it impossible for a reviewing court to grant relief.").

Affirmed.

/s/ Stephen L. Borrello

/s/ Joel P. Hoekstra

/s/ Peter D. O'Connell