STATE OF MICHIGAN

COURT OF APPEALS

In re JOHNSON, Minors.

UNPUBLISHED
April 23, 2020

No. 351543
Tuscola Circuit Court
Family Division
LC No. 19-011444-NA

Before: GADOLA, P.J., and STEPHENS and SHAPIRO, JJ.

PER CURIAM.

Respondent-mother (respondent) appeals by right from the order of disposition regarding her three minor children. On appeal, respondent argues that the trial court erred by authorizing the petition and by finding statutory grounds to assume jurisdiction over the children. Finding no clear in the trial court's rulings, we affirm.

I. BACKGROUND

Respondent and the biological father of her children divorced in 2014. She then married and later divorced the respondent-father in these proceedings. This case arose out of allegations that respondent's teenage son, LJ, was sexually abusing respondent-father's daughter, AB. At trial, AB testified that she was 10 years old when LJ first made sexual contact with her. Jurisdiction was sought on the grounds that respondents failed to protect AB from abuse.

After respondents divorced in January 2018, respondent-father and AB moved out of respondent's home. AB's first disclosure of inappropriate touching occurred in the summer of 2018 while she was staying with her maternal grandmother. The grandmother testified that AB told her that LJ was going into her bed at night, was trying to pull her "undies down," and "constantly aggravating her about getting her clothes off." The grandmother assumed that the touching was sexual in nature because AB said that LJ was touching her vaginal area. The grandmother called respondent-father, who denied that the grandmother informed him that the inappropriate touching disclosed by AB was sexual in nature. Respondent-father told the grandmother that he would address the issue, and he brought AB to a friend who was a retired police officer. The friend recommended that respondent-father obtain counseling for AB, which he did not do. Respondent knew of the contact from the grandmother, but denied any knowledge that the touching between AB and LJ being reported was sexual in nature.

Respondents reconciled and in the fall of 2018 respondent-father and AB moved back into respondent's home. In December 2018, respondent heard footsteps coming from one of her daughter's upstairs bedroom when that daughter was not home. When respondent reached the top of the steps, she saw LJ standing in the doorway of the bedroom and AB laying in the bed. The children would not tell respondent why they were in the bedroom, and when respondent told AB to get out of the bed, she answered that she could not because she did not have pants on. A family meeting with respondents and the children was held. The children did not provide an explanation for the incident, and respondent assumed that LJ and AB were "peeking at one another."

In January 2019, AB disclosed the allegations to the babysitter, who was also her best friend's mother. Child protective services was contacted and on January 28, 2019, a CPS worker went to respondent's home to inform her that there had been a complaint regarding AB. Respondent agreed to a safety plan under which AB and LJ would not be left alone together and would sleep on separate floors. At a forensic interview on February 12, 2019, AB disclosed that she and LJ had been having sexual interactions for two years. In a police interview on the same day, LJ admitted to having sex with AB. Both children disclosed that they reported sexual contact between them to respondent, which she denied. On February 14, 2019, a detective and a CPS investigator interviewed respondents at their home. A new safety plan was put in place that precluded both AB and LJ from staying in the home. On February 21, 2019, the Department of Health and Human Services filed a petition to remove the minor children from the home. After a probable-cause hearing, the trial court authorized the petition. Following a three-day adjudication trial held in August 2019, the trial court assumed jurisdiction over the children.

II. STANDARD OF REVIEW

"We review for clear error the trial court's findings of fact underlying the legal issues." *In re McCarrick/Lamoreaux*, 307 Mich App 436, 463; 861 NW2d 303 (2014). Specifically, we review for clear error the trial court's decision to exercise jurisdiction, *In re BZ*, 264 Mich App 286, 295; 690 NW2d 505 (2004), and its finding that the Department made reasonable efforts to preserve the family, see *In re Fried*, 266 Mich App 535, 542-543; 702 NW2d 192 (2005). "A finding is clearly erroneous if, after reviewing the entire record, we are definitely and firmly convinced that the trial court made a mistake." *In re McCarrick/Lamoreaux*, 307 Mich App at 463.

III. ANALYSIS

Respondent first argues that the trial court erred in finding probable cause to authorize the petition.

In *In re Ferranti*, 504 Mich 1, 15; 934 NW2d 610 (2019), the Supreme Court recently summarized the requirements for petition authorization:

> The Department, after conducting a preliminary investigation, may then petition the Family Division of the circuit court to take jurisdiction over the child. MCR 3.961(A). That petition must contain, among other things, "[t]he essential facts" that, if proven, would allow the trial court to assume jurisdiction over the child. MCR 3.961(B)(3); see also MCL 712A.2(b). After receiving the petition,

> the trial court must hold a preliminary hearing and may authorize the filing of the petition upon a finding of probable cause that one or more of the allegations are true and could support the trial court's exercise of jurisdiction under MCL 712A.2(b). See MCR 3.965(B).

Generally, "[a] probable cause determination does not involve the comparing and weighing of facts as required by the preponderance of evidence standard." *Blue Cross and Blue Shield of Mich v Milliken*, 422 Mich 1, 89; 367 NW2d 2d 1 (1985). Rather, "[a] probable cause finding requires only facts which would induce a fair-minded person of average intelligence and judgment to believe that the statute was violated." *Id*.

Respondent argues that there were misrepresentations in the removal petition. Specifically, she takes issue with the caseworker alleging that she admitted to catching LJ and AB having sex in December 2018. Cross-examination of the caseworker at the probable-cause hearing revealed that respondent made no such admission but that the allegation reflected the caseworker's understanding of the incident. Respondent also contests the allegation that she was aware that the grandmother repeatedly informed respondent-father of the sexual abuse. Indeed, the caseworker testified at the probable-cause hearing that respondent knew that the grandmother had reported inappropriate touching, but denied being aware that it was sexual in nature. However, even if there was not probable cause to support those specific allegations, the trial court did not clearly err in finding probable cause to authorize the petition. The trial court acknowledged that the respondent's counsel "raises good questions that make me raise my eyebrows," but it correctly noted that probable cause was not a demanding evidentiary standard and relied on the caseworker's unrefuted testimony that AB disclosed in her forensic interview that she reported the sexual abuse to respondent. The grandmother's statements to the caseworker and the December 2018 incident also provided supporting circumstantial evidence that respondent was aware of the abuse.

Respondent next argues that the trial court erred in finding that the Department made reasonable efforts to prevent removal based on the CPS investigation and corresponding safety plans.

MCR 3.965 governs preliminary hearings and provides in pertinent part:

> (4) *Reasonable Efforts Findings*. Reasonable efforts findings must be made. In making the reasonable efforts determination under this subrule, the child's health and safety must be of paramount concern to the court. When the court has placed a child with someone other than the custodial parent, guardian, or legal custodian, the court must determine whether reasonable efforts to prevent the removal of the child have been made or that reasonable efforts to prevent removal are not required. The court must make this determination at the earliest possible time, but no later than 60 days from the date of removal, and must state the factual basis for the determination in the court order. [MCR 3.965(C)(4).]

Respondent correctly notes that reasonable efforts were required in this case because aggravated circumstances were not present. See MCR 3.965(C)(4)(a). However, she cites no legal authority to support her position that services should have been provided to her before removal. Respondent relies on *In re Mason*¸ 486 Mich 142; 782 NW2d 747 (2010), but that case concerned

the *reunification* process, i.e., post-adjudication efforts and services. See *id.* at 146. A parent cannot be ordered to engage in services until adjudicated as unfit. See *In re Sanders*, 495 Mich 394; 852 NW2d 524 (2014). Further, the court rule's guidance that "the child's health and safety must be of paramount concern to the court" strongly suggests that pre-removal services are not required in all cases. MCR 3.965(C)(4). Respondent argues that additional investigation should have occurred, such as a medical examination and counseling for AB. However, considering that LJ admitted to sexual contact with AB and AB's multiple disclosures, we cannot say that those measures were required in this case.

Respondent also notes that the Department sought removal even though she fully complied with the safety plans. However, the caseworker's testimony established that the safety plans were implemented to ensure the children's safety while the investigation was conducted. The initial safety plan to keep the children separate and supervised at all times was put in place following the CPS complaint. Police and forensic interviews were then conducted. After respondents were interviewed by the detective and caseworker, a new plan was put in place for AB to leave the home for the duration of the investigation. Then, presumably after reviewing and discussing the investigation, the Department filed the petition. In sum, the Department made reasonable efforts to determine the veracity of the allegations and whether respondents failed to protect AB from abuse. Once probable cause was established, the Department decided to file the petition. While respondent indicates that she would have continued to follow the safety plan, her compliance was not mandatory and the safety plan was not a permanent solution. Accordingly, the trial court did not clearly err in finding that reasonable efforts were made under the circumstances of this case.

Finally, respondent argues that the trial court erred in assuming jurisdiction over the children. To acquire jurisdiction in child protective proceedings, "the factfinder must determine by a preponderance of the evidence that the child comes within the statutory requirements of MCL 712A.2[.]" *In re Brock*, 442 Mich 101, 108-109; 499 NW2d 752 (1993). See also MCR 3.972(C)(1). In this case, the trial court assumed jurisdiction under MCL 712A.2(b)(1) (failure to provide proper care) and MCL 712A.2(b)(2) (unfit home due to parent's behavior).

Respondent's main argument is that the trial court erroneously relied on AB's forensic interview rather than her trial testimony. This argument is without merit. As the trial court found, AB had difficulty testifying at trial. However, when the trial court made references to setting aside what AB said on the record, it was not implying that it was relying on AB's statement during the forensic interview. Rather, the clear import of the court's statements is that it found that jurisdiction has been proven by a preponderance of the evidence on the basis of the other evidence presented at trial. Respondent makes several other misrepresentations of the record that do not merit discussion.[1]

The trial court assumed jurisdiction because respondent ignored the "red flags," i.e., the disclosure to the maternal grandmother and the December 2018 incident. Regarding the disclosure to the grandmother, respondent testified that she was only informed via a text message from

[1] For instance, respondent asserts that AB testified that she did not tell either respondent about contact between her and LJ. On the contrary, AB testified that she immediately told respondent the first time LJ touched her inappropriately.

respondent-father that the LJ "had put his hands on" AB. But even assuming that is all respondent knew of the grandmother's report, that should have raised some concern. As the trial court reasoned, if fighting between LJ and AB was common, as multiple witnesses testified to, this text should have indicated that the disclosure related to something more serious. Yet respondent-father and AB moved back into respondent's home a few months later and no steps were taken to address this issue. Regarding the December 2018 incident, while respondent did not catch the children having sex, she clearly believed that something inappropriate, and sexual, was occurring between the children. There is some inconsistency in the record as to what, if any, rules were imposed after this incident. The testimony at trial was that safety plans were not implemented until CPS became involved.[2] But even if additional rules were imposed by respondents, they were ineffectual. In sum, even assuming that respondent did not know of the abuse, the evidence established that she had reason to know that something inappropriate was occurring between the children, yet she took no meaningful steps to address that issue. Accordingly, the trial court did not clearly err in finding that, by reason of neglect, respondent failed to provide proper care and that her home was unfit.

Affirmed.

/s/ Michael F. Gadola
/s/ Cynthia Diane Stephens
/s/ Douglas B. Shapiro

[2] While the initial petition indicated that respondents made a safety plan of not allowing the children to be alone together and put a door on AB's bedroom following the 2018 incident, the testimony at the adjudication established that these measures were put in place after the CPS investigation began.