

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of J.R.C., Minor.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

MARY LOUISE TITUS CHILDERS,

Respondent-Appellant,

and

GEORGE JEFFRY CHILDERS,

Respondent.

UNPUBLISHED

June 25, 2002

No. 232403

Wayne Circuit Court

Family Division

LC No. 87-265326

Before: Zahra, P.J., and Cavanagh and White, JJ.

PER CURIAM.

Respondent-appellant appeals as of right from the trial court's order terminating her parental rights to the minor child under MCL 712A.19b(3)(i) and (l). We reverse and remand for further proceedings.

Respondent-appellant argues that the trial court erroneously exercised jurisdiction over the child without affording her a trial on the question of jurisdiction and, instead, relying solely on prior orders and findings in proceedings involving the child's siblings. Whether respondent-appellant was entitled to a trial on the question of jurisdiction is a question of law. Questions of law are reviewed de novo. *Cardinal Mooney High School v Michigan High School Athletic Ass'n*, 437 Mich 75, 80; 467 NW2d 21 (1991).

MCL 712A.2(b) governs the trial court's jurisdiction in child protection proceedings. Contrary to what respondent-appellant argues, this statute addresses the trial court's subject matter jurisdiction, not the requirements for personal jurisdiction over a child. *In re Hatcher*, 443 Mich 426, 433, 437; 505 NW2d 834 (1993). We also reject the claim advanced by the child's attorney that respondent-appellant is barred from challenging the court's exercise of jurisdiction because she did not appeal the jurisdictional decision in a prior appeal. In *In re*

Hatcher, supra, our Supreme Court held that a respondent may not collaterally attack the trial court's exercise of jurisdiction in a subsequent appeal from an order terminating parental rights. In this case, however, respondent-appellant's parental rights were terminated at the initial dispositional hearing, and the dispositional order was the first order from which an appeal of right was available. See MCR 5.993(A)(1). Under these circumstances, the trial court's exercise of jurisdiction is not collateral to this appeal and the rule of *In re Hatcher* does not apply.

Turning to the question of jurisdiction, we agree with respondent-appellant that the trial court committed an error of law in concluding that it had jurisdiction over the child on the basis of its jurisdiction over the child's siblings. Jurisdiction in a child protection proceeding is tied to the child. *In re CR*, ___ Mich App ___; ___ NW2d ___; 2002 WL 273497. This is apparent from the language of MCL 712A.2(b), which provides that the court has "[j]urisdiction in proceedings concerning a juvenile under 18 years of age" When the language of a statute is clear and unambiguous, it must be applied as written. *Eldred v Ziny*, 246 Mich App 142, 147, n 7; 631 NW2d 748 (2001).

We further agree with respondent-appellant that, because she was denied a trial on the question of jurisdiction, reversal is required. The procedures for an adjudicative hearing are intended to protect a parent from the risk of an erroneous deprivation of the parent's liberty interest in the management of the child. *In re Brock*, 442 Mich 101, 111; 499 NW2d 752 (1993). A parent has a right to a trial, including a jury trial, to determine whether a child comes within the jurisdiction of the court. MCL 712A.17(2); MCR 5.911; see, also, *In re Brock, supra* at 108. The right to a jury may be waived, however, if not demanded in accordance with the court rule. *In re Hubel*, 148 Mich App 696, 699; 384 NW2d 849 (1986). At the adjudicatory trial, the factfinder must determine by a preponderance of the evidence whether the child comes within the statutory requirements of MCL 712A.2. MCR 5.972(C)(1); *In re Brock, supra* at 109. Additionally, where termination of parental rights is requested at the initial dispositional hearing, the determination whether a statutory ground for termination exists is to be made in reference to the evidence introduced at the adjudicatory trial. MCR 5.974(D)(3).

In this case, respondent-appellant was not afforded a trial of any kind at the adjudicatory stage on the question of jurisdiction. In a somewhat analogous situation, this Court recently held that the summary disposition procedure set forth in MCR 2.116(C)(10) may not be used to decide the question of jurisdiction in a child protection proceeding, and that doing so constitutes a denial of due process. *In re PAP*, 247 Mich App 148, 153; 640 NW2d 880 (2001). The rationale of *In re PAP* applies equally here and leads to the conclusion that respondent-appellant's due process rights were violated by the trial court's refusal to conduct a trial on the question of jurisdiction. We reject the minor child's claim that this error may be considered harmless. The failure to hold a trial of any kind is in the nature of a structural defect for which prejudice need not be shown, that is, a denial of the basic protections afforded by a trial to determine if the allegations in the petition are true. Cf. *People v Duncan*, 462 Mich 47, 51-52; 610 NW2d 551 (2000).

Furthermore, we are not persuaded that a finding of jurisdiction was the only finding that a trier of fact could have reached. Although the doctrine of anticipatory neglect recognizes that how a parent treats one child is probative of how that parent may treat another child, *In re Powers*, 208 Mich App 582, 588; 528 NW2d 799 (1995), this is merely an evidentiary rule for a factfinder to apply. It is apparent from the record that the child here was not similarly situated to

her siblings. Even if the intent of respondent-appellant was to avoid having the minor child subjected to the court's jurisdiction in Michigan, it is recognized that a parent may provide proper custody or guardianship for a child with another person so long as the care is not neglectful. *In re Systma*, 197 Mich App 453, 455; 495 NW2d 804 (1992); *In re Hurlbut*, 154 Mich App 417, 423; 397 NW2d 332 (1986).

Accordingly, we conclude that reversal is required. In light of our decision, it is unnecessary to address respondent-appellant's remaining claims. However, in order to provide guidance to the trial court on remand, we will address respondent-appellant's claim concerning whether the court is prohibited from exercising jurisdiction over the child, who is now located in Iowa, in light of the language of the MCL 712A.2(b) that provides for jurisdiction over a "juvenile . . . found within the county."

The petition requesting jurisdiction acknowledged that the child had been taken to Iowa, but alleged that the child was taken there under a "fraudulent temporary guardianship arrangement," and referred to the Uniform Child Custody Jurisdiction Act (UCCJA), MCL 600.651 *et seq.*, as a basis for jurisdiction.

In *In re Mathers*, 371 Mich 516, 526; 124 NW2d 878 (1963), when confronted with a dispute over which of two Michigan counties could hear a child protection proceeding, our Supreme Court determined that the Legislature intended that a court have jurisdiction over a child physically present in the county. In this case, it is undisputed that the child was not physically present within any county in Michigan when the petition was filed. However, *In re Mathers*, was decided before the enactment of the UCCJA.

The UCCJA applies to child neglect proceedings. MCL 600.652(c). Because it relates to the same subject matter as MCL 712A.2(b), we construe these statutes together as one law. See, generally, *State Treasurer v Schuster*, 456 Mich 408, 417; 572 NW2d 628 (1998). Under the UCCJA, the "[p]hysical presence of the child, while desirable, is not a prerequisite for jurisdiction to determine his custody." MCL 600.653(3). Hence, construing the UCCJA in pari materia with MCL 712A.2(b), we hold that, in a case such as this where the child is not physically present in the state at the time a neglect petition is filed, the "juvenile . . . found within the county" language of MCL 712A.2(b) should be construed in reference to where the child was physically present before his or her removal from the state.

We express no opinion on whether, under the UCCJA, jurisdiction was proper in this case, since the issue was not explicitly addressed below and is not addressed by respondent-appellant on appeal. We hold only that, where the UCCJA is the basis for jurisdiction, it is sufficient under MCL 712A.2(b) that the child was found within the county before his or her removal from the state.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Brian K. Zahra
/s/ Mark J. Cavanagh
/s/ Helene N. White