STATE OF MICHIGAN

COURT OF APPEALS

UNPUBLISHED
February 7, 2013

In the Matter of DONADIO, Minors.

No. 311801
Mecosta Circuit Court
Family Division
LC No. 11-005771-NA

Before: BECKERING, P.J., and STEPHENS and BOONSTRA, JJ.

PER CURIAM.

In this child protection action, respondent[1] appeals as of right from the order of the trial court assuming jurisdiction over her two minor children, following a jury's determination that one or more of the statutory grounds for the assumption of jurisdiction alleged in the petition was proved. We affirm.

I. DUE PROCESS

The initial petition was filed on October 12, 2011 and authorized by the trial court following a probable cause hearing on October 27, 2011. An amended petition was filed with the court on January 3, 2012, containing 21 new allegations pertaining to events occurring after October 12, 2011.[2] A final pretrial conference was held on February 7, 2012. The Order after Pretrial Hearing issued by the trial court indicated that "[a] petition has been submitted alleging that [the minors] come within the provisions of MCL 712A.2(b)."[3]

[1] The father of the children did not appeal this order.

[2] To avoid confusion, we note that a "supplemental petition" is a petition containing additional allegations of abuse or neglect *of a child who is under the court's jurisdiction.* MCL 712A.19(1). Thus, supplemental petitions are dispositional, rather than adjudicative. *In re Miller*, 178 Mich App 684, 686; 445 NW2d 168 (1989). In the instant case, jurisdiction had not yet been established; it is thus proper to refer to the petition as "amended" rather than "supplemental."

[3] MCL 712A.2(b) and its associated subsections grant the family division of the circuit court jurisdiction over juveniles under 18 years of age suffering from, generally, abuse, neglect, or abandonment.

Before trial, respondent objected to the presentation of any evidence regarding matters occurring after October 12, 2011, the date the petition seeking jurisdiction was filed, on the ground that no supplemental petition had been authorized. The trial court responded to respondent's objection by stating that "at such time as the evidence presents itself to provide the Court with probable cause, I will authorize the supplemental before it ever goes to the jury." The court then asked respondent's attorney if she had notice of the contents of the amended petition, and counsel responded in the affirmative, but explained that because the amended petition had not been authorized she did not expect issues presented therein to arise at trial. The court reiterated that it would "authorize those petitions before the question goes to the jury if there is probable cause to believe that the allegations are supported by the facts." The trial court did not hold an additional probable cause hearing or otherwise formally "authorize" the amended petition.

Respondent's attorney renewed this objection on the third day of trial. The trial court noted that discovery had been taken with regard to the amended petition, that the parties were familiar with its additional allegations, and that several pretrial hearings had been held prior to respondent's ever objecting to the amended petition. The court held that "there are no violations of due process here. There's been plenty of notice and opportunity presented for the parties to prepare with regard to those new allegations." In so ruling, the court cited MCL 712A.11(6), which states, "[a] petition or other court record may be amended at any stage of the proceedings as the ends of justice require."

Respondent argues that in so ruling the trial court violated her due process rights. We disagree.

A request for court action to protect a child must generally be by petition. MCR 3.961(A). A petition has two "essential functions": (1) to "set forth the alleged basis for the court's jurisdiction over a particular child," and (2) to "communicate to the respondents a notice of the charges against them so that they might evaluate their situation and prepare a response." *In re Hatcher*, 443 Mich 426, 434 n 7; 505 NW2d 834 (1993) (quotation marks and citations omitted). "The court may not inquire into matters not alleged in the petition" and the "description of the parents' acts of commission or omission should be put in terms specific enough to allow a defense to be prepared." *Id.* MCL 712A.11(6) provides that "[a] petition or other court record may be amended at any stage of the proceedings as the ends of justice require."

A trial court may authorize a petition to be filed if it contains the information required by MCR 3.961(B)[4] and there is probable cause to believe that one or more of the allegations are

[4] MCR 3.961(B) provides:
(B) Content of Petition. A petition must contain the following information, if known:
(1) The child's name, address, and date of birth.
(2) The names and addresses of:
(a) the child's mother and father,

true. MCL 712A.13a(2); MCR 3.962; MCR 3.965(B)(11). If the petition is authorized, and unless a parent enters a plea of admission or no contest, a trial will be held to determine whether the court will take personal jurisdiction over the child. MCR 3.972; MCR 3.903(A)(27).

In essence, and notwithstanding the trial court's prior authorization of the initial petition, respondent argues that due process required the trial court to "reauthorize" the amended petition, and that, absent this reauthorization, she was denied due process by the introduction of evidence relevant to matters that occurred after the filing of the initial petition. This argument is unsupported by caselaw or statute. A trial court may authorize a petition when there is probable cause to believe that *one or more* of the allegations within it are true. MCL 712A.13a(2). Respondent in fact admits that the trial court properly authorized the initial petition. Such petition was subject to amendment at any stage of the proceedings. MCL 712A.11(6). Respondent does not explain how the addition of further allegations to a petition that has already met the requirements for authorization requires "reauthorization." Instead, respondent asserts that she was denied proper notice and opportunity to be heard by the trial court's failure to further authorize the amended petition. We disagree, because the record is clear that respondent was given sufficient notice and the opportunity to respond in the instant case.

Although due process "has never been, and perhaps can never be, precisely defined," "the phrase expresses the requirement of 'fundamental fairness.'" *Lassiter v Dep't of Social Servs*, 452 US 18, 24; 101 S Ct 2153; 68 L Ed 2d 640 (1981). It is a flexible concept, "'"and calls for such procedural protections as the particular situation demands."'" *In re Brock*, 442 Mich 101, 111; 499 NW2d 752 (1993), quoting *Mathews v Eldridge*, 424 US 319, 332, 334; 96 S Ct 893; 47 L Ed 2d 18 (1976), quoting *Morrissey v Brewer*, 408 US 471, 481; 92 S Ct 2593; 33 L Ed 2d 484 (1972). "'Analysis of what process is due in a particular proceeding depends on the nature of the proceeding and the interest affected by it.'" *Sherrod v Detroit*, 244 Mich App 516, 524; 625 NW2d 437 (2001), quoting *Klco v Dynamic Training Corp*, 192 Mich App 39, 42; 480

(b) the parent, guardian, legal custodian, or person who has custody of the child, if other than a mother or father,

(c) the nearest known relative of the child, if no parent, guardian, or legal custodian can be found, and

(d) any court with prior continuing jurisdiction.

(3) The essential facts that constitute an offense against the child under the Juvenile Code.

(4) A citation to the section of the Juvenile Code relied on for jurisdiction.

(5) The child's membership or eligibility for membership in an Indian tribe, if any, and the identity of the tribe.

(6) The type of relief requested. A request for removal of the child or a parent or for termination of parental rights at the initial disposition must be specifically stated. If the petition requests removal of an Indian child or if an Indian child was taken into protective custody pursuant to MCR 3.963 as a result of an emergency, the petition must specifically describe:

(a) the active efforts that have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family; and

(b) documentation, including attempts, to identify the child's tribe.

(7) The information required by MCR 3.206(A)(4), identifying whether a family division matter involving members of the same family is or was pending.

NW2d 596 (1991). "The purpose of child protective proceedings is the protection of the child," and the "juvenile code is intended to protect children from unfit homes." *In re Brock*, 442 Mich at 107-108. The "[p]rocedure in a case is constitutionally sufficient when there is notice of the nature of the proceedings and a meaningful opportunity to be heard by an impartial decision maker." *Reed v Reed*, 265 Mich App 131, 159; 693 NW2d 825 (2005).

Respondent provides no actual argument as to how her due process rights were violated. She does nothing to challenge the trial court's finding that "[t]here's been plenty of notice and opportunity presented for the parties to prepare with regard to those new allegations." Respondent's attorney admitted to being aware of the allegations in the amended petition. The amended petition was statutorily authorized "at any stage of the proceedings." MCL 712A.11(6). Such amendment may be made on the record at an adjudicative hearing. See *In re Slis*, 144 Mich App 678, 682-683; 375 NW2d 788 (1985). Moreover, because protection of the children is the focus in a child protective proceeding, *In re Brock*, 442 Mich at 107-108, the ends of justice required a full presentation of the material facts.

The initial petition alleged that respondents' home was unfit for children to live in due to extreme unsanitary conditions, alleged that respondents could not appropriately parent their young children, and alleged that respondents struggled with mental health concerns. The initial petition also alleged that respondents had undergone various cognitive and mental health testing. Further, the order authorizing the initial petition noted that there was probable cause to believe that one or more of the allegations in the petition was true, and stated that it was contrary to the welfare of the children to remain in respondents' home because of "mental health issues, noncompliance with mental health services regarding the parents, [and] deplorable living conditions." The order also noted active efforts at reunification that included "mental health counseling."

The allegations that allegedly occurred after October 12, 2011 (apart from those that deal exclusively with respondent father) similarly include: (1) that the children had extremely poor hygiene and dirty clothes, (2) that respondents had a homeless man living with them that had an extensive criminal history, (3) that the home was dirty as noted by a Community Mental Health worker, (4) that respondent had angry outbursts during visitations with her children, as reported by a Community Mental Health worker, (5) that respondent had a variety of difficulties appropriately caring for her children during various supervised visits and frequently became angry during DHS visits, as observed by DHS foster care workers.

The witness list provided by petitioner, approximately two months before trial, contained numerous DHS and CMH workers, as well as the medical professionals that performed the testing on respondents. The exhibit list also included, *inter alia*, "Psychological Evaluations," "Pictures of home conditions," and "Community Mental Health Reports." It is clear that respondents had notice that the trial would revolve around respondent's parenting ability, mental health issues, the appropriateness of her home for children, and her ability to cooperate with treatment providers. Thus, the goals of due process, the provision of notice and an opportunity to be heard, were satisfied. *Reed*, 265 Mich App at 159.

Although it may not have formally "authorized" the amended petition, the trial court clearly concluded that the ends of justice required consideration of the allegations of the

amended petition. The trial court did not violate respondent's rights in allowing the proceedings below to take account of the allegations in the amended petition.

II. ADMISSION OF PSYCHOLOGICAL EVALUATION

Respondent next argues that the trial court abused its discretion in admitting her psychological evaluation,[5] on the ground that the psychologist who prepared it had relied on facts and data from reports from petitioner and Community Mental health (CMH) that were not produced at trial. A trial court's evidentiary rulings are reviewed for an abuse of discretion. *In re Jones*, 286 Mich App 126, 130; 777 NW2d 728 (2009). "An abuse of discretion occurs when the trial court chooses an outcome that falls outside the range of principled outcomes." *Id.* (internal quotation marks and citation omitted).

Respondent's argument is predicated on MRE 703.[6] Respondent's argument is misdirected. MRE 703 is a foundational requirement for the admission of an expert witness's opinion testimony. See MRE 705.[7] Respondent does not challenge the admission of the expert opinion.[8] Her challenge is to the admission of the report itself. The report was authenticated, and respondent does not raise a hearsay argument on appeal as to any of the information contained therein. Whether additional data and facts should have been admitted under MRE 703 to allow testimony under MRE 705 is irrelevant to the admissibility of the challenged reports. Further, the psychologist unequivocally testified that his opinions were based on his testing and

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[5] Respondent also challenges the admission of reports that concern the respondent-father, who is not a party to this appeal. She lacks standing to make these arguments and we do not address them. See *Branch Co Bd of Comm'rs v Serv Employees Int'l Union, Local 586*, 168 Mich App 340, 346; 423 NW2d 658 (1988) (one party may not claim another party's appellate opportunities).

[6] MRE 703 provides:

> The facts or data in the particular case upon which an expert bases an opinion or inference shall be in evidence. This rule does not restrict the discretion of the court to receive expert opinion testimony subject to the condition that the factual bases of the opinion be admitted in evidence thereafter.

[7] MRE 705 states:

> The expert may testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

[8] Respondent also challenges the admission of reports that concern the children's father. As noted above, she does not have standing to make these arguments. See *Branch Co Bd of Comm'rs*, 168 Mich App at 346.

evaluation of respondent, not extrinsic data, which was contained in the "narrative" portion of the report. Respondent has shown no error in the admission of this report.

III. JURY INSTRUCTIONS

Respondent also argues that the trial court erred in not instructing the jury to disregard the CMH assessment specialist's testimony opining that respondent suffered from Posttraumatic Stress Disorder (PTSD). "Jury instructions are reviewed in their entirety to determine whether they accurately and fairly presented the applicable law and the parties' theories." *Guerrero v Smith*, 280 Mich App 647, 660; 761 NW2d 723 (2008). Here, the record clearly shows that the jury was instructed twice during the testimony about the limits of the specialist's opinion regarding PTSD. The jury was specifically instructed to consider the testimony regarding PTSD "if and when they are confirmed by a licensed psychologist or psychiatrist," which did not occur. "It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

We also reject respondent's assertion that the jury was left with the false impression that she would not receive DHS services if the jury did not find that the court had jurisdiction. The trial court instructed the jury both before and after proofs were taken that its job was to decide whether the court should assume jurisdiction and that it should not concern itself with the options available to the court. Considering the instructions in their entirety, and considering trial testimony that clearly established that respondent had received services prior to the proceedings, the record leaves no doubt that the jury was not left with the impression that services would only be provided if it found the court had jurisdiction.

Finally, respondent argues that if no single claim of error itself warrants reversal, such relief is nonetheless required in the face of the cumulative effect of all errors. See *People v Cooper*, 236 Mich App 643, 659-660; 601 NW2d 409 (1999). However, because we conclude that respondent has failed to show any error at all, we have no occasion to apply cumulative-error analysis.

Affirmed.

/s/ Jane M. Beckering
/s/ Cynthia Diane Stephens
/s/ Mark T. Boonstra