STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of BUTLER, Minors.

UNPUBLISHED
March 4, 2014

No. 316654
Macomb Circuit Court
Family Division
LC Nos. 2012-000334-NA
2012-000335-NA

Before: MURPHY, C.J., and DONOFRIO and FORT HOOD, JJ.

PER CURIAM.

Petitioner, the mother of the involved minor children, appeals by right the circuit court order of adjudication that found no grounds of abuse or neglect by respondent, the children's father and petitioner's former husband, to justify its exercise of jurisdiction over the children. We affirm.

Petitioner filed for divorce from respondent in August 2005. At the time of the filing, the parties had two minor children, a daughter KB and son DB. The couple entered into a consent judgment of divorce in November 2006. However, there were allegations of domestic violence and child abuse during the marriage and divorce proceedings. Specifically, respondent pleaded guilty to two instances of child abuse that occurred in June 2006, and June 2009, involving the couple's minor son, DB. Despite these convictions, the parties entered into various consent agreements, allowing respondent to visit with his children under the supervision of others. Respondent explained that the first incident of abuse occurred when DB was in the bathtub, acting out, and respondent feared that the child would injure himself. Accordingly, respondent spanked the child, leaving a bruise. On the second occasion, he admitted to disciplining DB, but did not leave a bruise. Respondent testified that he completed parenting classes and learned that there were other methods of disciplining children that did not involve humiliation or embarrassment. Further, he was diagnosed with a mental illness for which he took his medication.

In January 2007, petitioner re-married and had two children with her new husband. KB and DB resided with petitioner, her husband, and their siblings. In February 2012, respondent was engaged in visitation in petitioner's home. However, DB would not cooperate with respondent's instructions to clean up his plate. Respondent obtained petitioner's permission to turn off the television. Respondent alleged that DB was injured when he leapt to try and take the remote from respondent. Petitioner and her husband, John Blasky, alleged that respondent

forcibly pushed DB to the ground with his body weight, causing a contusion to the boy's chest. Although respondent was charged with child abuse for this February 2012 incident, he was acquitted of the charge. Petitioner sought termination of respondent's parental rights, alleging that respondent continued to abuse the children even when supervised by others. Following six days of testimony from hospital personnel, doctors, police officers, therapists, family members, and friends, the circuit court referee held that in light of the "ongoing custody, support and visitation orders in effect in the family division . . . and due to the insufficient evidence presented . . . there are no statutory grounds to exercise jurisdiction over the children." From this ruling, petitioner appeals.[1]

Petitioner avers that abundant evidence established several statutory grounds for adjudicating the children as court wards and for terminating respondent's parental rights. Specifically, she contends that the children remained at a substantial risk of harm during supervised parenting times with respondent, in light of respondent's convictions and charges of child abuse, MCL 712A.2(b)(1), and that this evidence established that the children's supervised parenting time environment with respondent was unfit due to criminality, MCL 712A.2(b)(2). Petitioner further maintains that respondent admitted many of the allegations in the petition and thus consented to the court's jurisdiction. We disagree.

The reason for an adjudication trial is to ascertain whether a child is neglected in accordance with the provisions of MCL 712A.2(b). *In re Dearmon/Harverson-Dearmon*, ___ Mich App ___; ___ NW2d ___ (2014), slip op p 7. When a petition alleges abuse and neglect, the valid exercise of jurisdiction is established when the trial court finds probable cause to support the allegations contained in the petition. *Ryan v Ryan*, 260 Mich App 315, 342; 677 NW2d 899 (2004). This determination allows for preliminary, limited placement orders concerning the children pending the adjudicative trial. *Id*. For the trial court to exercise its full jurisdictional authority, an adjudication of at least one of the statutory grounds in MCL 712A.2(b) must be proven by trial or plea. *Id*. "The fact-finder must determine by a preponderance of the evidence that the statutory requirements of MCL 712A.2 are met." *Id*. At the adjudicative phase, the respondent may demand that a jury determine the facts at this phase. *Id*.; see also *In re SLH, AJH, & VAH*, 277 Mich App 662, 669; 747 NW2d 547 (2008). The issue presented to the adjudication trier of fact is whether the respondent's actions or inactions produced an unfit environment for the children. *In re Dearmon/Harverson-Dearmon*, ___ Mich

[1] We note that contrary to the provisions of MCR 7.212(C)(6) and (7), petitioner's appellate brief does not contain a statement of facts, both favorable and unfavorable, with citation to the record. Nonetheless, we address the issues raised in the appeal. The guardian ad litem (GAL) for the children also filed a brief on appeal, alleging that the lower court erred by failing to take jurisdiction and terminate respondent's parental rights. We granted respondent's request to file a supplemental brief in response to the GAL's brief. All briefs have been received and reviewed. Respondent's brief and supplemental brief contain an opinion from the divorce action regarding parenting time rendered after the lower court's decision declining jurisdiction. This is an inappropriate expansion of the record on appeal and was not considered. *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 56; 649 NW2d 783 (2002).

App ___, slip op p 7. Although the rules of evidence apply to the adjudicative phase, "hearsay statements of children pertaining to acts of child abuse are admissible at the trial if the criteria for reliability set forth in MCR 3.972(C)(2) . . . are satisfied." *In re Archer*, 277 Mich App 71, 80; 744 NW2d 1 (2007).

At the adjudicative phase, notwithstanding a request to terminate parental rights, the standard of proof is by a preponderance of the evidence. *In re Utrera*, 281 Mich App 1, 15; 761 NW2d 253 (2008). On appeal, the trier of fact's determination to exercise jurisdiction is reviewed for clear error in light of the factual findings. *In re BZ*, 264 Mich App 286, 295; 690 NW2d 505 (2004). A decision is clearly erroneous if, although there is evidence to support it, the reviewing court, following review of the entire evidence, is left with the definite and firm conviction that a mistake has been made. *In re Utrera*, 281 Mich App at 15. In proceedings seeking termination of parental rights, we give deference to the trier of fact's special opportunity to assess the credibility of the witnesses. *In re HRC*, 286 Mich App 444, 459; 781 NW2d 105 (2009).

Our Legislature has invested the family division of circuit court with jurisdiction over "proceedings concerning a juvenile under 18 years of age found within the county," MCL 712A.2(b), under the following relevant circumstances:

> (1) . . . [W]ho is subject to a substantial risk of harm to his or her mental well-being. . . .
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> * * *
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> (2) Whose home or environment, by reason of neglect, cruelty, drunkenness, criminality, or depravity on the part of a parent, guardian, nonparent adult, or other custodian, is an unfit place for the juvenile to live in.

"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 S R*, 229 Mich App 310, 314; 581 NW2d 291 (1998); see also MCR 3.972(C)(1) (providing that "the standard of proof by a preponderance of evidence appl[ies] at the" adjudication trial).

Our review of the entire record leads us to conclude that the circuit court did not clearly err in determining that petitioner failed to prove by a preponderance of the evidence that respondent posed to the children a risk of neglect described in MCL 712A.2(b). Respondent conceded that he had twice spanked his son, DB, once in 2006 with his bare hand, and again in 2009 with a paddle. However, respondent testified that he thereafter successfully completed two anger management classes and a parenting class, and repeatedly elaborated on the concepts he had learned in each class. Near the time of the second spanking incident, respondent was diagnosed as paranoid schizophrenic, and up until the adjudication trial, respondent regularly attended his medical appointments, and took several prescriptions to manage the symptoms caused by his mental illness.

The only subsequent occasion on which respondent allegedly physically abused either child, DB again, occurred on February 11, 2012, during supervised parenting time at petitioner's house. Respondent and John Blasky, petitioner's husband, testified that DB leapt from a couch

onto respondent and tried to climb respondent's body to reach the remote control. The only divergence in the testimony of respondent and Blasky involved the event's conclusion. Respondent testified that DB started to fall, and respondent attempted to catch DB with his free left arm to break DB's fall.[2] Blasky recalled that respondent "used his free hand . . . to push [DB] off of him and . . . down onto the ground," then "pushed down onto [DB's] chest with all of his weight." Respondent repeatedly denied having pushed DB to the ground, lying on top of DB, or otherwise injuring him. On the present record, DB never expressed a version of how he received the two small areas of abrasion or bruising in the area of his left chest. A subsequent jury trial on a misdemeanor fourth-degree child abuse charge against respondent ended in respondent's acquittal.

Petitioner cites the testimony of the children's psychiatrist, Dr. John Briles, as establishing that respondent's actions created a substantial risk of harm to the children's mental health and established respondent's lack of fitness as a parent. Dr. Briles testified that he had diagnosed the parties' daughter, KB, with "generalized anxiety disorder and obsessive compulsive disorder." In Dr. Briles's opinion, KB, who had attended five appointments with him, greatly improved her mental status by taking Zoloft and had a good prognosis. Dr. Briles did not remember KB having specifically mentioned respondent. He opined that KB and respondent did not enjoy a close relationship, and KB possibly feared respondent if the social history he had obtained from petitioner and KB, involving an unsubstantiated allegation that respondent sexually abused KB and charges that respondent abused DB were true. Dr. Briles concluded that termination of respondent's parental rights would further KB's best interests in light of the information he had been provided by petitioner and counsel.

Regarding DB, who reportedly had exhibited physical aggression, voiced threats of harm, had problems managing his anger and emotions, showed a high sensitivity to rejection, and always seemed on edge, Dr. Briles diagnosed him with generalized anxiety disorder, an adjustment disorder involving disturbed conduct and emotions, and mood disorder not otherwise specified. Dr. Briles offered a fair prognosis for DB, and believed that in light of the incidents of respondent's physical abuse of DB, which certainly had some impact on DB's presentation, it was good for DB that he had not seen respondent since February 2012. Dr. Briles did not counsel the children on a regular basis, but did prescribe medication for them.

However, Dr. Briles conceded that he had not seen respondent interact with the children or even spoken to respondent, and an interview with respondent "would be important . . . to get a complete profile of his family dynamic." Dr. Briles acknowledged that he had not reviewed any documents regarding the parties' judgment of divorce, postjudgment parenting time orders, Care of Macomb records of respondent's supervised parenting times between 2009 and 2011, or CPS reports regarding respondent, and did not know the facts surrounding any of respondent's alleged

[2] Respondent testified that he "used textbook classic parenting . . . skills" in response to DB's misbehavior on February 11, 2012, specifically reminding DB that as a consequence of not cleaning, respondent would turn off the television, and when that did not work, respondent consistently and continually tried calming DB, none of which succeeded on that occasion.

acts of child abuse of DB or alleged, unsubstantiated sexual abuse of KB. In Dr. Briles's recollection, neither child had accused respondent of abuse, otherwise disparaged respondent, or expressed a desire not to see respondent again. Dr. Briles agreed that the parties' divorce, ongoing custody issues, and other court proceedings could adversely impact the children, KB's issues could have arisen from not seeing respondent, and DB's difficulties could have been caused by something other than respondent. Dr. Briles denied feeling that respondent should never see the children again.

Stacey Dalton, KB's counselor for approximately 50 sessions between January 2011 and the 2013 adjudication trial, testified that KB occasionally "reported feeling annoyed that [in parenting times] her dad asked the same questions," once told Dalton that she felt uncomfortable during a parenting time because she believed respondent might have looked "up her pants or her skirt," and KB expressed "inappropriate guilt regarding some of the legal issues" involving her parents.[3] Although Dalton filed a report with CPS concerning KB's comments about respondent looking at her inappropriately, CPS did not substantiate the complaint. KB expressed to Dalton her consistent wish to maintain a relationship with respondent, "to feel like she and her brother are safe in [respondent's] presence," and her desire to learn more about respondent's schizophrenia diagnosis. In Dalton's estimation, KB's presence during the alleged child abuse of DB by respondent in February 2012, had caused KB anxiety, as did the multiple CPS interviews that KB had endured, but her anxiety level had diminished since January 2011. After respondent's last parenting time in February 2012, KB mentioned respondent to Dalton less frequently. However, Dalton admitted that she never saw respondent with the children, met him, reached out to him, reviewed the parties' divorce file, or reviewed any criminal files regarding respondent, any CPS documents concerning respondent, or any of his medical records, and knew no details concerning respondent's supervised parenting times at Care of Macomb.

Respondent elicited testimony from Kay McGuire, an assistant Macomb County prosecutor who advocated for child abuse victims and domestic violence victims, and who also supervised 95 percent of respondent's weekly, 1-1/2-hour parenting times at Care of Macomb between September 2009 and March 2011. McGuire testified that she always remained in the parenting time area with respondent and the children. McGuire recalled that respondent came to every parenting time, he always appeared happy to see the children, the children always seemed pleased to see respondent, and the children routinely jumped on respondent in an appropriate manner when he arrived. Concerning respondent's interactions with KB, McGuire remembered no inappropriate affection, contact, discipline, or language, and no abnormal interactions. Instead, they shared normal conversations, played games, and did other things together.

McGuire testified that DB usually interacted well with KB and respondent, but on a few occasions DB seemed "a bit on edge or angry" on arriving for the parenting times, and even absent any potentially agitating conduct by KB or respondent, he easily became upset and cried or threw something if he lost a game or someone else did something he found questionable.

[3] The trial testimony reflected that KB had also mentioned to Dalton two additional, unusual incidents involving respondent in 2009, during which nothing inappropriate occurred.

McGuire recounted that respondent remained calm when DB became angry, and appropriately employed reason to explain or negotiate with the children. Sometimes DB responded to respondent's efforts to discuss his behavior, but other times DB argued with respondent and became angrier, including when DB incorrectly perceived that KB had received more Christmas gifts than he did. McGuire remembered that once when respondent had done nothing to provoke DB, KB informed respondent that DB had received a disciplinary action at school, DB became upset and argued with KB, and DB became unusually destructive by throwing a small table against a wall, breaking toys, and kicking McGuire.

McGuire denied that respondent had ever become angry or upset, inappropriately placed his hands on the children, displayed favoritism for either child in any respect, failed to parent the children, neglected the children, or did anything else inappropriate. In McGuire's opinion, respondent was incredibly patient, "the most patient parent that came there," and he explained to McGuire "the different ways of handling things" that he learned in parenting classes. McGuire testified that the children never seemed uneasy in respondent's presence. On holidays and special occasions, respondent always brought the children gift bags, and the children several times brought respondent homemade cards and school projects. McGuire described the parenting times as healthy and loving, apart from DB's few temper tantrums. Although the children occasionally expressed a preference for longer parenting times or parenting times at respondent's residence, KB more than once mentioned during the parenting times, "[M]om says that's never going to happen."

Petitioner averred that after supervised parenting times began at Care of Macomb, both children "became very aggressive and upset and crying." As an example, petitioner recalled that she learned from the children that respondent had pulled DB's underwear during a parenting time at Care of Macomb, which greatly embarrassed and upset DB.[4] With respect to the parenting times supervised at her house beginning in December 2011, petitioner recalled "a lot of inappropriate stuff" that did not rise to the level of physical abuse necessitating a police report. For example, respondent massaging KB's feet or placing his hand on KB's "leg, above the knee," which made KB uncomfortable. In response to a query regarding what post-2009 actions of respondent had increased petitioner's concern that respondent would harm the children, petitioner answered that respondent continually abused the children emotionally. But she identified no criminal or civil allegation that she had brought against respondent, and mentioned specifically only a 2010 or 2011 report regarding KB that CPS did not substantiate.[5] Petitioner admitted that despite the extent of her knowledge, she had consented to the entry of multiple parenting times orders, including in December 2011. Despite being shown information from the

[4] McGuire denied observing this during any of the parenting times she supervised.

[5] The record reflects that CPS decided whether to substantiate reports of abuse or neglect by a preponderance of the evidence standard.

friend of the court indicating that she obstructed or cancelled visits, petitioner denied the allegations.[6]

In light of the deference afforded the trier of fact's assessment of credibility,[7] we conclude that the trial court did not err in finding that a preponderance of the evidence failed to show that respondent posed a substantial risk of harm to the children's mental health, MCL 712A.2(b)(1), or the children's "environment, by reason of . . . criminality" on respondent's part, rendered it unfit for the children, MCL 712A.2(b)(2). *In re Utrera*, 281 Mich App at 15; *In re BZ*, 264 Mich App at 295. We reach our conclusions for the following reasons: (1) respondent's two spankings of DB occurred seven and four years before the adjudication trial; (2) respondent thereafter successfully completed a parenting course and anger management and domestic violence classes; (3) respondent also pursued an ongoing course of treatment for his paranoid schizophrenia; (4) McGuire, who supervised respondent's parenting times most often between 2009 and 2011, and William Drew, who observed parenting times in 2011, attested to respondent's entirely appropriate and loving interactions with the children, the children's bond and easy interactions with respondent, and respondent's exceptional patience with DB's behavioral issues; (5) the misdemeanor child abuse charge against respondent in 2012 arose only after he attempted to discipline DB several different ways, DB leapt onto respondent, Blasky perceived that respondent had pushed DB onto the ground, and DB suffered two minor abrasions or bruises to his chest; (6) petitioner identified no other, post-2009 substantiated acts of emotional or physical abuse by respondent; (7) Dr. Briles conceded that multiple issues other than respondent's acts of abuse had contributed to the children's mental health issues; and (8) Dr. Briles and Dalton admitted to lacking information important to offering opinions concerning respondent's relationship with the children.[8] Petitioner failed to recognize the deficiencies in the

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[6] Petitioner acknowledged that she received two letters from the friend of the court instructing her to adhere to the parties' parenting time schedule, but did not recall whether she had responded to respondent's allegations that she canceled parenting times. Petitioner also acknowledged reading in an April 16, 2012, post-divorce hearing transcript a friend of the court referee's comment to petitioner's attorney "that from day one it's been your position to try and keep these children from their father," but denied remembering the statement.

[7] Additionally, the supervisors of the visitation testified. The Hucks provided testimony in support of petitioner, their niece, that respondent was hot-tempered and inappropriate. William Drew, a former employer and friend of respondent, testified that respondent was a good father and appropriate with the children.

[8] Petitioner cites *In re Emmons*, 165 Mich App 701; 419 NW2d 449 (1988), in support of the proposition that the circuit court should have exercised jurisdiction over the children because respondent committed crimes against children. However, we view as distinguishable from this case *In re Emmons*, 165 Mich App at 702-703, in which the respondent was charged with sexually abusing multiple children and pleaded guilty of at least one criminal count of sexual abuse. To the extent that petitioner suggests that the circuit court erred in taking into account the children's current home with petitioner and Blasky in finding no risk of harm to the children, our reading of the referee's findings and conclusions does not support petitioner's contention.

testimony of the treating physician and counselor where they relied solely on the information presented by petitioner or her counsel and acknowledged, but did not investigate, the important role respondent played in the children's lives. Additionally, they did not analyze the import of petitioner's remarriage and new siblings on the children, despite information that DB conflicted with one of the siblings. Moreover, there was evidence from McGuire and friend of the court personnel that petitioner played an obstructionist role, contrary to her testimony. Accordingly, on this record, we cannot conclude that the lower court erred by holding that there was insufficient evidence to exercise jurisdiction.

We note that petitioner disingenuously suggests that respondent consented to the circuit court's exercise of jurisdiction over the children. First, respondent did not admit to all of the petition's allegations. Respondent admitted only to having spanked DB in 2006 and 2009, but denied having harmed or intended to harm DB in February 2012. Second, respondent's counsel did not acknowledge during his closing argument that the circuit court could exercise jurisdiction over the children. Counsel instead argued that the court should dismiss the petition, and alternatively, *if* the court exercised jurisdiction over the children, that the evidence did not warrant termination of respondent's parental rights.

Affirmed.

/s/ William B. Murphy
/s/ Pat M. Donofrio
/s/ Karen M. Fort Hood