

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of AMBER BLOCKER, Minor.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

JACK JAY BLOCKER,

Respondent-Appellant.

UNPUBLISHED

January 17, 2008

No. 279581

Wayne Circuit Court

Family Division

LC No. 06-452810-NA

Before: Saad, C.J., and Borrello and Gleicher, JJ.

PER CURIAM.

Respondent appeals as of right from a circuit court order terminating his parental rights to the minor child pursuant to MCL 712A.19b(3)(b)(i), (j), and (k)(ii). For the reasons set forth in this opinion, we reverse and remand to the trial court for further proceedings consistent with this opinion.

This case involves the termination of respondent's parental rights pursuant to MCL 712A.19b(3)(b)(i), (j), and (k)(ii) and §19b(3)(b)(i). The single issue addressed on this appeal is whether the trial court erred in terminating respondent's parental rights on the basis of a plea and an abuse report which the trial court stated would be used specifically for the purpose of the trial court obtaining jurisdiction. Because we conclude that the record does not clearly show that respondent stipulated to the admission of the abuse report and plea to establish the statutory grounds for termination, and the statutory grounds were not otherwise established by legally admissible evidence, we are forced to reverse this matter and remand it to the trial court for proceedings consistent with this opinion.

In child protective proceedings, the court must first obtain jurisdiction over the children which generally requires a determination whether the children have been neglected as defined in MCL 712A.2(b)(1), or are without a fit home as defined in MCL 712A.2(b)(2). *In re AMB*, 248 Mich App 144, 167; 640 NW2d 262 (2001). Generally, the determination whether the allegations in the petition are true, thus allowing the court to exercise jurisdiction, is made from the respondent's admissions to the allegations in the petition or from other evidence if the respondent pleads no contest, or from evidence introduced at a trial if the respondent contests

jurisdiction. *In re PAP*, 247 Mich App 148, 152-153; 640 NW2d 880 (2001); MCR 3.971; MCR 3.972; MCR 3.973(A).

Once jurisdiction is obtained, the case proceeds to disposition to determine what is to be done with the child. MCR 3.973; MCL 712A.18. The court may make the child a temporary ward and have the parents participate in services to facilitate reunification or it may make the child a permanent ward by terminating parental rights. MCR 3.973(F); MCR 3.977(E).

The court may order termination of parental rights at the initial dispositional hearing if

(1) the original, or amended, petition contains a request for termination;

(2) at the trial or plea proceedings, the trier of fact finds by a preponderance of the evidence that one or more of the grounds for assumption of jurisdiction over the child under MCL 712A.2(b) have been established;

(3) at the initial disposition hearing, the court finds on the basis of clear and convincing legally admissible evidence that had been introduced at the trial or plea proceedings, or that is introduced at the dispositional hearing, that one or more facts alleged in the petition:

(a) are true, and

(b) establish grounds for termination of parental rights under MCL 712A.19b(3)(a), (b), (d), (e), (f), (g), (h), (i), (j), (k), (l), (m), or (n);

unless the court finds by clear and convincing evidence, in accordance with the rules of evidence as provided in subrule (G)(2), that termination of parental rights is not in the best interests of the child. [MCR 3.977(E).]

Petitioner argued, and the trial court found, that there was a statutory basis for termination under §§ 19b(3)(b)(i), (j), and (k)(ii). Those grounds are:

(b) The child or a sibling of the child has suffered physical injury or physical or sexual abuse under 1 or more of the following circumstances:

(i) The parent's act caused the physical injury or physical or sexual abuse and the court finds that there is a reasonable likelihood that the child will suffer from injury or abuse in the foreseeable future if placed in the parent's home.

* * *

(j) There is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent.

(k) The parent abused the child or a sibling of the child and the abuse included 1 or more of the following:

* * *

(ii) Criminal sexual conduct involving penetration, attempted penetration, or assault with intent to penetrate.

The petition contained a request for termination. The court determined on the basis of respondent's plea that it had jurisdiction over the child. It utilized the investigative report to determine that it had jurisdiction on the basis of overall neglect¹ and utilized the abuse report to determine that it had jurisdiction on the basis of child abuse. The court ultimately ordered termination because it found, again from the abuse report received into evidence at the plea proceeding, that respondent had sexually abused Amber's siblings. However, the abuse report contained multiple layers of hearsay: it was an out-of-court assertion relating what the foster father had told a case worker about what the boys had told him, all of which was considered by the trial court for the truth of the matters asserted in contravention of MRE 801.

Petitioner does not dispute that the abuse report contained inadmissible hearsay, but argues that respondent cannot challenge the court's consideration of that evidence, having stipulated to its admission at the plea proceeding. This would be true if the plea had been offered for the purposes of establishing a statutory basis for termination, respondent could not now claim error on the basis of evidence received pursuant to his own attorney's stipulation. *People v Knapp*, 244 Mich App 361, 378; 624 NW2d 227 (2001), lv den 465 Mich 934 (2001); *People v McCray*, 210 Mich App 9, 14; 533 NW2d 359 (1995), lv den 451 Mich 902 (1996). However, it is not clear from the record that the plea was taken for the purpose of establishing a statutory basis for termination.

While not specifically authorized under the court rules, it is not unusual for a respondent to enter a plea to a petition for termination, admitting to facts that establish a statutory basis for termination and requesting a dispositional hearing for the purpose of showing that termination is contrary to the child's best interests. Petitioner is of the view that this is what transpired here.

The plea itself is tacit evidence that it was taken for purposes other than jurisdiction because the court already had jurisdiction over all the children by virtue of the mother's plea and, therefore, it was unnecessary to hold a separate adjudicatory hearing with respect to respondent. *In re CR*, 250 Mich App 185, 205; 646 NW2d 506 (2002).

Certain remarks by respondent's counsel also suggest that respondent was offering his plea to the statutory grounds for termination. Before respondent offered his plea, his attorney stated:

[M]y client, for judicial economy, is willing to enter a no contest plea.
But still vehemently denies the allegations as they pertain to criminal sexual

¹ Assuming without deciding that the CPS investigative report established an alternate basis for termination under § 19b(3)(j), that is irrelevant because the court ordered termination solely on the basis of the sexual abuse of Amber's siblings; it did not find that Amber was likely to be harmed because respondent was unable to function as a proper parent.

conduct. In order to avoid any type of embarrassment to, or subjecting to [sic] children be it him taking the stand, or any type of testimony of that nature providing criminal sexual conduct. He is willing to avoid that.

And in the mean time, if the Court accepts his no contest plea to both environmental, and physical abuse that as it pertains to the various children, the two boys, that he will be requesting a polygraph test . . . in regards to the criminal sexual conduct aspect to vindicate him from any and all allegations of that nature.

I know usually it's the other way around, but in order to expedite this matter, in order to put it into motion we've agreed to proceed in that direction.

In addition, after the plea, respondent's counsel noted that respondent wanted to take a polygraph examination "for use regarding best interest." These statements suggest that respondent was entering a plea to the termination aspect of the petition and agreeing that the court could use the otherwise inadmissible hearsay in the abuse report to establish one or more grounds for termination with the understanding that he would attempt to persuade the court at the dispositional hearing that the abuse did not in fact occur.

When taking the plea, however, the trial court advised respondent that "[t]he only thing before me right at this moment is the jurisdictional question" and further advised that respondent was giving up the right to have petitioner prove "jurisdiction by a preponderance of the evidence. *He would still have to in the future either prove by a preponderance of the evidence that temporary custody is necessary. Or by clear and convincing evidence that there's grounds for termination of parental rights[.]*" (Emphasis added). Even at the dispositional hearing, the court noted that it had only taken jurisdiction with respect to respondent at the plea proceeding. We are thus bound by the explicit language used by the trial court in asserting that the plea proceeding was only used for purpose of taking jurisdiction. Given the statements of the trial court together with the fact that the parties did not expressly state the purpose of the plea on the record, we conclude that respondent did not stipulate to admission of the abuse report for the purpose of establishing a statutory basis for termination.

In light of our decision, it is unnecessary to consider respondent's remaining issues. Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Stephen L. Borrello
/s/ Elizabeth L. Gleicher