STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of KIARA MARIE JOHNSON,
Minor.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

MARVIN L. JOHNSON,

Respondent-Appellant.

UNPUBLISHED
November 17, 2009

No. 292545
Oakland Circuit Court
Family Division
LC No. 08-753929-NA

Before: Hoekstra, P.J., and Murray and M. J. Kelly, JJ.

PER CURIAM.

Respondent appeals as of right the June 1, 2009 order that terminated his parental rights to the minor child pursuant to MCL 712A.19 (3)(g) (failure to provide proper care or custody), (h) (parent's imprisonment will deprive the child of a normal home for more than two years), and (j) (the child is likely to be harmed if returned to the parent's home). Because we conclude that the trial court erred in exercising jurisdiction over the minor child, we reverse.

I. Statement of the Facts

Respondent and Patrice Jones are the parents of Kiara Johnson, who was born November 11, 1998. In November 2008, the Department of Human Services (DHS) filed a petition for the trial court to take custody of Kiara and to terminate respondent's parental rights. The petition alleged that while investigating a referral that one of Jones's other children, S.M., had been sexually abused by a family friend, DHS learned that respondent had been convicted of criminal sexual conduct (CSC) against a minor and sentenced to 6 to 15 years' imprisonment. Termination was requested pursuant to §§ 19b(3)(b)(i) (physical or sexual abuse of a child or sibling by the parent), (g), (h), and (j). Following a preliminary hearing, the petition was authorized.

At an adjudication trial on February 20, 2009, Eliza Burlingame, a DHS employee, testified that, while investigating Jones's report that S.M. had been sexually abused by a family

friend, Jones told her that respondent "was in prison for molesting a child."[1] Burlingame determined that respondent had been convicted of third- and fourth-degree CSC in March 2007 and sentenced to 6 to 15 years in prison. Respondent admitted that he had been convicted of the CSC offenses and that the victim was a 14-year-old girl. The girl was a student at the school where respondent worked as a janitor and the offenses occurred at the school. Respondent testified that he thought the girl was 17 years old and that he did not find out until later that she was younger. Kiara would be about the same age as the victim if respondent were to be released on his earliest release date.

Burlingame testified that when respondent committed the CSC offenses, he was not residing with Kiara, who lived with Jones, but that he did have "a father/daughter relationship" with Kiara. Respondent explained that he had lived with Kiara and Jones from the time Kiara was born until she was approximately five years old. After he and Jones separated, respondent maintained regular contact with Kiara. Respondent stated that he had contact with her "most likely everyday" and that he had weekend visitation with Kiara every other weekend, which continued until he was incarcerated. In prison, respondent maintained contact with Kiara by telephone, letters, and cards. He spoke to Kiara by telephone two or three times a month, whenever she visited his parents. According to Burlingame, the DHS considered respondent an unfit parent based solely on his CSC offenses.

At the end of the hearing, the trial court found that it had jurisdiction over Kiara. It stated, "And, the Court first finds that based on the information provided that father will not be around for a significant period of this child's life and that that satisfies MCL 712.2b(1) and (2)." It then found that petitioner had proven the statutory grounds of §§ 19b(3)(g), (h), and (j) by clear and convincing evidence.[2] The trial court ordered that respondent and Kiara undergo a psychological exam and it scheduled a hearing to determine Kiara's best interest.

At the dispositional hearing, the trial court, after hearing testimony, found that termination of respondent's parental rights was in the best interest of Kiara. It subsequently entered an order terminating respondent's parental rights.

II. Analysis

Respondent argues that the trial court erred in finding that it had jurisdiction over Kiara. We agree. "We review the trial court's decision to exercise jurisdiction for clear error in light of the court's findings of fact." *In re BZ*, 264 Mich App 286, 295; 690 NW2d 505 (2004).

In order to terminate parental rights at the initial dispositional hearing, the trial court must have found at the trial that one or more grounds for assumption of jurisdiction over the minor

[1] The parties agreed that S.M. was not the victim of respondent's offenses, which had been committed against someone "totally unrelated" to the family.

[2] The trial court dismissed the request for termination under ¶ 19b(3)(b)(i) because the victim of defendant's CSC offenses was neither Kiara nor a sibling of Kiara.

child under MCL 712A.2 were established by a preponderance of the evidence. MCR 3.977(E)(2). MCL 712A.2 provides, in pertinent part:

> The court has the following authority and jurisdiction.
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> * * *
>
> (b) Jurisdiction in proceedings concerning a juvenile under 18 years of age found within the county:
>
> (1) Whose parent or other person legally responsible for the care and maintenance of the juvenile, when able to do so, neglects or refuses to provide proper or necessary support, education, medical, surgical, or other care necessary for his or her health or morals, who is subject to a substantial risk of harm to his or her mental well-being, who is abandoned by his or her parents, guardian, or other custodian, or who is without proper custody or guardianship. As used in this sub-division:
>
> * * *
>
> (B) "Without proper custody or guardianship" does not mean a parent has placed the juvenile with another person who is legally responsible for the care and maintenance of the juvenile and who is able to and does provide the juvenile with proper care and maintenance.
>
> (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.

Section § 2(b) grants a court jurisdiction over a minor child if the child's parent or guardian is neglectful as defined in § 2(b)(1) or has failed to provide a fit home as defined in § 2(b)(2). *In re AMB*, 248 Mich App 144, 167; 640 NW2d 262 (2001).

The first basis for jurisdiction under § 2(b)(1) is that the parent "legally responsible for the care and maintenance of the juvenile, when able to do so, neglects or refuses to provide proper or necessary support, education, medical, surgical, or other care necessary for his or her health or morals." At the time the petition was filed, respondent was in prison and thus was unable to provide properly for the minor child's needs. Further, the trial court did not find that respondent, when able, failed to properly provide for the child's needs.

The second basis for jurisdiction under § 2(b)(1) is that the child "is subject to a substantial risk of harm to his or her mental well-being." Where the child is the victim of a criminal offense committed by the parent, the court can exercise jurisdiction under the second clause of § 2(b)(1) because "there most certainly will be some negative effect on the child's mental well-being" and the fact that the parent is incarcerated at the time the petition is filed "does not eliminate the mental and emotional effect on the child of his violent conduct." *In re S R*, 229 Mich App 310, 315; 581 NW2d 291 (1998). In this case, however, respondent committed the CSC offenses against an unrelated minor who was not a member of his household, and there

was no evidence at the trial that Kiara was aware of the nature of the offenses or was affected by them.

The third basis for jurisdiction under § 2(b)(1) is that the child has been abandoned by her parents. To abandon something is "to leave completely and finally; forsake utterly; desert." *Random House Webster's College Dictionary* (1992). In the context of the parent-child relationship, abandonment is most often described as willful or intentional conduct on the part of the parent which manifests a settled purpose to forgo all parental duties and relinquish all parental claims to the child. *In re TCB*, 166 NC App 482, 485; 602 SE2d 17 (2004). Accord *Petition of CEH*, 391 A2d 1370, 1373 (DC, 1978); *Hinkle v Lindsey*, 424 So 2d 983, 985 (Fla App, 1983); *In re Adoption of DA*, 222 Ill App 3d 73, 78; 583 NE2d 612 (1991); *In re Adoption of MLL*, 810 NE2d 1088, 1092 (Ind App, 2004); *In re Guardianship of DMH*, 161 NJ 365, 376-377; 736 A2d 1261 (1999). While respondent was unable to parent Kiara due to his incarceration, he continued to maintain contact with her. He sent her cards and letters and spoke to her two or three times a month by telephone. The evidence did not establish that respondent had abandoned Kiara.

The fourth basis for jurisdiction under § 2(b)(1) is that the child is without proper custody or guardianship. Although respondent was not providing for Kiara and was unable to provide proper custody, the focus of this clause is on the child and not the parent. Thus, if the child is living with another legally responsible adult who is providing proper care, the child is not without proper custody or guardianship despite the fact that the parent himself is unable to provide proper custody. MCL 712A.2(b)(1)(B); *In re Nelson*, 190 Mich App 237, 241; 475 NW2d 448 (1991). The evidence was undisputed that Kiara had been living with Jones, a person legally responsible for her, since before respondent was incarcerated, and there was no evidence that Jones was not providing proper care and maintenance. Therefore, the evidence did not support a finding that Kiara was without proper custody or guardianship.

The trial court also found that it had jurisdiction over Kiara under § 2(b)(2). This subsection requires proof that due to some danger posed by a parent, the child's home or environment is an unfit place for the child to live. It was undisputed that respondent had a criminal history. However, a parent's criminal status alone is not sufficient to enable the court to exercise jurisdiction under § 2(b)(2). *In the Matter of Curry*, 113 Mich App 821, 830; 318 NW2d 567 (1982). It must also be shown that the child's custodial environment was unfit. *Id.* No such evidence was offered at the trial.

The evidence offered at the trial did not support a finding that respondent was neglectful as defined in any of the four provisions of § 2(b)(1) or failed to provide a fit home as defined in § 2(b)(2). Accordingly, the trial court erred in exercising jurisdiction over Kiara. Because a court cannot terminate parental rights under § 19b(3) unless jurisdiction exists under § 2(b), *In re S R*, *supra* at 314, the trial court clearly erred in terminating respondent's parental rights, MCR 3.977(J).

Reversed.

/s/ Joel P. Hoekstra
/s/ Michael J. Kelly