

STATE OF MICHIGAN  
COURT OF APPEALS

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In the Matter of JOSHUA HATCHETT, Minor.

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DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

JESSIE M. HATCHETT,

Respondent-Appellant.

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UNPUBLISHED

January 12, 2010

No. 292220

Wayne Circuit Court

Family Division

LC No. 08-478625

Before: Meter, P.J., and Borrello and Shapiro, JJ.

PER CURIAM.

Respondent appeals as of right from the March 23, 2009, order of Wayne Circuit Judge Judy A. Hartsfield, which assumed jurisdiction over respondent's adopted minor child, pursuant to MCL 712A.2(b)(1), and made him a temporary ward of the court. We affirm.

"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); MCR 3.972(C)(1); MCR 3.965(B)(11). "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).

MCL 712A.2(b) provides, in relevant part, that the family division of the circuit court has:

(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.

In the present case, the trial court determined that grounds to exercise jurisdiction under MCL 712A.2(b)(1) over Joshua existed because there was a “failure to provide, when able to do so, support, education, medical, surgical, or other necessary care for health or morals.” The trial court found that respondent failed to provide Joshua with support, denied him access to her home after they were “involved in some dispute” wherein Joshua cursed at respondent and left the home, and refused to allow him to return to the home. Respondent thereafter “vacillated[] between allowing and not allowin[g] him to return,” and ultimately “decided not to allow the child back in the home as he had been ‘corrupted’ by contact with his biological family.”

We conclude that respondent has failed to show that the trial court’s findings of fact were clearly erroneous or that jurisdiction was not demonstrated by a preponderance of the evidence. *In re S R, supra*; *In re BZ, supra*. The preponderance of the evidence established that respondent, although able to do so, neglected or refused to provide Joshua with “proper or necessary support, education, medical, surgical, or other care necessary for his . . . health or morals,” MCL 712A.2(b)(1), by refusing to allow him to return home because he was “corrupted” by his biological family, failing to ensure his enrollment in school, and conditioning his ability to return to her home on good behavior.

The record reflects that the Department of Human Services (DHS) filed an initial neglect petition that was dismissed in May 2008, alleging both abuse and neglect by respondent and that respondent refused to allow Joshua to return home and took his keys after he left following an argument. This initial petition was dismissed on grounds that a guardianship would be set up with Renee Talley, respondent’s granddaughter; Joshua would receive counseling; and a neglect petition could be refiled if necessary. The guardianship was never established, however, because the next day Joshua ran away from his placement. When Joshua was eventually picked up on a writ on January 8, 2009, he had not attended or been enrolled in school for the entire fall 2008 semester. Respondent indicated she had not enrolled Joshua in school because she did not know where he was, and he was walking into school but then leaving.

The trial court authorized petitioner’s second neglect petition on January 15, 2009, indicating that Joshua would be placed at the St. Jude Home for Boys. The second petition reiterated the events surrounding the first petition, including that Joshua called his biological mother, Tori Walker, to pick him up after respondent refused to allow him back home. Protective services worker Wanda Woods alleged that respondent “has made it very clear [to DHS] she doesn’t [sic] want Joshua to return to her home. [Respondent] stated she wants him in a ‘Group Home’ or the ‘Detention Facility.’” “Joshua’s only legal parent refuses to allow him to return home if/when he is located. Joshua is without proper care and supervision. Joshua is in need of this court’s supervision.”

At trial, Woods testified that she was contacted by Talley and respondent after Joshua ran away from Talley. Woods further testified that when Joshua was located, Woods contacted respondent and asked if she was willing to take Joshua back, but respondent told Woods that she was “not willing to have him in her home at this time. She felt that he had been perhaps corrupted by where he had been with the biological relatives.” According to Woods, respondent suggested that Joshua be placed “in a detention facility or in a group home.” Woods informed respondent of the consequence of Joshua not returning to her home and that a petition would be filed, but respondent “felt that Joshua had be[en] corrupted by his biological family” and explained her belief that the family was involved in illegal activities.

Respondent testified that she did not put Joshua out of the home in April of 2008; he left on his own and did not tell her where he was going after their argument. However, she admitted that she took his keys and refused to allow him to return to her home because he had lied about her and her son and cursed her. She also admitted that outside of making an initial police report, she made no efforts to locate Joshua after he left. When she told police that Joshua ran away, she did not ask them to bring him back home or tell them what to do with him; she told the police that “he was in the court.” Respondent denied any abuse or neglect of Joshua, denied telling Woods that she wanted Joshua placed in a detention facility or a group home, and denied that Woods asked whether respondent wanted Joshua to return to her home after he was found. Respondent testified that she had visited Joshua at his placement at St. Jude and the visits were going “pretty good,” and she wanted to repair her relationship with Joshua. However, she expressed concern with Joshua returning home; she stated that she would “like him back if he’s going to behave.” When asked directly if she wanted him to return home, she stated, “If he’s going to have good behavior, yeah. If not--.” Respondent also admitted stating that she did not want Joshua back in her home because Joshua had been corrupted by contact with his biological family.

Respondent argues that an incorrigibility petition was the proper course of action. However, respondent never took this position before the trial court. At the January 9 hearing, it was the trial court that brought up, *sua sponte*, the issue of a delinquency petition. In response, petitioner stated that it re-filed the neglect petition “because we thought that the services could be best provided for him . . . under the neglect jurisdiction[ w]hether or not there’s also going to be a delinquency case.” Respondent took no position and made no comments throughout the entire discussion regarding a delinquency petition. At the conclusion of the hearing, however, when the trial court asked if there was anything further, respondent stated that she “agree[d] with the counseling with [Joshua] and with me” to which the trial court responded, “please make a referral for counseling.”

At the January 15 hearing, the trial court again attempted to determine whether filing an incorrigibility petition was appropriate, indicating that it was “still on the fence.” As before, respondent made no objection to the failure to file a petition and in no way indicated that she wanted the trial court to refer the matter to the prosecutor’s office. Instead, she and her counsel remained silent throughout the entire discussion. We admit to having some concern that an incorrigibility petition may have been more appropriate. However, given respondent’s failure to object or in some way advise the trial court that she believed an incorrigibility petition would have been better or more appropriate, the lack of an incorrigibility petition can be attributed to respondent and, therefore, any error in the failure to file such a petition does not require reversal. *In re Utrera*, 281 Mich App 1, 11; 761 NW2d 253 (2008). Furthermore, petitioner indicated it intended to continue with the neglect petition even if an incorrigibility petition was filed and respondent has not argued that the trial court would have been required to dismiss the neglect petition had an incorrigibility petition been filed. Having found no case law to indicate that neglect and incorrigibility petitions are mutually exclusive, the issue before us is whether the trial court appropriately took jurisdiction under the neglect pleading that was filed. Based on the record, we reluctantly conclude that jurisdiction was properly assumed.

In ruling, we give due regard to the trial court’s special opportunity to observe Woods and respondent as they testified and assess their credibility. *In re BZ*, *supra* at 296-297; MCR

2.613(C). Respondent's own testimony at trial reveals that, although she expressed a desire to repair her relationship with Joshua, she conditioned his return to her home on good behavior. Respondent wavered throughout the process regarding whether Joshua could return home and the evidence showed that she had denied him access to her home for some time after an argument in the past. Even after being warned that a neglect petition would be filed, respondent indicated that Joshua should be sent to a group home or detention facility and that she believed he was "corrupted" by his biological family. By failing to enroll Joshua in school, refusing or neglecting to provide Joshua with necessary care and support, repeatedly vacillating on whether she even wanted to allow him back into her home, and conditioning necessary parental support on the teenager's good behavior, respondent left Joshua without proper support and custody, and strongly suggested that even if he was returned home, the parties would likely end up back in court once Joshua engaged in "bad" behavior.

Petitioner was not required to prove every allegation in the petition. Rather, all that was required to assume jurisdiction over Joshua was to prove by a preponderance of the evidence that he came within the statutory requirements of MCL 712A.2. *In re S R, supra*. We recognize that this is not the "typical" neglect case and that respondent's actions are neither egregious nor shocking. However, because the record provides evidence that respondent, although able to do so, neglected or refused to provide Joshua with "proper or necessary support, education, . . . or other care necessary for his . . . health or morals," MCL 712A.2(b)(1), we cannot say that the trial court clearly erred in assuming jurisdiction.<sup>1</sup>

Respondent also argues that her right to parent was impaired because the trial court used, as a standard for assuming jurisdiction, whether better services could be rendered under a neglect proceeding versus a delinquency proceeding. Respondent failed to raise this claim below; it is therefore unpreserved. *Rooyakker & Sitz, PLLC v Plante & Moran, PLLC*, 276 Mich App 146, 162; 742 NW2d 409 (2007). However, even considering the argument, we conclude that it has no merit.

"It is undisputed that parents have a fundamental liberty interest in the companionship, care, custody, and management of their children." *In re B and J*, 279 Mich App 12, 23; 756 NW2d 234 (2008).

The Due Process Clause "provides heightened protection against government interference with certain fundamental rights and liberty interests." *Washington v Glucksberg*, 521 US 702, 720; 117 S Ct 2258; 138 L Ed 2d 772 (1997). The government may not infringe a fundamental liberty interest unless the infringement is narrowly tailored to serve a compelling state interest. *Id.* at 721;

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<sup>1</sup> We note that the parties represented to the trial court at the January 9 hearing that they had agreed that respondent would not be placed on the central registry as a result of this petition. At oral argument, counsel for petitioner was unable to advise this Court whether respondent had been or would be placed on the central registry. In affirming jurisdiction, we have relied on the representations in the record that respondent has not been and will not be placed on the central registry as a result of this petition.

*Reno v Flores*, 507 US 292, 302; 113 S Ct 1439; 123 L Ed 2d 1 (1993). [*Id.* at 22-23.]

Although petitioner argued that it did not want an incorrigibility petition pursued because it felt that Joshua's situation could best be handled as a neglect petition, the trial court's decision does not reflect that it found probable cause to support exercising statutory jurisdiction over Joshua because DHS services could best be provided under a neglect petition scenario. Rather, the referee's and the trial court's findings followed the statutory language and requirements of MCL 712A.2(b)(1), in concluding that respondent failed to provide, when able to do so, the proper or necessary support and care for Joshua. Further, the proceeding at issue was not a termination of parental rights proceedings, which requires a higher standard of proof, i.e., clear and convincing evidence that one of the statutory grounds is proven. *In re B and J*, *supra* at 18, 23. Respondent has not alleged that her parental rights were terminated by the trial court's exercise of jurisdiction, and these are not the circumstances of the present case. *Id.* at 23-24. Rather, the trial court granted respondent supervised visitation and ordered that reasonable efforts made to reunify and preserve the family for Joshua to return home. Moreover, respondent was represented by counsel at all of the proceedings and does not claim a lack of notice or opportunity to be heard. See *Mudge v Macomb Co*, 458 Mich 87, 101; 580 NW2d 845 (1998) (Due process requires notice and an opportunity to be heard in a meaningful manner before an individual may be deprived of life, liberty or property in an adjudication).

Respondent also claims that her stand-in counsel, Erwin, rendered ineffective assistance when she conceded probable cause to authorize the petition, and that but for this error, the neglect petition would not have been authorized. Respondent has failed to preserve this issue by requesting an evidentiary hearing or a new trial. See *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). We review an unpreserved ineffective assistance of counsel claim for error apparent on the record. *Id.* We conclude that respondent has failed to establish that counsel's representation was deficient, or that there is a reasonable probability that the outcome would have been different, but for any ineffective assistance. *In re CR*, 250 Mich App 185, 198; 646 NW2d 506 (2001); *In re Trowbridge*, 155 Mich App 785, 786; 401 NW2d 65 (1986).

The trial court "may authorize the filing of the petition upon a showing of probable cause, unless waived, that one or more of the allegations in the petition are true and fall within MCL 712A.2(b)." MCR 3.965(B)(11); *In re Hatcher*, 443 Mich 426, 433-435; 505 NW2d 834 (1993). Because probable cause was waived at the January 15, 2009 hearing, little inquiry into probable cause occurred. However, this Court does not substitute its judgment for that of counsel regarding strategic decisions. *Trowbridge*, *supra* at 787. Further, the record supports that respondent herself acquiesced to the proposal that the parties undergo counseling and Joshua remain at St. Jude; she did not contest the proposal when the trial court asked her opinion, and she indicated that she would participate in the counseling as well. A party "may not waive objection to an issue before the trial court and then raise it as an error on appeal." *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000) (quotation marks and citation omitted). Moreover, a finding of probable cause to believe that one or more of the allegations in the petition were true and fell within MCL 712A.2(b) would have been made absent a waiver, in light of the allegations set forth in the second petition; the evidence presented at the preliminary hearing that respondent failed to enroll Joshua in school and that she did not want him in her

home because he snuck out at night and hurt her feelings; and the fact that the trial court subsequently determined that the preponderance of the evidence established that Joshua fell within the statutory jurisdiction of MCL 712A.2(b) after more evidence was presented at the trial. Thus, on the record available, respondent has failed to establish that but for her counsel's waiver of probable cause to authorize the petition, there is a reasonable probability that the result of the proceedings would have been different. *In re CR, supra*. In addition, to the extent that contesting probable cause to authorize the petition would have been futile, counsel was not ineffective for failing to advocate a meritless position. *Id.* at 209.

Affirmed.

/s/ Patrick M. Meter  
/s/ Stephen L. Borrello  
/s/ Douglas B. Shapiro