STATE OF MICHIGAN

COURT OF APPEALS

In re P. M., Minor.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

SHAE MULLINS,

Respondent-Appellant.

UNPUBLISHED
March 16, 2010

No. 291874
Berrien Circuit Court
Family Division
LC No. 2008-000103-NA

Before: Talbot, P.J., and Whitbeck and Owens, JJ.

PER CURIAM.

Respondent Shae Mullins appeals as of right the trial court order establishing jurisdiction over respondent's minor child, pursuant to MCL 712A.2(b)(1) and (2)(b)(2). We reverse.

In general, child protective proceedings are comprised of two phases: the adjudicative phase and the disposition phase. In this appeal, we are concerned with the adjudicative phase, in which a family court determines whether it may exercise jurisdiction over a minor child. The jurisdiction of a family court in termination proceedings is solely derived from statutes and the constitution. *In re S R*, 229 Mich App 310, 313; 581 NW2d 291 (1998), citing *In re Toler*, 193 Mich App 474, 476; 484 NW2d 672 (1992). For a trial court to properly exercise jurisdiction, it must first determine that a statutory basis for jurisdiction exists. *In re PAP*, 247 Mich App 148, 152-153; 640 NW2d 880 (2001). The content of the petition seeking the court's intervention, following a probable cause hearing, establishes the valid exercise of jurisdiction. *In re Hatcher*, 443 Mich 426, 437-438; 505 NW2d 834 (1993). Jurisdiction is to be established by a preponderance of the evidence. *In re BZ*, 264 Mich App 286, 295; 690 NW2d 505 (2004). "We review the trial court's decision to exercise jurisdiction for clear error in light of the court's findings of fact." *Id.*

The trial court assumed jurisdiction over the minor child in accordance with MCL 712A.2(b)(1) and (2). Specifically, MCL 712A.2 provides, in relevant part:

The court has the following authority and jurisdiction:

* * *

> (b) Jurisdiction in proceedings concerning a juvenile under 18 years of age found within the county:
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> (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.
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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.

Before addressing the trial court's determination, there exist several uncontested factual predicates, which are important to provide a context for the trial court's reasoning and the evidence presented. First, respondent and the child's biological father were never married. The minor child was approximately two to two and one-half years of age when most of the events transpired. Second, respondent was not supportive of the biological father obtaining parenting time with the minor child, which was ordered through the Friend of the Court. After the father obtained unsupervised, overnight parenting time with the minor child, respondent began presenting the minor child to various physicians due to her observation, and the documented existence, of redness and swelling in the child's genital or anal areas following her return from parenting time. Third, the child was known beforehand to have extremely sensitive skin and had been diagnosed with urticaria.[1]

The trial court asserted jurisdiction over the minor child in accordance with MCL 712A.2(b)(1) premised on respondent's procurement of frequent and repetitive physical/genital examinations of the minor child by medical personnel within approximately a nine-month time span, for suspected sexual abuse. The trial court assumed jurisdiction, primarily based on its

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[1] The American Academy of Dermatology (AAD) defines urticaria or "hives" as: "[L]ocalized, pale, itchy, pink wheals (swellings) that can burn or sting. They may occur singularly or in groups on any part of the skin; they are part of an allergic reaction and are very common . . . . Most episodes of hives disappear quickly in a few days to a few weeks. Hives can vary in size and can form as small as a pencil eraser to as large as a dinner plate, and may join to form even larger swellings . . . . Allergic reactions, chemicals in foods, or medications may cause hives; sometimes it is impossible to find out the cause. When hives form around the eyes, lips, or genitals, the tissue may swell excessively. Although frightening, the swelling usually goes away in less than 24 hours. Severe cases of hives may cause difficulty in breathing or swallowing and emergency room care is required."
<http://www.aad.org/public/publications/pamphlets/skin_urticaria.html> (accessed January 26, 2010).

determination that respondent was "doctor shopping" and had subjected the minor child to 11 vaginal exams in an effort to preclude or interfere with the father's parenting time and relationship with the minor child. Our review of the lower court record confirms the completion of 11 physical exams involving the child spanning from February 11, 2008 through October 3, 2008. Of these examinations, two were initiated at the behest of DHS and should not be attributed or held against respondent. Of the remaining 9 examinations, four were with the child's pediatrician or office and occurred the day immediately following an urgent care or emergency room visit in accordance with the discharge instructions provided to respondent. Of these remaining five examinations, the February 21, 2008 report denoted a clinical impression of "alleged sexual abuse (very suspicious)." Additionally, the examining physician diagnosed the child to have the flu and contacted protective services.[2] At the examination on March 23, 2008, the physician noted, "some satellite lesions, and along the left side of the labia minora fold into the majora up by the clitoral hood." The physician "explained to mom this redness *can be* from a diaper dermatitis if she had not been changed much over the weekend or it could even be from yeast infection with satellite lesions." (Emphasis added.) It was indicated that the child was not in distress and "tolerated well" the examination. On March 4, 2008, respondent brought the child to the emergency room due to her observation of the child being emotionally distressed during a diaper change and some redness in the genital area. While the physician did not find any indications of sexual abuse, staff was directed to complete a reporting form for submission and contacted child protective services by telephone. Notably, on September 21, 2008, when the child was again seen in an emergency room, the treating physician noted some bruising on the child's leg along with genital swelling and redness and indicated "suspect possible sexual abuse." Contrary to the implications made by the trial court, it appears that the majority of the examinations conducted were only external examinations and not physically intrusive.

In assuming jurisdiction, the trial court relied on statements by Dr. Steven Guertin, who reviewed the medical records but never examined the minor child. Citing Dr. Guertin, the trial court opined that respondent was invested in proving that the child is a victim of sexual abuse "so the mother likely will implant in her daughter's psyche the belief that her father is evil in order to support her own distorted sense of reality, which she apparently has come to believe herself in the face of a dearth of scientific support." Specifically, the trial court stated, in relevant part:

> The mother's search for a doctor to support her in her quest occurred even in the face of multiple medical personnel's findings that did not support her pursuit of an irrational belief that [the child] had been sexually abused.
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> No criminal prosecutions were undertaken, even though there were three requests for the same that were initiated and fully investigated by Michigan State Police, as outlined by Detective Kill in his testimony.
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> No CPS petitions were filed with the court to pursue a child protection case for abuse of the child by [the father]. And while that's not the end-all,

[2] Notably the child's own pediatrician assisted with this examination.

> obviously this consistent pattern of visits and then examinations with no support for those claims by the mother supports the fact that MSP and CPS did not pursue action against [the father] or to protect [the child] for some belief by the mother.
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> While referrals were made to Protective Services by some of the mandated reporters who [the child] saw, that did not necessarily evidence a belief that the child had been abused, but merely an effort to comply with their responsibilities under the child protection law. What is more, those referrals were often made following an initial exam at a medical facility following the mother's contact with a new doctor as she continued, what I characterize, as her mission of doctor shopping.

We find the trial court mischaracterized or misconstrued some of the evidence relied on in reaching its decision to assume jurisdiction over this child. First, the medical records denote that the child did experience, at a minimum, redness and swelling in the vaginal or anal area at each examination.[3] Given the child's diagnosed dermatological condition of urticaria and the actual medical records, it cannot be disputed that respondent's presentation of the child for medical treatment had a relationship to the presence of certain symptoms. However, it is the origin or attribution of cause of these physical symptoms, which were interpreted or diagnosed differently by different physicians, that is in dispute. At least two treating professionals indicated a suspicion of abuse, and it was the medical care providers who contacted protective services and not respondent. The trial court appears to hold respondent to a higher standard of knowledge or ability to discern the accuracy of a diagnosis than the medical professionals providing the diagnosis. Whether respondent was pleased with the fact that these reports resulted in the temporary suspension of the father's parenting time with the child we cannot speculate. However, we do recognize that respondent is in somewhat of an untenable position since her failure to report her suspicions could also expose her to assertions and/or scrutiny for neglect by the very agencies and professionals that are now criticizing her behavior.

In addition, it is important to note that none of the treating physicians actually denied the possibility of abuse; rather they merely failed to substantiate. It was a physician who opined that the child had sustained a "penetrating" injury, not respondent. Based on the nuances of the different medical terminology used within the various opinions rendered, it seems unreasonable to hold respondent to the high standard of knowledge and comprehension required by the trial court. This is not to suggest that we find that abuse occurred, merely that the findings of the medical care providers could be misunderstood or sufficiently confusing to spur respondent to seek a more definitive finding or reassurance. To an extent, Dr. Elizabeth Simms, who the trial court cited as authoritative, recognized and discussed this conundrum. Specifically, Dr. Simms testified, in relevant part:

[3] Notably, it is documented in the record that on one occasion when the child's father observed redness and swelling in the area while changing the child's diaper that he became extremely upset and concerned.

> Dr. Gushurst did not say that in her medical records. Dr. Gushurst in this very first evaluation stated that the redness is a non-specific finding. She did not say that redness means that the child could not have been abused and that parents have to be vigilant and concerned.
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> What is concerning is that the patient's mother continued to believe that just redness, not sexualized behaviors or not any reports of any kind of bleeding or any other kinds of trauma marks, but the simple redness continued to cause mother to be concerned that this child was sexually abused because of redness, which is a non-specific finding.
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> * * *
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> On the records that I reviewed there was no finding of penetrating injury that had been alleged. And that's what Dr. Gushurst had been asked to see the child about, because of a previous concern the last time about a penetrating injury to this child's genital area. There was no sign or symptom of penetrating sexual trauma . . . and whether or not this child may or may not have been sexually abused in any way, I cannot make that finding . . . . I can say that redness, in and of itself, is not specific to sexual abuse. But sexual abuse can occur – can occur in touching, non-touching offenses. It can – it can involve licking, kissing, touching, that doesn't leave any marks whatsoever . . . . so a definitive finding that this child . . . has not been sexually abused, I have never made that statement.

While the trial court determined that the number of genital exams performed "were mentally and physically abusive," Dr. Simms indicated:

> It was my concern that we *were approaching a form of medical abuse* with the persistence of the patient's mother that – in examining this child an excessive number of times, that there was definite concern about that. [Emphasis added.]

However, while respondent is criticized for not realizing or understanding that redness and swelling alone did not comprise a definitive demonstration that abuse had occurred, there is no indication in the record that respondent was educated regarding the various signs or symptoms of sexual abuse or that the mere existence of redness and swelling in the child's genital area was deemed a "non-specific" finding and what that term meant. Further, there was no evidence in the record to show that the minor child had actually suffered or incurred emotional trauma from the repetitive examinations. Rather it was assumed that the child would, in the future, be emotionally injured should these examinations continue at their current level of frequency.

The trial court also chastised and rebuked respondent for "doctor shopping." This was based on her taking the child to several different urgent care or emergency rooms in order to allegedly procure the answer or diagnosis she sought to obtain. It was then speculated, by several consulting professionals, that the reason for this behavior was to preclude the father's parenting time. The problem that arises is that this determination comprised mere speculation. We do not doubt that respondent was, at best, reluctant to have the father involved in this child's life. However, we do not find it appropriate to speculate or attribute a motivation for behavior that cannot be substantiated through actual evidence. There was no evidence that when

respondent was ordered by the Friend of the Court to allow the child to participate in parenting time with the father that she, in any way, prohibited or interfered with that schedule directly. In addition, we find it difficult to support the trial court's premise of doctor shopping since 7 of the 9 examinations (excluding the two evaluations mandated by DHS) were done through the health care provider of the minor child or the urgent care that is located in physical proximity to this provider. It was the physicians at the local urgent care that specifically opined on the possible existence of sexual abuse. Had respondent wanted mere verification, she could have continued with the local care providers. She did not have to venture any further or seek an alternative opinion if that was her motivation.

We recognize that there was testimony suggesting respondent made disparaging comments and allegedly "coached" the child to make negative statements regarding the father. However, there was no definitive proof of coaching by respondent and alternative explanations by different professionals for the child's statements were posited. In addition, there was evidence that the father also made disparaging or negative comments concerning respondent while the minor child was present or even while being held in his arms.[4] Given the history between these individuals we do not doubt that animosity existed, which could come to negatively impact this child. Unfortunately, similar to many family law cases involving divorce, these individuals need to come to terms with their situation and place the child's interests above their own personal grievances. These parties were already under the auspices of the Friend of the Court, which originally ordered the father to have parenting time. It would have been a more efficacious and expedient use of judicial and other resources to have referred the parents back to Friend of the Court for family counseling to assist in their adjustment to parenting time and to educate respondent on the signs and symptoms of sexual abuse and instruct the father on proper hygiene and physical care of the child, given her diagnosis of urticaria, in order to avoid future misinterpretation of her physical condition upon return from overnight or protracted periods of parenting. Certainly, if every divorced family that faced the same issues underlying this case were brought before the family court for jurisdictional purposes it would be both overwhelming and a misuse of that court's role and authority. While we do not intend this opinion to be interpreted as necessarily condoning respondent's actions, we note that the "juvenile code is intended to protect child from unfit homes rather than to punish their parents." *In re Brock*, 442 Mich 101, 108; 499 NW2d 752 (1993). In this instance, it is a disservice to the minor child to preclude her from a relationship with either parent when the potential to educate and counsel the parents remains a viable alternative.

Finally, the trial court also found jurisdiction appropriate pursuant to MCL 712A.2(b)(2). It was asserted that respondent had "infantilized" the child by allowing her to sleep in a crib, maintain a "security" blanket, use a bottle and continuing to use diapers. The trial court found that this did not comprise evidence of "abuse by the mother." Rather, the trial court viewed these matters "as an effort to control the child and to keep the child really to herself." We would concur with the trial court's finding that the record does not reveal any abuse by respondent

[4] We note that the father was held in contempt of court for violating a court order pertaining to taking the minor child out of state, which interfered and prevented scheduled parenting time for respondent with the minor child on the child's birthday.

under this portion of the statute. The cited "issues" are really matters of parental preference and should not subject respondent, or any other parent, to the jurisdiction of the family court. In Michigan, it is routinely recognized that parents are entitled and have the right to manage their children without state interference, absent the existence of compelling circumstances that threaten a child's safety and welfare. *Ryan v Ryan*, 260 Mich App 315, 333; 677 NW2d 899 (2004). Before concerns of sexual abuse arose, respondent had not come to the attention of DHS. All reports indicate the child was happy, healthy, had well-developed verbal skills, and demonstrated fine and gross motor skills commensurate with her chronological age. As such, these allegations were insufficient to render jurisdiction to the family court.

On appeal, respondent also asserts error by the trial court in failing to grant her belated jury request. Based on our resolution of the jurisdictional issue, we need not address this issue.

Reversed.

/s/ Michael J. Talbot
/s/ William C. Whitbeck