# STATE OF MICHIGAN

# COURT OF APPEALS

*In re* MURPHY, Minors.

UNPUBLISHED
March 8, 2016

Nos. 329408 and 329498
Grand Traverse Circuit Court
Family Division
LC No. 15-003941-NA

Before: METER, P.J., and BOONSTRA and RIORDAN, JJ.

PER CURIAM.

Respondent-mother and respondent-father separately appealed as of right following an adjudication jury trial, after which the trial court took jurisdiction over their two minor children. Their cases have been consolidated on appeal.[1] We affirm.

DOCKET NO. 329408

Respondent-father contends that the trial court clearly erred by taking jurisdiction over the children with respect to him based on abandonment because the evidence did not support the jury's finding of abandonment. We review a trial court's decision to exercise jurisdiction for clear error. *In re BZ*, 264 Mich App 286, 295; 690 NW2d 505 (2004). Clear error occurs "if the reviewing court has a definite and firm conviction that a mistake has been committed, giving due regard to the trial court's special opportunity to observe the witnesses." See *id*. at 296-297.

The trial court must find that a statutory basis for jurisdiction exists in order to exercise jurisdiction over a child in protective proceedings. *In re PAP*, 247 Mich App 148, 152-153; 640 NW2d 880 (2001). "To initiate a child protective proceeding, the state must file in the family division of the circuit court a petition containing facts that constitute an offense against the child under the juvenile code . . . ." *In re Sanders*, 495 Mich 394, 405; 852 NW2d 524 (2014). The respondent parent has the option of admitting or pleading no contest to the allegations in the petition, or demanding a trial on the issue of jurisdiction and contesting the merits of the petition. MCR 3.971; MCR 3.972. If the respondent demands a trial, then the respondent is entitled to a

[1] *In re Murphy Minors*, unpublished order of the Court of Appeals, entered October 21, 2015 (Docket Nos. 329408 & 329498).

jury, MCR 3.911(A), and the petitioner has the burden of proving by a preponderance of the evidence at least one of the statutory grounds for jurisdiction, MCR 3.972(C)(1) & (E). Abandonment of the child by the parent is one of the statutory grounds that justify the court's taking jurisdiction over a child. MCL 712A.2(b)(1).

Respondent-father argues that he did not abandon his children because he thought respondent-mother was in a better position to care for them. He asserts that she allowed him only minimal contact with the children and that she moved with the children from Texas to Michigan. He also asserts that she refused monetary support even though he offered. He analogizes the facts of this case to *In re Nelson*, 190 Mich App 237; 475 NW2d 448 (1991), a case also involving alleged abandonment. In that case, the Court reaffirmed that a parent's placement of a child in a relative's home where the child receives adequate care evidences "concern for the child, not neglect or abandonment." *Id.* at 241. The Court held that the respondent's placement of the child in issue with a relative who provided proper care was insufficient evidence to assume jurisdiction, even if the respondent did not provide monetary support. *Id*.

While there are similarities between the case now before us and *In re Nelson*, there are important distinctions. In *In re Nelson*, the respondent initially left her child in the care of the child's maternal grandmother for specific job-related reasons, and it was not disputed that the grandmother provided proper care for the child. *Id.* at 238, 241. In the case now before the Court, respondent-father testified that he "started to withdraw" from his involvement in the child protective case in Texas because respondent-mother was "doing good" and had "more of the things to provide for the kids . . . ." A Texas caseworker testified that respondent-father "faded into the woodwork and we never heard from him again." She also testified that she attempted to locate him and even spoke to his mother, but even his mother did not know respondent-father's whereabouts. Respondent-father's withdrawing from child protective proceedings and receding into the background to the extent that service providers could not locate him simply ceded responsibility for the children to respondent-mother. By contrast, the respondent in *In re Nelson* purposefully left her child, at least initially, with the respondent's mother so that the "respondent could attend out of town training courses for employment with the State of Michigan." *Id*. at 238.

Additionally, in *In re Nelson*, there was "no dispute that [the] respondent and [her mother] remained in contact and discussed respondent's circumstances and stability in reference to her ability to regain custody of the child." By contrast, respondent-father here admitted that the last time he physically saw the children was in 2011 and that the last time he talked with the children was in 2013, and there is no indication that respondent-father ever intended or attempted to regain custody of the children or discussed the possibility of doing so. Cf. *id*. (where discussions about the respondent's ability to regain custody did take place). He testified that he did not attempt to obtain custody or parenting time, stating, "I don't know all my rights and stuff, and procedures and things of that nature." Respondent-father attributes his lack of communication with the children to respondent-mother's desire not to have contact with him. Even if this is so, he never attempted to obtain parenting time or contact with his children through court proceedings.

Respondent-father also testified that he was happy that respondent-mother was "being monitored by various people" to keep her from abusing pills and drinking. Withdrawing from active participation while respondent-mother needed to be "monitored" undermines the assertion that he was placing the children in a situation where they would receive adequate care. At the very least, he should have maintained consistent contact with the appropriate agency or agencies to make sure that the circumstances of the children's placement with respondent-mother remained stable.

In fact, respondent-father admitted that he knew that the children were later removed from respondent-mother's care. Although the children were later returned, the stability of the children's home environment could no longer be assumed to be stable once they were removed. This calls into question respondent-father's motivation and raises a reasonable question regarding why he did not attempt to obtain custody.

Finally, respondent-father contends that he did not abandon the children because he was abiding by a Texas court order that prevented him from having visitation with the children. However, this argument is undercut by respondent-father's testimony at trial that he was not aware of the court order.

In sum, the circumstances of the case at hand supported the conclusion that respondent-father abandoned the children.

DOCKET NO. 329498

Respondent-mother contends that the trial court committed instructional error when it read the second amended petition to the jury. We review claims of instructional error de novo. *Ward v Consol R Corp*, 472 Mich 77, 83; 693 NW2d 366 (2005). "Instructional error warrants reversal if it resulted in such unfair prejudice to the complaining party that the failure to vacate the jury verdict would be inconsistent with substantial justice." *Id*. at 84 (citations and quotation marks omitted).

In the context of child protective proceedings, a trial is defined, in part, as "the fact-finding adjudication of an authorized petition to determine if the minor comes within the jurisdiction of the court." MCR 3.903(A)(27). As part of the preliminary proceedings, "[t]he court shall read the allegations in the petition, unless waived." MCR 3.972(B)(2). See also M Civ JI 97.06.[2] In the case now before us, the trial court complied with MCR 3.972(B)(2) and

[2] The model instruction provides as follows (asterisk omitted):

> We are here today on a petition filed by [ _____ ], a Children's Protective Services worker for the [ _____ ] County Family Independence Agency, alleging that the Court has jurisdiction over [ names of children ], who [ was/were ] born on [ _____ ], and [ is/are ] now ____ years of age. Under Michigan law, the Family Division of the Circuit Court has jurisdiction in proceedings concerning any child under 18 years of age found within the County:

read the allegations in the petition over the objection of respondent-mother. The trial court did not commit instructional error by reading the factual allegations in accordance with the court rules.[3]

Respondent-mother also contends that the trial court erred by denying three motions in limine seeking to exclude several of petitioner's proposed trial exhibits. In these motions, respondent-mother sought to exclude exhibits relating to her criminal record in Michigan, child protective services reports from Grand Traverse County, and exhibits relating to her out-of-state criminal and child protective services reports and records. We review for an abuse of discretion a trial court's decision to grant or deny a motion in limine. *People v Vansickle*, 303 Mich App 111, 117; 842 NW2d 289 (2013). "An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes." *Zaremba Equip Inc v Harco Nat Ins Co*, 302 Mich App 7, 21; 837 NW2d 686 (2013).

The rules of evidence apply at an adjudication. MCR 3.972(C)(1). To be admissible, evidence must be relevant. MRE 402. " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. Relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." MRE 403.

The vast majority of the exhibits identified by respondent-mother in her brief on appeal were never marked or received at trial. Respondent's argument concerning these exhibits indicates only that they were part of the petition that the trial court read to the jury. This is an allegation of instructional error, which we have already rejected.

The exhibits that were admitted that respondent-mother is challenging are plaintiff's exhibits 5B-5D and 6B-6C. On appeal, respondent-mother's sole argument in relation to these exhibits is that they were more prejudicial than probative under MRE 403.

Exhibits 5B and 5C concern respondent-mother's having obtained prescription drugs by fraud from a Traverse City pharmacy. Exhibit 5B is a certified copy of a felony complaint, testified about by the officer investigating the charges. The officer indicated that his investigation began in June 2014. Exhibit 5C is the judgment of sentence from the case, which indicates that respondent-mother pleaded guilty to one count of "possession of cocaine under 25 grams." Evidence of respondent-mother's having illegally obtained drugs while the children in

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> (read pertinent statutory allegations from MCL 712A.2(b)(1),(2),(3),(4) and/or (5)).
>
> The allegations which the petitioner will attempt to prove are as follows: (read factual allegations in petition.)

[3] We further note that the trial court instructed the jury that "the big, long petition I read to you in the beginning, that's not evidence."

issue were under her care and custody was relevant to whether jurisdiction was appropriate under MCL 712A.2(b)(1).[4]

Exhibit 5D is a certified copy of a show-cause order, which "reports that there was a violation of bond conditions. Defendant tested positive for a PBT on August 21st, 2014, .064 and .064." This evidence not only spoke to the issue of illegal drug use, but also to respondent-mother's ability to comply with court orders. Both were relevant with respect to MCL 712A.2(b)(1).

Exhibit 6B is a criminal complaint from March 2015. It indicates that respondent-mother was charged with "[a]ttempted police officer assaulting, resisting, obstructing, attempted interfering with electronic communications and two counts of domestic violence."[5] Exhibit 6C was identified as "a case history print," which identified the number of counts she was facing. These charges occurred shortly before the filing of the original petition. Child Protective Services worker Brittany Zawislak testified that after speaking to respondent-mother in jail after the issuance of the complaint, "we held something called a Family Team Meeting to make a game plan for what was going to happen with [respondent-mother] and her daughters." Because of respondent-mother's behavior during that meeting, Zawislak filed a petition asking the court to assume jurisdiction.

Exhibits 6B and 6C were not only relevant with regard to respondent-mother's ability to care for the children, but they also provided context for the filing of the petition. As such, they were relevant to facts of consequence. Also, while all five of these exhibits were prejudicial, they were not *unfairly* so. Indeed, it was the relevance they had to the proceedings that rendered them prejudicial. No error has been shown.

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[4] The statute provides that the court has:

> (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. . . .

[5] The jury heard that respondent-mother pleaded to "[a]ttempted interference with electronic communication and disorderly person drunk" and that the other charges were dismissed.

Affirmed.

/s/ Patrick M. Meter
/s/ Michael J. Riordan
/s/ Mark T. Boonstra