

STATE OF MICHIGAN
COURT OF APPEALS

UNPUBLISHED
October 23, 2012

In the Matter of McGee/MacArthur, Minors.

No. 305751
Alger Circuit Court
Family Division
LC No. 2011-004388-NA

Before: MURPHY, C.J., and SAWYER and HOEKSTRA, JJ.

PER CURIAM.

In this child protective proceedings case, respondents appeal as of right the trial court's assertion of jurisdiction over their four minor children, three of whom are Indian children within the meaning of the Indian Child Welfare Act (ICWA), 25 USC 1901, *et seq.* We affirm.

Respondents first argue that the trial court clearly erred in finding by a preponderance of the evidence that there was a statutory basis to exercise jurisdiction. "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). To properly exercise jurisdiction, the trial court must find that a statutory basis for jurisdiction is established by a preponderance of the evidence. *Id.*; MCR 3.972(C)(1).

Here, the trial court concluded that it had jurisdiction under MCL 712A.2(b)(1) or (2), which provide for the court to take jurisdiction over minors:

(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 property custody or guardianship. . . .

(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.

At the conclusion of the three-day trial, the trial court rendered a thorough and detailed ruling. Having reviewed the record, we find no error.

The trial court examined each of the allegations in turn, even concluding that several of them did not rise to the level of warranting the exercise of jurisdiction. Regarding the issues of prenatal care and marijuana use, it noted that although respondent-mother was under no obligation to report her pregnancy, she was certainly aware that she was pregnant and her failure to obtain prenatal care was neglectful to JM. In addition, her continued marijuana use while pregnant, even after previously giving birth to a child with multiple problems because of marijuana use during that pregnancy, and her prior involvement with the court because of substance abuse, showed a lack of understanding that necessitated court involvement and oversight. She conceded the positive marijuana test and admitted her marijuana use to multiple witnesses, all of whom testified about it. The trial court found the testimony of the paternal aunt and paternal great-aunt more credible than respondent-mother's testimony and indicated that respondent-mother's actions with respect to prenatal care were insufficient even with the level of knowledge she claimed to have had about being pregnant. Thus, the record contained a preponderance of evidence that respondent-mother was a parent who, when able to do so, neglected or refused to provide proper care or necessary medical care and subjected a child to a substantial risk of harm to his mental well-being. See MCL 712A.2(b)(1).

The trial court also carefully considered and weighed the evidence involving the allegation that respondent-father hit BM on the head with his knuckles (referred to as the "popcorn incident"). The court acknowledged everyone's testimony, including the paternal aunt's admission that she had exaggerated the incident when first reporting it, but also noted that the paternal aunt still testified that respondent-father was describing the incident as far more trivial than it was. She continued to believe that respondent-father had used excessive force. The trial court also took note of the child's "hysterical" response to being struck. Again, given the weight the court ascribed to the witnesses' testimony, the record supports the trial court's conclusion, by a preponderance of the evidence, that BM was subject to substantial risk of harm to his mental well-being under MCL 712A.2(b)(1), and that his home was unfit by reason of cruelty on the part of respondent-father under MCL 712A.2(b)(2). Further, considering that only two months had elapsed since respondents were last under the jurisdiction of the court, and the backsliding was fairly significant, the exercise of jurisdiction in this case seems prudent. There was no error, clear or otherwise.

Respondents next argue that the trial court erred in failing to timely rule on whether petitioner's expert witness was sufficiently qualified. We review de novo issues involving application of the ICWA,¹ *Empson-Laviolette v Crago*, 280 Mich App 620, 624; 760 NW2d 793 (2008), and issues involving the interpretation of court rules, *Lignons v Crittenton Hosp*, 490 Mich 61, 70; 803 NW2d 271 (2011).

¹ Although respondents generally reference the ICWA, they cite no specific provisions and rely solely on Michigan court rules related to Indian children. Accordingly, we shall only address this issue with respect to the court rules argued by respondents.

As an initial matter, respondents' reliance on MCR 3.980(C)(3) as the basis for their claim is misplaced because MCR 3.980 was deleted effective May 1, 2010, and the orders appealed were issued in 2011. The applicable court rule is MCR 3.967.

The emergency removal took place pursuant to MCR 3.963(B) on April 9, 2011. Respondents concede that the removal hearing began timely, see MCR 3.967(A), but contend that the hearing was never completed because the referee disqualified the petitioner's proposed expert witness and the trial court failed to rule on this issue at the bench trial.

The evidence necessary for removal of an Indian child from a parent is set forth in MCR 3.967(D), which provides, in relevant part as follows:

An Indian child may be removed from a parent or Indian custodian, *or, for an Indian child already taken into protective custody pursuant to MCR 3.963 or MCR 3.974(B), remain removed* from a parent or Indian custodian *pending further proceedings*, only upon clear and convincing evidence, including the testimony of at least one expert witness who has knowledge about the child-rearing practices of the Indian child's tribe [Emphasis added.]

At the April 25, 2011, removal hearing, petitioner attempted to offer testimony from Kimberly Swanberg to satisfy the expert witness requirement pursuant to MCR 3.967(D). The referee ultimately determined that it would not qualify Swanberg as an expert. Petitioner then requested to have the trial court review the determination that the expert was unqualified, and the referee agreed to refer the matter over to the trial court. However, the referee explicitly recognized that the court rule required expert testimony in order for the State to continue the removal of the Indian children and, accordingly, returned all of the children back to the care and custody of respondents.² We find no error. MCR 3.967(D) required expert testimony for the children already taken into custody pursuant to MCR 3.963(B) to "remain removed . . . pending further proceedings." The referee's determination that the witness was unqualified resulted in the children being returned to the care and custody of respondents. There was no violation of MCR 3.967.

Further, we reject respondents' assertion that MCR 3.697 is jurisdictional. Jurisdiction over minors is established under MCL 712A.2. MCR 3.967 relates only to the requirements necessary to remove or retain children already removed. Nothing in the trial court's failure to make a determination about whether Swanberg was a qualified witness affected the trial court's jurisdiction in any way.

Finally, respondents argue that the trial court erred by admitting hearsay testimony regarding alleged statements made by a three-year-old because it failed to hold a hearing prior to trial as required by MCR 3.972(C)(2)(a) and because the testimony did not have sufficient indicia of reliability. Although respondents have preserved their appeal as to whether the trial

² Incidentally, we note that because BM is not an Indian child, the trial court could have continued his removal regardless of whether there was expert witness testimony.

court erred in determining that there were sufficient indicia of reliability to admit the testimony, their contention regarding the timing of the hearing is unpreserved. The parties all agreed to wait to hold the hearing regarding the admissibility of the testimony on the first day of trial. Counsel for both respondents indicated that they thought the issue would be addressed at the beginning of trial rather than just before the admission of the testimony. However, the record reveals that there were two separate evidentiary issues related to the admission of testimony and, at the conclusion of the trial court's ruling as to a privilege issue, the trial court asked if there were any other preliminary matters that needed to be addressed and counsel for both respondents stated that they had none. Thus, although the trial court had not made any ruling on the admissibility of the testimony of statements made by the three-year-old, no one objected, rendering the issue unpreserved. *Veltman v Detroit Edison Co*, 261 Mich App 685, 690; 683 NW2d 707 (2004).

For preserved issues, this Court reviews a trial court's decision regarding the admission of evidence for an abuse of discretion, although preliminary questions of law that impact the decision to admit evidence are reviewed de novo. *Barnett v Hidalgo*, 478 Mich 151, 158-159; 732 NW2d 472 (2007). Unpreserved issues are reviewed for plain error affecting substantial rights. *Veltman*, 261 Mich App at 690.

This issue involves the requirements of MCR 3.972(C)(2), which provides:

Any statement made by a child under 10 years of age . . . regarding an act of child abuse [or] child neglect . . . as defined in MCL 722.622(f) [or] (j) . . . performed with or on the child by another person may be admitted into evidence through the testimony of a person who heard the child make the statement as provided in this subrule.

(a) A statement describing such conduct may be admitted regardless of whether the child is available to testify or not, and is substantive evidence of the act or omission if the court has found, in a hearing held before trial, that the circumstances surrounding the giving of the statement provide adequate indicia of trustworthiness. This statement may be received by the court in lieu of or in addition to the child's testimony.

* * *

(c) If the child has not testified, a statement denying such conduct may be admitted to impeach a statement admitted under subrule (2)(a) if the court has found, in a hearing held before trial, that the circumstances surrounding the giving of the statement denying the conduct provide adequate indicia of trustworthiness.

Assuming, without deciding, that it was plain error for the trial court to wait to hold the hearing on admissibility until just before the testimony was offered in light of the language of the court rule requiring the decision to occur "before trial," the error cannot be deemed to have affected respondents' substantial rights if there were sufficient indicia of trustworthiness in the record, thereby making the evidence admissible.

Respondents argued explicitly at trial and inferentially argue on appeal that the testimony of the forensic interviewer was insufficient to determine whether the statements were reliable

and that once their testimony regarding their child's propensity to tell lies was considered, the evidence was unreliable and should not have been admitted. Generally, indications of trustworthiness revolve around "the nature and circumstances surrounding the hearsay statements." *In re Brimer*, 191 Mich App 401, 405; 478 NW2d 689 (1991); see also *In re Archer*, 277 Mich App 71, 82; 744 NW2d 1 (2007) ("The reliability of a statement depends on the totality of the circumstances surrounding the making of the statement."). "Circumstances indicating the reliability of a hearsay statement may include spontaneity, consistent repetition, the mental state of the declarant, use of terminology unexpected by a child of a similar age, and lack of motive to fabricate." *Id.*

Here, the forensic interviewer who interviewed BM had received training in conducting interviews of abused children and used it "every time" she interviewed a child in the more than two years since her training, including in the interview of BM. The interview was "pretty much" the first thing she did upon arrival. It was an isolated one-on-one interview in a state vehicle, just sitting in the car in the driveway, which lasted about 15 or 20 minutes, after which she walked the child back to the house. She asked generally how the child got along with respondent-father and did not ask any leading questions. The child was comfortable with her, in part because she had spoken with him previously (roughly once a month as the foster care worker in the prior case before it was discharged). She described BM as being "fairly talkative" with "pretty good" communication skills. When asked whether three years of age was too young to give reliable testimony, the interviewer testified that there is no specific age cut-off for children's testimony to be considered reliable. However, according to the interviewer, children do have to be able to demonstrate that they know the difference between a truth and a lie, and BM was able to demonstrate to her satisfaction that he knew the difference. She did not believe that the child had any reason to fabricate.

In light of the actual testimony provided, the record does appear to contain sufficient indicia of trustworthiness—the context in which the statement was given, the use of the forensic interviewing technique, the lack of any specific suggestive questions regarding whether the child was hit or who hit him, the lack of a reason to fabricate—to permit the admission of the statement. We hold that the trial court did not abuse its discretion in admitting the evidence and, therefore, also hold that, because the testimony was admissible, the failure to hold the hearing before trial did not affect respondents' substantial rights and reversal is not required. Moreover, any assumed error was harmless, given that the trial court's decision to exercise jurisdiction was based chiefly on the abusive "popcorn incident" involving respondent-father as testified to by the paternal aunt, respondent-mother's prenatal substance abuse, and respondents' history of court intervention; the actions by respondent-father alluded to in BM's statements did not form the basis for the court's ruling.

Affirmed.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Joel P. Hoekstra