STATE OF MICHIGAN

COURT OF APPEALS

In Re KEIVON and KARVELL POWELL, Minors.

UNPUBLISHED
December 20, 1996

DEPARTMENT OF SOCIAL SERVICES,

Petitioner-Appellee,

v

No. 190580
Genesee County
LC No. 84-066682-NA

LEONA POWELL,

Respondent-Appellant.

Before: Doctoroff, C.J., and Corrigan and R.J. Danhof,* JJ.

PER CURIAM.

Respondent appeals as of right from a probate court order adjudicating her children temporary wards of the probate court pursuant to MCL 712A.2(b); MSA 27.3178(598.2)(b). We affirm.

Respondent argues that the probate court erred in assuming jurisdiction over her children, thirteen-year-old twins Keivon and Karvell Powell, pursuant to MCL 712A.2(b); MSA 27.3178(598.2)(b). Respondent asserts that the probate court clearly erred in finding that she subjected her children to cruelty, neglected her children by failing to provide them with adequate food, and used illegal narcotics.

In order for the probate court to properly exercise jurisdiction over a child in a child protective proceeding, the petitioner must demonstrate by a preponderance of the evidence that the child comes within the statutory requirements, here MCL 712A.2(b)(1) and (2); MSA 27.3178(598.2)(b)(1) and (2). *In re Brock*, 442 Mich 101, 108 n 12; 499 NW2d 752 (1993). The probate court's findings of fact are reviewed under the clearly erroneous standard. *In re McIntyre*, 192 Mich App 47, 50; 480 NW2d 293 (1991). To be clearly erroneous, although there is evidence to support it, a finding must leave this Court with a definite and firm conviction that a mistake has been made. *In re Miller*, 182

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

Mich App 70, 81; 451 NW2d 576 (1990). When applying the clearly erroneous standard, MCR 2.613(C) requires that "regard is to be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." *In re Miller*, *supra*.

MCL 712A.2(b)(1); MSA 27.3178(598.2)(b)(1) provides, in pertinent part, that the probate court may exercise jurisdiction over children

> [w]hose parent . . . 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 . . . or who is without proper custody or guardianship.

Additionally, MCL 712A.2(b)(2); MSA 27.3178(598.2)(b)(2) provides, in pertinent part, that the probate court may exercise jurisdiction over children

> [w]hose home or environment, by reason of neglect, cruelty, drunkenness, criminality, or depravity on the part of a parent . . . is an unfit place for the child to live in.

In this case, the probate court assumed jurisdiction over Keivon and Karvell, under both § 2(b)(1) and § 2(b)(2), on the basis of its findings that respondent physically abused her children, used illegal narcotics, and failed to provide her children with food on several occasions.

Respondent first argues that the probate court clearly erred in finding that she subjected her children to cruelty based on the fact that she beat them with a telephone cord until they bled. We disagree. While respondent is correct in her assertion that very little, if any, case law interprets the term "cruelty" as used in MCL 712A.2(b)(2); MSA 27.3178(598.2)(b)(2), statutory language should be accorded its plain and ordinary meaning, taking into consideration the context in which it is used. MCL 8.3a; MSA 2.212(1); *In re Public Service Commission's Determination Regarding Coin-Operated Telephones*, 204 Mich App 350, 353; 514 NW2d 775 (1994). Moreover, statutes should be construed to avoid absurd results. *Gardner v Van Buren Public Schools*, 445 Mich 23, 44; 517 NW2d 1 (1994).

In the context of the Probate Code and its concern for the child's well-being, it would be absurd to not consider child abuse, which would include, on a common sense level, beating children with a telephone cord until they bleed, to be "cruelty" within the meaning of MCL 712A.2(b)(2); MSA 27.3178(598.2)(b)(2). Moreover, we disagree with respondent's claim that we must examine each of the two beating episodes separately, in order to determine if each event rises to the level of "cruelty" under the statute. First, respondent's argument would have little impact on the outcome of this case, since each separate beating with a telephone cord could, standing alone, be considered cruel. Second, respondent's argument would lead to absurd results under the statute. In respondent's view, an allegation of cruelty based on the purposeful starving of a child could be analyzed only in terms of each individual meal that the parent denied the child, and not as an entire, "cruel" process of abuse.[1] Since

the evidence established that respondent whipped her children with a telephone cord until they bled on two separate occasions in August 1995, we are not convinced that a mistake was made when the probate court found that respondent subjected her children to cruelty.

Respondent also argues that the probate court clearly erred in finding that she failed to provide her children with adequate food and that she used illegal narcotics. Although the evidence on each of these issues was not as strong, we have already concluded that the probate court did not clearly err in finding that respondent subjected her children to cruelty within the meaning of MCL 712A.2(b)(2); MSA 27.3178(598.2)(b)(2). This was a sufficient basis upon which to exercise jurisdiction over respondent's children. Accordingly, we affirm the probate court's order adjudicating respondent's children temporary wards of the probate court.

Next, respondent asserts that the probate court abused its discretion by temporarily placing her children in the custody of her 21-year old daughter, Nadine Powell.[2] We disagree.

If a petition is authorized following a preliminary hearing, MCL 712A.13a(7); MSA 27.3178(598.13a)(7) authorizes the probate court to "order placement of the child with someone other than a parent if the court . . . determines that both of the following conditions exist":

> (a) Custody of the child with a parent, guardian, or custodian presents a substantial risk of harm to the child's life, physical health, or mental well-being and no provision of service or other arrangement except removal of the child is reasonably available to adequately safeguard the child from such risk.
>
> (b) Conditions of custody of the child away from a parent, guardian, or custodian are adequate to safeguard the child's health and welfare.

Although we review the probate court's decision to place respondent's children with her daughter for an abuse of discretion, in the context of its ultimate placement decision, the probate court's findings of fact are reviewed under the clearly erroneous standard. *McIntyre*, *supra*.

In deciding to place respondent's children with Nadine, the probate court adopted the findings contained in the DSS initial service plan, which indicated, in pertinent part, that respondent's children would likely be subjected to continued physical abuse if they remained with respondent and that placement with Nadine was in the best interests of the children's health and welfare. We find ample support in the record for these findings. Although respondent asserts that Nadine is too young and otherwise unsuitable to care for her brothers, evidence showed that respondent had left her children with Nadine for extended periods of time prior to the protective proceedings. Moreover, respondent's own actions belie her complaints concerning the probate court's placement decision. In sum, we are unable to conclude that the probate court's placement decision was an abuse of discretion.

Affirmed.

/s/ Martin M. Doctoroff
/s/ Maura D. Corrigan
/s/ Robert J. Danhof

[1] Respondent cites *People v Loomis*, 161 Mich 651, 656; 126 NW 985 (1910), in support of her proposition that each instance of cruelty must be viewed separately in a child protective proceeding. In *Loomis*, however, the Michigan Supreme Court determined that the prosecutor could not "prove separate and distinct whippings as together constituting the offense" of cruelty to children "under the information and facts of [the] case." *Id.* The Court did not purport to define cruelty in *Loomis*. Indeed, the Court made clear that the offense of cruelty to children could be proven by establishing separate punishments which, when taken together, could be deemed cruel. *Id.*

[2] In relation to this issue, respondent also argues that the probate court failed to make findings on the record in accordance with MCR 5.965(C)(2) and (C)(3) regarding the pretrial placement of her children. We agree with respondent that the probate court failed to make findings of fact on the record regarding the pretrial placement of respondent's children. However, we have recognized the power of the probate court to temporarily place children in foster care upon a filing of a neglect petition and before the adjudication hearing without first conducting an evidentiary hearing where such pretrial placement is necessary to protect the health and welfare of the children and only pending the scheduling of the adjudicative hearing. *In Re Albring*, 160 Mich App 750, 757 (1987). Since the adjudicative hearing was held in this matter and respondent was afforded the opportunity to submit evidence on the subject of placement of her children, whether the trial court erred in failing to comply with the procedural dictates of MCR 5.965(C)(2) is, in reality, a moot issue.