STATE OF MICHIGAN

COURT OF APPEALS

IN RE SOVRAN BROWN and
KRISTIANNA MARTIN, Minors.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

TABITHA LEE MARTIN,

Respondent-Appellant.

UNPUBLISHED
October 6, 1998

No. 207328
Isabella Probate Court
LC No. 97-000142 NA

IN RE JOSEPHINE HARROW, a Minor.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

TABITHA LEE MARTIN,

Respondent-Appellant.

No. 207413
Isabella Probate Court
LC No. 97-000143 NA

Before: White, P.J., and Hood and Gage, JJ.

PER CURIAM.

In these consolidated cases, respondent appeals as of right two orders removing her three minor children from her home, arguing that the probate court did not have jurisdiction over the minors. Pursuant to MCL 712A.2(b)(1), (2); MSA 27.3178(598.2)(b)(1), (2), the Family Independence

Agency (FIA) petitioned the probate court for removal of the minors, alleging eight identical counts of neglect regarding each of the three minor children. A jury found that three of the eight allegations were proven by a preponderance of the evidence, vesting the probate court with jurisdiction over the minors. After a dispositional hearing, the probate court removed the minors from respondent's care. We affirm.

Respondent contends that the probate court did not have valid jurisdiction over the minors because there was insufficient evidence to support the jury's conclusions that three FIA allegations were proven by a preponderance of the evidence. When reviewing a claim based on sufficiency of the evidence in a civil action, this Court examines the evidence in a light most favorable to the nonmoving party, giving the nonmoving party the benefit of every reasonable inference that can be drawn from the evidence. *Price v Long Realty, Inc*, 199 Mich App 461, 472; 502 NW2d 337 (1993).

Probate court jurisdiction in child protective proceedings is derived solely from statutes and the constitution. *In re Toler*, 193 Mich App 474, 476; 484 NW2d 672 (1992). The jurisdictional statute, MCL 712A.2(b)(1), (2); MSA 27.3178(598.2)(b)(1), (2), reads in relevant part:

> The court has the following authority and jurisdiction:
>
> * * *
>
> (b) Jurisdiction in proceedings concerning any 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. As used in this sub-subdivision:
>
> (A) "Education" means learning based on an organized educational program that is appropriate, given the age, intelligence, ability, and any psychological limitations of a juvenile, in the subject areas of reading, spelling, mathematics, science, history, civics, writing, and English grammar.
>
> (B) "Without proper custody or guardianship" does not mean a parent has placed the juvenile with another person who is legally responsible for the care and maintenance of the juvenile and who is able to and does provide the juvenile with proper care and maintenance.
>
> (2) Whose home or environment, by reason of neglect, cruelty, drunkenness, criminality, or depravity on the part of a parent, guardian, or other custodian, is an unfit place for the juvenile to live in.

To establish the probate court's jurisdiction, the trier of fact must determine by a preponderance of the evidence that the child comes within these statutory requirements. *In re Brock*, 442 Mich 101, 108-109; 499 NW2d 752 (1993); MCR 5.972(C)(1).

Respondent argues first that there was insufficient evidence from which the jury could have found by a preponderance that she failed to send Josephine Harrow, her oldest child, to school. Although some of Josephine's absences were excusable, the evidence established that between September 1996 and early March 1997, Josephine had eight and one-half unexcused absences. Testimony by Josephine's second grade teacher and her school's truant officer also established that during this same time period, and despite their several discussions with respondent regarding a tardiness problem and the close proximity (five to six blocks) of respondent's home to the school in which Josephine was enrolled, Josephine had arrived late to school at least forty-five times, thus missing an estimated thirty-six hours of school time. Moreover, respondent's failure to ensure her daughter's timely and regular attendance began before her daughter entered the second grade. The problem was not cured by visits of the truant officer or by the efforts of Mark Brown, father of minors Sovran Brown and Kristianna Martin, who installed a telephone in the house and subscribed to an automatic operator service to call respondent's house at 7:30 a.m. on weekdays. While respondent alleged that she had cured the tardiness problem by removing her daughter from the elementary school to begin a home school program, respondent provided no evidence corroborating her claim other than an incomplete workbook. Therefore, we conclude that sufficient evidence existed to support the jury's conclusion by a preponderance that respondent neglected her child's educational needs. MCL 712A.2(b)(1); MSA 27.3178(598.2)(b)(1).

Respondent next challenges as unsupported the jury's finding that her house was without electricity, water and food due to her failure to comply with conditions placed on her receipt of assistance benefits through the Michigan Opportunity Skill Training (MOST) program. An FIA eligibility specialist explained that respondent was sanctioned for failing to comply with MOST job-seeking requirements. This sanction reduced by twenty-five percent the amount of assistance benefits respondent received. The FIA worker testified that she warned respondent several times that her continued failure to address the sanction would result in the termination of her benefits, and that respondent had stated her understanding of this fact. Respondent testified that she received no such warning, but conceded that her benefits were canceled and that her resultant failure to pay her electric bill led to disconnection of her electric service. Although evidence indicated that her children were well fed, respondent admitted that the lack of electricity deprived her house of hot water, and that her water had once been turned off completely. Thus, while no evidence established that respondent's children were without food, we conclude that there was sufficient evidence from which the jury could have concluded that her household was without electricity on at least one occasion as a result of her neglect and that her home was also without water on one occasion. Because we conclude that there was sufficient evidence to support the jury's findings regarding the allegations discussed above, we need not address respondent's challenge to the finding regarding domestic violence.

Next, respondent argues that the probate court committed error requiring reversal by admitting the fathers' lay opinion testimony expressing their approval of the probate court's exercise of jurisdiction over the minors. We disagree.

This Court reviews a trial court's decisions to admit or exclude evidence for an abuse of discretion. *Davidson v Bugbee*, 227 Mich App 264, 266; 575 NW2d 574 (1997). MRE 701 governs lay person opinion testimony and reads:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

Although MRE 704 allows opinion testimony pertaining to an ultimate issue to be decided by the trier of fact, *McCalla v Ellis*, 180 Mich App 372, 384; 446 NW2d 904 (1989), opinion testimony may not invade the province of the jury. *Koenig v City of South Haven*, 221 Mich App 711, 725; 562 NW2d 509 (1997). "[W]here a jury is as capable as anyone else of reaching a conclusion on certain facts, it is error to permit a witness to give his own opinion or interpretation of the facts because it invades the province of the jury." *Id*. at 726, quoting *People v Drossart*, 99 Mich App 66, 80; 297 NW2d 863 (1980).

Before a probate court may exercise jurisdiction over minor children in child protective proceedings, the *trier of fact* must decide whether the allegations set forth in the petition were proven by a preponderance of the evidence. *In re Brock*, *supra* at 108-109. Jeffrey Harrow, father of minor Josephine, and Mark Brown, father of the two other involved minors, both responded affirmatively when asked whether they wanted the probate court to exercise jurisdiction. Their statements reflected only their subjective desires that the court exercise jurisdiction and not their opinions regarding the legal propriety of an exercise of jurisdiction by the probate court. Thus, we conclude that respondent's argument that the probate court erroneously admitted improper opinion testimony is without merit.

Affirmed.

/s/ Helene N. White
/s/ Harold Hood
/s/ Hilda R. Gage