STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of AMBER SPENCLEY, CRYSTAL SPENCLEY, and SCOTT SPENCLEY, Minors.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

JAMES LOUIS SPENCLEY,

Respondent-Appellee,

and

SANDRA JANET SPENCLEY,

Respondent-Appellant.

UNPUBLISHED
April 7, 2000

No. 219801
Lapeer Circuit Court
Family Division
LC No. 98-007986

Before: Jansen, P.J., and Collins and J. B. Sullivan*, JJ.

PER CURIAM.

Respondent-appellant Sandra Spencley appeals as of right from the family court's order of May 4, 1999, adjudicating the minor children to be temporary wards of the court. We affirm.

Respondents are the parents of the three children involved in this case. The oldest child Crystal (date of birth 9/30/83) is appellant's biological daughter and was adopted by James Spencley at a young age. The two other children, Scott (date of birth 9/17/88) and Amber (date of birth 9/26/90), are the biological children of both respondents. At the time the petition alleging neglect and abuse was filed by the Family Independence Agency (FIA) requesting jurisdiction over the children in December 1998, respondents were in the process of obtaining a divorce. Respondents had separated in November 1997 and appellant filed for a divorce that same month. Appellant was initially awarded

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

temporary physical custody of the children after the divorce complaint was filed. The divorce proceedings and this child protective proceeding were consolidated for trial. The trial was held in April 1999. During trial, respondents reached a settlement regarding the property division and the only remaining issue in the divorce case was the custody of the children. The divorce case, however, a separate proceeding, is not currently before this Court.

In the petition to assume jurisdiction, petitioner alleged that in August 1998, it received a referral for investigation of sexual abuse of Crystal and Amber by respondent-father. Two earlier referrals had been investigated by petitioner and law enforcement officials regarding allegations of physical and sexual abuse against the children by respondent-father; however, those allegations were determined to be unsubstantiated. The petition requesting that the court take jurisdiction over the children was filed in December 1998, and in February 1999, the family court ordered that Crystal be removed from the family home and placed into foster care. Scott and Amber were allowed to remain in respondents' custody where they spent alternate weeks with each respondent.

The family court issued its findings of fact and conclusions of law on the record on the final day of the trial on April 21, 1999. The family court first provided a synopsis of the testimony of each witness at trial. The family court found that there was emotional and mental injury to all three children as a result of the activities of respondents, and the family court found that there was no sexual abuse committed by respondent-father. The family court then ordered that Crystal would remain in foster care and the other two children would also be placed into foster care. The family court's order of disposition, making the children temporary wards of the court, was entered on May 4, 1999.

Appellant's appellate brief initially raised two issues: whether the family court's assertion of jurisdiction over the children pursuant to MCL 712A.2(b)(1); MSA 27.3178(598.2)(b)(1) was factually and legally erroneous, and whether the court's finding with regard to a statutory best interest factor in connection with the custody (divorce) case was erroneous. After oral argument, this Court granted appellant's motion to add a new ground on appeal. In her supplemental brief, appellant raises one argument: whether the family court erred in denying her motion to set aside the petition because the family court failed to advise appellant of her right to a jury trial at the preliminary hearing. We do not find any issue to require reversal.

The petition was filed on December 22, 1998. The preliminary hearing was held on January 4, 1999, before Judge Michael P. Higgins. At the beginning of the hearing, appellant was not represented by counsel. In fact, the following colloquy occurred:

> THE COURT: And Ms. Spencley, you told me earlier that you intend to be represented – is it by Ms. Berker?
>
> MS. SPENCLEY: Yes.
>
> THE COURT: And she's been away and has not had a chance to be notified of this hearing but as I told you we're going to go ahead with the Preliminary Hearing

but I would certainly give you the opportunity to represent you at any further proceedings in this matter. You need to be in touch with her as soon as possible.

MS. SPENCLEY: Right.

At the preliminary hearing, the family court proceeded to hold an evidentiary hearing to determine whether there were sufficient allegations to authorize the petition. Because appellant (who is not a lawyer) was not represented by counsel, she conducted her own examination of the witnesses. After the family court found on the record that based on the evidence there were sufficient allegations in the petition to go forward and made the children temporary wards of the court, Linda Berker entered her appearance on the record as counsel for appellant.[1] Ms. Berker's appearance in the lower court record is dated January 5, 1999.

MCR 5.965(B) governs the procedure for a preliminary hearing. Specifically, MCR 5.965(B)(6) states that the "court shall advise the respondent of the right to trial on the allegations in the petition and that the trial may be before a referee unless the required demand for a judge or jury is filed pursuant to MCR 5.912 or 5.913." As explained in *In re Hatcher*, 443 Mich 426, 434; 505 NW2d 834 (1993), a preliminary hearing is the formal review of the petition when the judge or referee considers authorizing the petition and placing the case on the formal calendar. As stated in *Hatcher*, *id.*, pp 434-436:

> At the preliminary hearing, [family] courts require a finding of probable cause to substantiate that the facts alleged in the petition are true and that if proven at trial would fall under [MCL 712A.2; MSA 27.3178(598.2)]. When a court authorizes a petition for jurisdiction during the preliminary hearing, generally, it will issue a preliminary order that specifies a plan for temporary placement. The adjudicative [now, trial] phase follows the preliminary hearing. At this stage, the court weighs the evidence to determine whether the child is neglected within the meaning of subsection (b) and then orders the disposition placement that comports with the child's best interests.

The trial phase, formerly known as the adjudicative phase, is the only portion of child protective proceedings where a respondent is entitled to a jury. MCR 5.911 and 5.972. A review of the January 4, 1999, hearing indicates that the family court did not advise appellant of her right to trial on the allegations in the petition. Further, appellant was not represented by counsel and did not specifically waive her right to counsel.

Following the preliminary hearing, the divorce and child protective proceedings were consolidated by way of a "reassignment order" dated January 19, 1999, and the cases were consolidated before Judge Nick O. Holowka, who had been presiding over the divorce matter. When trial commenced on April 9, 1999, the following colloquy occurred between the trial court and appellant's counsel:

> THE COURT: . . . the Court will be taking testimony in regards to both file[s] simultaneously –

* * *

THE COURT: Is that your understanding, Ms. Berker?

MS. BERKER: It's my understanding that the Court's going to take testimony simultaneously. I thought that's what happened when we – when we combined the cases administratively, anyway.

THE COURT: Well –

MS. BERKER: I didn't know I agreed to that.

THE COURT: Well, I thought –

MS. BERKER: I didn't know I had to agree to that.

THE COURT: Well, all I'm saying is that – that you're not objecting to it?

MS. BERKER: No. I assume that it's the way we got to do it.

Although this is not a clear waiver of the right to a jury trial, appellant did not specifically request a jury trial. See MCR 5.911(B) (the "party who is entitled to a trial by jury may demand a jury by filing a written demand with the court"). Rather, the only document relating to the trial is an order stipulating to the adjournment of trial, specified as a non-jury trial, from February 11, 1999, to April 9, 1999.

After the trial, the family court assumed jurisdiction over the children and made them temporary wards of the court. After the filing of this appeal (which occurred on May 25, 1999), the family court entered a supplemental order of disposition, dated July 21, 1999, which continued the children in foster care. However, the last two orders of disposition that are contained in the lower court record, dated August 25, 1999, indicate that while Crystal is to be continued in foster care, Scott and Amber have been placed in the custody of their father, James Spencely.

Under the circumstances of this case, although we agree with appellant that there were clear problems at the preliminary hearing, including the fact that appellant was not represented by counsel and that the family court failed to notify appellant of her right to a jury trial, we are compelled to find that the record indicates that the jury trial was waived and that, in any event, the issue is now moot. Further, we conclude that the error is harmless in light of the most recent orders of disposition dated August 25, 1999, and that the "existing record does not persuade us that this case must be retried." *In re Osborne*, 459 Mich 360, 369; 589 NW2d 763 (1999).[2] In fact, we believe that a new trial would be highly detrimental to the children because of these most recent orders of disposition which place the two youngest children in the custody of their father and continue Crystal's foster care environment.

Accordingly, we find that the error that occurred at the preliminary hearing was waived and is harmless and do not believe that the case should be retried in light of current circumstances.[3]

Next, appellant argues that neither a factual nor a legal basis existed to support the family court's decision to assume jurisdiction over the children. To properly exercise jurisdiction, the family court must find that a statutory basis for jurisdiction exists. *In re Toler*, 193 Mich App 474, 476; 484 NW2d 672 (1992). To assume jurisdiction, the family court was required to find by a preponderance of the evidence that the children came within the statutory requirements of MCL 712A.2(b); MSA 27.2178(598.2)(b). *In re Brock*, 442 Mich 101, 108-109; 499 NW2d 752 (1993).

Petitioner requested that the court assume jurisdiction under § 2(b)(1). At the time the petition was filed, this section provided:

> 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. . . .

Although appellant argues that this case presents an issue of first impression because the family court relied on "parental alienation syndrome" as a factual basis for assuming jurisdiction, we believe that petitioner properly responds that the family court's factual findings are amply supported by the record and that the term "parental alienation syndrome" is merely a way of describing appellant's actions as they related to the circumstances of this case. At trial, one of the psychologists who had worked with the family, described appellant's behavior as "parental alienation syndrome" simply as a way of describing her behavior. In other words, there was evidence that appellant was, during the course of the divorce, attempting to alienate the children from their father.

Although appellant disputes the legitimacy of this theory, we agree with petitioner that the psychologist's use of this theory at trial was merely a way to explain appellant's behavior to deprive the children of their emotional well-being. In fact, there was a great deal of evidence that appellant was manipulating the children to alienate them from their father. Additionally, appellant did not challenge the admission of the evidence concerning "parental alienation syndrome" at trial. Further, we note that the family court did not base its decision on this theory. The family court merely stated that there was emotional and mental injury to all three children as a result of the activities of the parents and also found that there was no sexual abuse by respondent-father.

The family court's factual findings are amply supported by the evidence presented at trial and, indeed, there was overwhelming evidence that the children were suffering from severe emotional

problems. Accordingly, we conclude that the evidence demonstrated that the family court had a factual basis, by a preponderance of the evidence, upon which to assert jurisdiction over the children pursuant to § 2(b)(1), due to a substantial risk of harm to the children's mental well-being.

Lastly, appellant challenges the court's finding with regard to one of the best interest factors under the Child Custody Act, MCL 722.23; MSA 25.312(3). This finding was in connection with the court's custody decision in the divorce case. Because appellant has filed her claim of appeal only from the family court's order entered in the child protective proceeding case, this Court does not have jurisdiction to decide this issue.

This Court's jurisdiction is determined by the order appealed. MCR 7.203(A), (B). Here, the divorce and child protective proceedings cases were clearly two separate cases, although they were consolidated for trial. Appellant filed a claim of appeal only from the family court's May 4, 1999, order assuming jurisdiction over the children in the child protective proceeding case, but did not appeal from any order entered in the divorce case. See, e.g., *People v Anderson*, 209 Mich App 527, 538; 531 NW2d 780 (1995). Accordingly, we lack jurisdiction to decide any issue relating to the divorce matter.

The family court's order of May 4, 1999, assuming jurisdiction over the children and making them temporary wards of the court is affirmed.

/s/ Kathleen Jansen
/s/ Jeffrey G. Collins
/s/ Joseph B. Sullivan

[1] It is not known whether Ms. Berker was present during the entire hearing because she did not put an appearance on the record when counsel and the parties first introduced themselves. However, at no time did Ms. Berker examine any witness on behalf of appellant.

[2] The Supreme Court in *Osborne, supra*, pp 367-369, held that while counsel's appearance for the prosecution in a termination of parental rights proceeding was improper because that same attorney had previously represented the mother, the case did not have to be retried. The Court specifically noted that the parties failed to notice or raise the problem at the time of the hearing, when a remedy could have been fashioned, and that there was an absence of demonstrated harm.

[3] We also note that appellant did not object to the failure to be informed of her right to a jury trial in the lower court until October 25, 1999, when she moved to set aside the child protective proceedings as being null and void. The family court denied the motion following a hearing held on November 5, 1999.