# STATE OF MICHIGAN

# COURT OF APPEALS

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In the Matter of NICOLE AMBER KRISTI KERR, Minor.

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BEVERLY CATTO,

Petitioner-Appellant,

v

LORENA KERR and JOHN HEPWORTH,

Respondents-Appellees.

UNPUBLISHED
September 26, 2000

No. 222784
Monroe Probate Court
LC No. 99-008156-GD

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In the Matter of NICOLE AMBER KRISTI KERR, Minor.

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FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellant,

v

BEVERLY CATTO,

Respondent,

and

LORENA MARY KERR AND JOHN EARNEST HEPWORTH,

Respondents-Appellees.

No. 223318
Monroe Circuit Court
Family Division
LC No. 99-014356-NA

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Before: Murphy, P.J., and Collins and Owens, JJ.

PER CURIAM.

This is a consolidated appeal. In Docket No. 222784, petitioner Beverly Catto (Catto) appeals by leave granted from the probate court's order dismissing her petition for guardianship of the minor child. In Docket No. 223318, petitioner Family Independence Agency (FIA) appeals by leave granted from the order of the family division of the circuit court dismissing its petition for temporary wardship of the minor child. We affirm in Docket No. 222784 and reverse in Docket No. 223318.

These two cases arise out of a child custody dispute involving the minor child's natural parents, respondents Lorena Kerr (Kerr) and John Hepworth (Hepworth), and Catto, Hepworth's sister, who has been caring for the minor child since her birth in 1994.

Respondents are both citizens of Canada. In 1991, on the basis of allegations of sexual abuse by Hepworth of Kerr's three children[1], the children became the Canadian equivalent of temporary court wards. In 1992, Kerr gave birth to a daughter fathered by Hepworth. That child became a temporary court ward upon birth. While proceedings concerning the four children were pending, Kerr became pregnant again. Because respondents were concerned that the Canadian authorities would remove that child from their care at birth, Kerr came to Michigan, where she gave birth to Nicole Kerr on December 10, 1994. Kerr left Nicole in the custody of Catto, pursuant to a written agreement, and returned to Canada. Shortly thereafter, respondents' parental rights to the four older children were terminated. On January 17, 1998, Kerr gave birth to twins, who immediately became the subjects of child protective proceedings in Canada. However, a Canadian court dismissed the petition in February 1999. Respondents then expressed their intention to have Nicole returned to their custody by June 1999. Catto contacted her attorney, the FIA became involved, and a neglect petition was filed.[2]

The court noted at pretrial conference in July 1999, that because termination of parental rights was not requested in the petition, the trial would be solely on the issue of whether Nicole comes under the jurisdiction of the court. The court also stated that evidence relating to the Canadian proceedings would not be allowed since those proceedings had no bearing on the allegations in the petition with respect to jurisdiction.

Following the adjudicatory hearing on July 13, 1999, the court ruled that it did not have jurisdiction over Nicole. In its ruling, the court noted that its decision might have been different had there been a legal guardianship for Nicole, there being other factors to consider in such a situation.

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[1] Hepworth was not the father of these children.

[2] Although the petition states that respondents' parental rights should be terminated, the final relief requested was that the child be made a temporary court ward. The FIA's attorney explained at a pretrial conference that the agency was not seeking termination, which would be handled by a supplemental petition after the adjudicatory hearing, assuming the court took jurisdiction over the child.

Catto then filed a petition for guardianship, alleging that Nicole was in need of a guardian because respondents permitted Nicole to reside with her and did not provide her with legal authority to provide for Nicole's care and maintenance. The court ultimately dismissed the petition. The court concluded that in order for it to have the power, pursuant to MCL 700.424; MSA 27.5424, to establish a guardianship, the conditions alleged must have existed at the time the petition was filed. While respondents earlier had granted Catto permission to have Nicole reside with her, prior to the filing of the petition they had clearly requested that Nicole be returned to them. The court found that because Nicole was not living with Catto with respondents' permission at the time the petition for guardianship was filed, the court could not consider the petition.

Catto argues on appeal in Docket No. 222784 that the probate court erred in dismissing her petition for guardianship. A trial court's decision regarding the existence of subject-matter jurisdiction is a question of law that this Court reviews de novo. MCR 2.116(C)(4); *In re Martin*, 237 Mich App 253, 255; 602 NW2d 630 (1999). Probate courts are courts of limited jurisdiction and derive their jurisdiction and power from statutory authority. *Id.*[3]

MCL 700.424; MSA 27.5424[4] provided, in pertinent part, as follows:

> (1) A person interested in the welfare of a minor, or a minor if he or she is 14 years of age or older, may petition for the appointment of a guardian of the minor. The court may order the family independence agency or an employee or agent of the court to conduct an investigation of the proposed guardianship and file a written report of the investigation.
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> (2) The court may appoint a guardian for an unmarried minor if 1 or more of the following circumstances exist:
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> * * *
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> (b) The parent or parents have permitted the minor to reside with another person and have not provided the other person with legal authority for the care and maintenance of the minor, and the minor is not residing with his or her parent or parents when the petition is filed.

Catto contends that the words "have permitted" suggest the past tense and points out that the statute does not require that the permission had to have been granted at the time of the filing of the petition. Because respondents had permitted Nicole to reside with Catto at one time without providing legal authority for her care, argues Catto, the court erred in refusing to consider her guardianship petition.

[3] Although probate courts once had exclusive jurisdiction over guardianship proceedings, see *In re Martin*, 237 Mich App 253, 255; 602 NW2d 630 (1999), as of January 1, 1998, the family division of the circuit court has ancillary jurisdiction over cases involving guardians and conservators. MCL 600.1021(2)(a); MSA 27A.1021(2)(a).

[4] Repealed by 1998 PA 386, effective April 1, 2000.

We find that the court did not err in determining that it did not have jurisdiction to establish a guardianship for Nicole. Section (2)(b) states two requirements: (1) that the parents have permitted the child to reside with another person without providing that person with legal authority for the child's care and maintenance, *and* (2) that the minor is not residing with his or her parents when the petition is filed. Thus, under the plain language of the statute, even if respondents did allow Nicole to reside with Catto without providing her with the legal authority for Nicole's care, if Nicole were residing with respondents *at the time the petition was filed,* the fact that she had previously been residing with someone who did not have legal authority for her care would not be sufficient to allow the court to assume jurisdiction. Here, respondents requested in February 1999 that Nicole be returned to them by June 1999. Catto did not file her petition for guardianship until August 1999. Thus, the only reason that Nicole was not residing with respondents at the time the petition was filed was because Catto refused to relinquish possession. Under these circumstances, we cannot conclude that the statute provided the court with jurisdiction to appoint a guardian for Nicole.

Our interpretation is supported by the recent amendments to this section. As noted above, the section at issue here was repealed effective April 1, 2000, by 1998 PA 386. Former Revised Probate Code (RPC) § 424 is now MCL 700.5204; MSA 27.15204, and provides, in pertinent part, as follows:

> (2) The court may appoint a guardian for an unmarried minor if any of the following circumstances *exist*:
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> * * *
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> (b) The parent or parents *permit* the minor to reside with another person and *do not* provide the other person with legal authority for the minor's care and maintenance. [Emphasis added.]

The Legislature's use of the present tense in the prefatory language of subsection (2) and in subsection (2)(b) clarifies its intent that the circumstances are to be considered as they exist at the time the petition is filed. See *Wortelboer v Benzie Co,* 212 Mich App 208, 217; 537 Mich App 603 (1995). Accordingly, we conclude that the probate court did not err in dismissing Catto's guardianship petition.

In Docket No. 223318, petitioner FIA argues that the circuit court erred in finding that it could not assume jurisdiction over Nicole. Specifically, the FIA argues that the court had jurisdiction under MCL 712A.2(b)(1); MSA 27.3178(598.2)(b)(1) because Nicole was subject to a substantial risk of harm to her mental well-being, she had been abandoned by her parents, and she was left without proper custody or guardianship. The FIA further argues that the court had jurisdiction under MCL 712A.2(b)(2); MSA 27.3178(598.2)(b)(2) on the basis that respondents' home was unfit.

Under § 2(b), the court could exercise jurisdiction over any child under the age of eighteen 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.
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> * * *
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> (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. [MCL 712A.2(b); MSA 27.3178(598.2)(b).]

To acquire jurisdiction, the trial court must determine by a preponderance of the evidence that the child comes within the statutory requirements of MCL 712A.2; MSA 27.3178(598.2). *In re Ramsey*, 229 Mich App 310, 314; 581 NW2d 291 (1998).

We find that the court had jurisdiction under MCL 712A.2(b)(1); MSA 27.3178(598.2)(b)(1) on the basis that Nicole was at substantial risk of harm to her mental well-being if respondents were allowed to follow through with their intention to immediately reclaim custody of her. Trial testimony shows that respondents had very little contact with Nicole during the time that she lived with Catto. Indeed, the court found that

> [t]he parents' lack of involvement and lack of personal contact with the child simply resulted in the fact, and it's really an undisputed fact, that the child is bonded and views Ms. Catto as—that Ms. Catto has been her only parent in fact.

The unrebutted testimony of Sally Carter, a Child Welfare Program manager for the FIA who was qualified by the court as an expert in the field of child welfare, shows that respondents' plan to remove Nicole from Catto's home and place her in a totally unfamiliar environment would likely prove traumatic to the child. Carter stated that the bonding between a parent and child is most critical during the first four or five years of a child's life and the failure to form that attachment can cause antisocial behavior in the future. In Carter's opinion, the respondents' contacts with Nicole were "totally insufficient to establish any type of relationship, let alone a bond or an attachment." She stated that removing Nicole from the only caretaker she'd known "would be very devastating to her" and placing her with her parents, who were essentially total strangers, "would be very damaging, and create . . . emotional problems for this child for years to come." In view of this testimony, we find that petitioner established by a preponderance of the evidence that Nicole was subject to a substantial risk of harm to her mental well-being and, therefore, fell within at least one statutory basis for jurisdiction under § 2(b)(1).

Relying on *In re Clausen*, 442 Mich 648; 502 NW2d 649 (1993), the circuit court stated that while it wanted to assume jurisdiction to prevent any emotional harm to Nicole, it believed that it could not do so absent some evidence that respondents were unfit parents. We note that the circuit court's reliance on *Clausen* was misplaced. The statements of the *Clausen* Court indicating that emotional harm to the child is not a basis for denying custody to the biological parents related to cases in which third parties and the parents were involved in a custody dispute. *Id*. at 687-690. Although such a dispute gave rise to this case, the case itself involves a petition by the state for the court to take the child

into protective custody. The court may do that when it determines that the child's mental health is subject to substantial risk by the conduct of the parents. Here, Carter's testimony showed that respondents' proposed plan of action did create such a risk. While that risk may not give Catto a right to sue respondents for custody of Nicole, it does not prevent the family division of the circuit court from assuming jurisdiction. Because we find that jurisdiction was proper on the basis that Nicole's mental well-being was subject to substantial risk of harm, we need not address whether respondents abandoned Nicole or whether she was without proper custody or guardianship.

Finally, we agree with petitioner FIA that the court erred in ruling that evidence of the Canadian termination proceedings was inadmissible, since the information was directly relevant to determining whether jurisdiction was appropriate under MCL 712A.2(b)(2); MSA 27.3178(598.2)(b)(2). Under the doctrine of anticipatory neglect, "how a parent treats one child is certainly probative of how that parent may treat other children." *In re Powers*, 208 Mich App 582, 588; 528 NW2d 799 (1995). See also *In re Dittrick Infant*, 80 Mich App 219, 222; 263 NW2d 37 (1977) and *In the Matter of LaFlure*, 48 Mich App 377, 392; 210 NW2d 482 (1973). In *Powers*, *supra* at 589, this Court held that the doctrine of anticipatory neglect or abuse may provide an appropriate basis for invoking jurisdiction under MCL 712A.2(b)(2); MSA 27.3178(598.2)(b)(2). Accordingly, we conclude that the court erred in not allowing the FIA to present evidence relating to the allegation that Kerr's parental rights to four children and Hepworth's parental rights to his one child were terminated in Canada on the basis of sexual abuse of Kerr's children by Hepworth and Kerr's failure to protect the children from abuse. However, because we find that jurisdiction is proper under § 2(b)(1), we need not remand for admission of the excluded evidence and determination of whether jurisdiction is proper under § 2(b)(2).

We affirm the court's order in Docket No. 222784. We reverse the court's order in Docket No. 223318 and, because the circuit court does have jurisdiction, remand for further proceedings under the statute. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Jeffrey G. Collins
/s/ Donald S. Owens