# STATE OF MICHIGAN

# COURT OF APPEALS

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In the Matter of CRAIG EMBREE, Minor.

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DEPARTMENT OF HUMAN SERVICES, f/k/a/ FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

V

SANDRA MANN,

Respondent-Appellant,

and

CRAIG EMBREE, SR. and CLAUDE GODDARD,

Respondents.

UNPUBLISHED
January 19, 2006

No. 263795
Kent Circuit Court
Family Division
LC No. 04-057037-NA

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In the Matter of AMBER EMBREE, Minor.

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DEPARTMENT OF HUMAN SERVICES, f/k/a/ FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

V

SANDRA MANN,

Respondent-Appellant,

and

CRAIG EMBREE, SR. and CLAUDE GODDARD,

Respondents.

No. 263796
Kent Circuit Court
Family Division
LC No. 04-057185-NA

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In the Matter of CLAUDIA GODDARD, Minor.

DEPARTMENT OF HUMAN SERVICES, f/k/a/ FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

V

SANDRA MANN,

Respondent-Appellant,

and

CRAIG EMBREE, SR. and CLAUDE GODDARD,

Respondents.

No. 263797
Kent Circuit Court
Family Division
LC No. 04-057186-NA

Before: Zahra, P.J., and Murphy and Neff, JJ.

PER CURIAM.

Respondent Sandra Mann appeals as of right from an order in which the trial court found that the allegations set forth in the petition filed by Child Protective Services (CPS) had been established by a preponderance of the evidence, and ordered that Mann's three minor children be made temporary wards of the court and placed in licensed foster care. We affirm.

In its petition, CPS alleged respondent failed to follow through with the medical needs of Claudia, who contracted a serious infection following a hamster bite on her hand, and that Mann had a long history of substance abuse. At the September 21, 2004, preliminary examination, the referee found probable cause existed that the allegations in the petition were true, and placed the minors in protective custody pending the outcome of the adjudication proceedings. The adjudication proceedings commenced on November 17, 2004, and concluded on May 31, 2005, at which point the trial court found the allegations in the petition were true by a preponderance of the evidence.

Respondent first claims her procedural due process rights were violated when the trial court adjourned the adjudication proceedings on three separate occasions between November 7, 2004, and May 31, 2005, and argues the trial court should have dismissed the proceedings on these grounds. This Court reviews a trial court's decision on a motion to dismiss for abuse of discretion. *In re Contempt of Tanksley*, 243 Mich App 123, 127; 621 NW2d 229 (2000). "An abuse of discretion is found in cases in which the result is so violative of fact and logic that it

evidences a perversity of will, a defiance of judgment, or an exercise of passion or bias." *Id.* Interpretation and application of statutes and court rules are questions of law this Court reviews de novo. *Id.* Due process violations are reviewed de novo. *In re CR*, 250 Mich App 185, 203; 646 NW2d 506 (2002).

MCR 3.923(G) indicates adjournments of trials and hearings in child protective proceedings may be granted only (1) for good cause, (2) after taking into consideration the best interests of the child, and (3) for as short a period of time as necessary. MCL 712A.17(1) states:

> The court shall adjourn a hearing or grant a continuance . . . only for good cause with factual findings on the record and not solely upon stipulation of counsel or for the convenience of a party. In addition to a factual finding of good cause, the court shall not adjourn the hearing or grant a continuance unless 1 of the following is also true:
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> (b) The court grants the adjournment or continuance upon its own motion after taking into consideration the child's best interests. An adjournment or continuance granted under this subdivision shall not last more than 28 days unless the court states on the record the specific reasons why a longer adjournment or continuance is necessary.

Respondent contends the requirements set forth in MCR 3.972, requiring children be released to the custody of their parents or guardians if the adjudication does not commence within sixty-three days after the children's placement in CPS custody, should also apply to MCL 712A.17(1). However, MCR 3.972 only applies when the trial court fails to commence the adjudication proceedings within sixty-three days after placing the minors in protective custody; in the present case, the hearing commenced within the sixty-three day time period. Neither MCL 712A.17(1) nor MCR 3.923(G) require that the children be released to respondent's custody if the court fails to reconvene the adjudication proceedings over twenty-eight days after adjournment without stating on the record the specific reasons why a longer adjournment or continuance is necessary.

In *People v Smith*, 200 Mich App 237, 242; 504 NW2d 21 (1993), this Court quoted from 3 Sutherland, Statutory Construction (5th ed), § 57.19, pp 47-48, as follows:

> The general rule is that if a provision of a statute states a time for performance of an official duty, without any language denying performance after a specified time, it is directory. However, if the time period is provided to safeguard someone's rights, it is mandatory, and the agency cannot perform its official duty after the time requirement has passed.
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> * * * *
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> A provision requir[ing] a decision of a court, referee, administrative agency, or the like, to be entered or filed within a certain time has been held to be directory.

Our legislature never set forth a specific remedy for a violation of the time requirement in MCL 712A.17(1). Therefore, this time requirement set forth in MCL 712A.17(1) is directory, established by our legislature to prod our courts to move the proceedings forward within a reasonable period of time. MCR 3.923(G), which sets forth the requirements for adjourning a child protective proceedings hearing, does not even reiterate the specific time requirements set forth in MCL 712A.17(1), but reflects the directory nature of this statute by requiring that adjournments be "for as short a period of time as necessary." MCR 3.923(G)(3).

Respondent also contends the trial court's repeated adjournments of her adjudication proceedings for over twenty-eight days deprived her of her due process liberty interest in caring for her children. We find respondent was not erroneously deprived of her liberty interest due to the repeated adjournments of the adjudication proceedings for over twenty-eight days. Respondent only had a liberty interest in caring for her children to the extent her children were free from an abusive environment. *In re MU*, 264 Mich App 270, 281; 690 NW2d 495 (2004). By finding by a preponderance of the evidence the allegations in the CPS petition had been established, the trial court affirmed that CPS properly removed the children from respondent's care and, therefore, respondent had not been erroneously deprived of her liberty interest in caring for her children. Furthermore, any application by the trial court of respondent's proposed rule that her children should have been released to her custody once the adjudication was adjourned for more than twenty-eight days would have had no substantive effect; CPS would have simply filed a new petition and again removed the children from respondent's care. Finally, at the preliminary examination, the trial court found probable cause to remove the children pending adjudication, due to indications that Claudia's medical needs were not being met and that respondent was using illegal substances. When the trial court adjourned the proceedings, the referee's interim order remained in effect. The trial court's actions do not constitute an erroneous deprivation of respondent's liberty interest, but rather constitute proper consideration of the children's rights to be free from an abusive environment.

Next, respondent contends the trial court erred in failing to grant her motion for a directed verdict. In the alternative, respondent contends the trial court clearly erred in finding Claudia had suffered medical neglect when petitioner failed to present sufficient evidence to prove the allegation by a preponderance of the evidence.

This Court reviews de novo a trial court's decision to grant or deny a motion for a directed verdict. *Meagher v Wayne State University*, 222 Mich App 700, 708; 565 NW2d 401 (1997). "When evaluating a motion for a directed verdict, a court must consider the evidence in the light most favorable to the nonmoving party, making all reasonable inferences in favor of the nonmoving party. Directed verdicts are appropriate only when no factual question exists upon which reasonable minds may differ." *Id.* (citations omitted).

This Court reviews the trial court's factual findings for clear error. "A finding of fact is clearly erroneous when the reviewing court is left with a definite and firm conviction that a mistake has been made." *In re Terry*, 240 Mich App 14, 22; 610 NW2d 563 (2000). "[R]egard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." MCR 2.613(C).

At the adjudication stage of child protective proceedings,

> the petitioner . . . must prove one or more of the allegations in the petition that indicate that the children who are the subject of the proceeding come within the family court's jurisdiction, as defined by MCL 712A.2(b). This proof must meet the preponderance standard and must rely on legally admissible evidence. [*In re CR, supra* at 200. See also MCR 3.972(C)(1), (E).]

MCL 712A.2(b) indicates proceedings fall under the jurisdiction of the family court when they concern

> [A] juvenile under 18 years of age . . . :
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> (1) Whose parent . . . , 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, [or] who is subject to a substantial risk of harm to his or her mental well-being . . . .
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> (2) Whose home or environment, by reason of neglect, cruelty, drunkenness, criminality, or depravity on the part of a parent . . . is an unfit place for the juvenile to live in.

Dr. Emig, the specialist treating a bacterial infection in Claudia's hand, testified to numerous occasions where Claudia failed to appear at several scheduled appointments over a two-year period and that the infection in Claudia's hand worsened over time. Emig stated that due to the numerous missed appointments, it was difficult to properly treat Claudia's hand. We find the trial court did not err in finding this evidence of missed appointments, and the difficulty it caused Dr. Emig in properly treating Claudia, resulting in the worsening of the condition, if viewed in a light most favorable to the petitioner, presented a factual question regarding whether respondent's actions constituted medical neglect of Claudia.

Respondent then argues that even if a directed verdict were not warranted, her testimony clarified and explained the numerous missed appointments, and the evidence adduced at trial was insufficient to support a finding of medical neglect. Respondent contends the trial court was not permitted to make an assessment of her credibility at trial, because the petitioner did not present evidence contradicting her testimony detailing her excuses for making Claudia miss her doctor's appointments. Respondent bases her contention on this Court's statement in *Helms v Helms*, 185 Mich App 680, 684; 462 NW2d 812 (1990), that "[t]he trial court was in the best position to determine the credibility of the conflicting witnesses produced at trial," arguing the use of the word "conflicting" indicates this Court need only defer to the trial court's assessment of witness credibility when there is conflicting evidence.

Yet MCR 2.613(C) does not make such a distinction. MCR 2.613(C) notes, "regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it," regardless of whether their testimony "conflicted" with other evidence presented at trial. Furthermore, MCR 2.613(C) recognizes the superior ability of the trial court to judge the overall truthfulness of a witness, because "[t]here are many aids possessed by the judge who hears the oral testimony in deciding who of the witnesses are truthful that do not get upon the printed page." *Donaldson v Donaldson*, 134 Mich 289, 291; 96 NW 448 (1903).

We defer to the trial court's judgments regarding the credibility of the witnesses who appeared at the adjudication hearing, and find the trial court did not clearly err in finding by a preponderance of the evidence that the petitioner had established the allegations made against respondent in the CPS petition. Respondent brought Claudia to several appointments, but missed several others. Much of the remaining evidence establishing petitioner's allegations of medical neglect, as well as many of the defenses set forth by respondent, came in the form of witness testimony. The trial court questioned the veracity of respondent's excuses for not taking Claudia to the doctor on several occasions, especially considering that respondent's mother and Claude Goddard were also available to take Claudia.

The trial court also noted its reluctance to believe respondent's testimony accusing Dr. Emig of not properly handling Claudia's case by prescribing medication Claudia could not ingest and refusing to call in a refill of Claudia's prescription. Instead, the court chose to rely on Dr. Emig's testimony that she "wrote to CPS on three separate occasions over a course of months asking for some sort of intervention in this matter or some sort of investigation," as this "would have done nothing but call attention to what had occurred in this case," including any improper handling of the case by Dr. Emig. The trial court also relied on Dr. Emig's opinion that she had difficulty treating Claudia due to a series of missed appointments and that the condition of Claudia's hand worsened over time. Based on this evidence, we find the trial court did not clearly err in finding by a preponderance of the evidence that Claudia had experienced medical neglect due to the actions of respondent.

Respondent argues that there was no nexus established between the allegations in the petition of her ongoing substance abuse and criminal history and the allegations of medical neglect and child abuse brought forth in the petition. However, MCR 3.972(E) states, "the verdict must be whether one or more of the statutory grounds alleged in the petition have been proven." A dispositional hearing is then conducted "once the court has determined following trial . . . that one or more of the statutory grounds alleged in the petition are true." MCR 3.973(A). As we have found the trial court did not err in finding the allegation of medical neglect had been established by a sufficiency of the evidence, one of the allegations has been proven. So, it matters not whether other allegations were also proven.

Third, respondent argues that because employees of the pharmacy at which respondent picked up Claudia's antibiotics failed to appear as witnesses for the petitioner, the trial court should have inferred their testimony would have been harmful to petitioner's case. This is a question of law this Court reviews de novo. *CR*, *supra* at 197.

The crux of respondent's argument is that the rule that the anticipated testimony of a res gestae witness who does not appear at trial should be inferred to favor the opposing party should apply to child protective proceedings.

The Code of Criminal Procedure, MCL 767.40a states:

> (1) The prosecuting attorney shall attach to the filed information a list of . . .all res gestae witnesses known to the prosecuting attorney or investigating law enforcement officials.

> (2) The prosecuting attorney shall be under a continuing duty to disclose the names of any further res gestae witnesses as they become known.
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> (3) Not less than 30 days before the trial, the prosecuting attorney shall send to the defendant or his or her attorney a list of the witnesses the prosecuting attorney intends to produce at trial.
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> (5) The prosecuting attorney or investigative law enforcement agency shall provide to the defendant, or defense counsel, upon request, reasonable assistance, including investigative assistance, as may be necessary to locate and serve process upon a witness.

This statute indicates that only prosecuting attorneys in criminal cases have a statutory duty to exercise due diligence in producing res gestae witnesses. Pursuant to MCL 712A.1(2), child protective proceedings are considered civil, not criminal, proceedings; therefore, MCL 767.40a does not apply.

CJI2d 5.12 states that when a witness whose appearance was the responsibility of the prosecution is missing, the factfinder "may infer that this witness's testimony would have been unfavorable to the prosecution's case." In *People v Perez*, 469 Mich 415, 420-421; 670 NW2d 655 (2003), our Supreme Court noted that the appropriateness of reading CJI2d 5.12 would depend on the facts of a particular case, but would be appropriate under circumstances in which the prosecutor failed to fulfill his requirements under MCL 767.40a. Thus, the inference articulated in CJI2d 5.12 is derived directly from the statutory duty of prosecutors to disclose res gestae witnesses and provide reasonable assistance in locating these witnesses; the inference applied when the prosecutor failed to meet his duties under MCL 767.40a. There is no analogous statutory duty in child protective proceedings; therefore, the inference respondent advocates would also not apply to child protective proceedings. Respondent's contention that the trial court should have drawn a negative inference against the petitioner's case due to the failure of the pharmacy personnel to testify at the adjudication is without merit.

Next, respondent contends the trial court abused its discretion by admitting into evidence Dr. Emig's testimony that she only rarely reported matters to CPS, because this testimony was irrelevant and highly prejudicial. This Court reviews a trial court's decision to admit evidence for an abuse of discretion. *Waknin v Chamberlain*, 467 Mich 329, 332; 653 NW2d 176 (2002).

We find the trial court did not abuse its discretion in admitting this testimony. Because Dr. Emig did not make voluminous referrals to CPS, the fact she contacted CPS regarding her suspicions of medical neglect in the present case is relevant to indicate her level of concern that medical neglect had occurred. In a bench trial, "the judge, sitting as factfinder, is presumed to possess an understanding of the law that allows him to understand the difference between admissible and inadmissible evidence . . . ." *In re Forfeiture of $19,250*, 209 Mich App 20, 31; 530 NW2d 759 (1995). We find the relevance of this testimony is not substantially outweighed by the risk of prejudice to respondent, and the trial court did not abuse its discretion in admitting Dr. Emig's testimony on this subject into evidence.

Finally, respondent contends the trial court clearly erred when in its ruling, it relied on "extraneous evidence" that respondent's Medicaid had been cancelled, without first determining if respondent's Medicaid had been cancelled before or after her children were removed from her care. This Court reviews findings of fact for clear error. A finding is clearly erroneous when the reviewing court is left with a definite and firm conviction that a mistake has been made." *Terry, supra* at 22.

Respondent fails to cite any authority to support her argument that the trial court may not consider evidence arising after the filing of a CPS position in the subsequent adjudication. "A party may not merely announce his position and leave it to us to discover and rationalize the basis for his claim." *In re Toler*, 193 Mich App 474, 477; 484 NW2d 672 (1992). Because respondent has not presented any authority to support her position, this Court need not address the issue further. *Id.*

Regardless, even if the trial court erred in considering evidence of respondent's expired Medicaid, such error would be harmless.

> An error in the admission or exclusion of evidence, an error in a ruling or order, or an error or defect in anything done or omitted by the court . . . is not ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice. [MCR 2.613(A).]

The trial court did not rely solely on evidence that respondent's Medicaid expired in August or September 2004 to determine that the allegations made in the petition had been established by a preponderance of the evidence. Instead, the trial court based its decision that the allegation of medical neglect had been established on a range of evidence, including evidence Claudia had missed a series of appointments with Dr. Emig for the treatment of her hand, that Claudia had not regularly received antibiotic medication to treat the infection in her hand, and that as a result it was increasingly difficult for Dr. Emig to properly treat Claudia and for her infection to clear up. As sufficient evidence had been presented for the trial court to find by a preponderance of the evidence that Claudia had suffered from medical neglect independently of the evidence that respondent's Medicaid had expired, any error in this case would have been harmless.

Affirmed.

/s/ Brian K. Zahra
/s/ William B. Murphy
/s/ Janet T. Neff