STATE OF MICHIGAN

COURT OF APPEALS

In re K.L.A. MAES, Minor.

UNPUBLISHED
March 10, 2016

No. 327357
Ingham Circuit Court
Family Division
LC No. 14-000065-NA

Before: SERVITTO, P.J., and GADOLA and O'BRIEN, JJ.

PER CURIAM.

Respondent appeals as of right the circuit court's order terminating her parental rights to the minor child, KLA, under MCL 712A.19b(3)(g)(failure to provide proper care or custody); (j) (reasonable likelihood, based on conduct or capacity of custodian, that child will be harmed if returned home); and (l)(parent's right to another child were terminated). Because the circuit court clearly erred in adjudicating respondent, we vacate the circuit court's order terminating respondent's parental rights and remand for further proceedings not inconsistent with this opinion.

Initially, the circuit court took jurisdiction over KLA in March 2014 due to actions of KLA's father and the father's girlfriend, with whom KLA resided. At that time, KLA did not reside with respondent, had not resided with her since February 2013, and respondent had had supervised parenting time with KLA once per week since February 2013, due to her mental health issues. A petition to terminate the parental rights of both respondent and KLA's father was filed in July 2014, but it was noted that respondent had not been adjudicated. Thus, an amended petition seeking to terminate respondent's parental rights was filed and, on April 15, 2015, a jurisdictional bench trial to adjudicate respondent and a request to terminate her parental rights at initial disposition took place.

At the bench trial, the circuit court adjudicated respondent and found that clear and convincing evidence existed to terminate respondent's parental rights pursuant to MCL 712a.19b(3)(g), (j), and (l). The circuit court further found that it was in KLA's best interests to terminate respondent's parental rights.

Respondent first argues on appeal that the circuit court erred in adjudicating her as unfit. We agree.

This Court reviews for clear error the circuit court's decision to exercise jurisdiction over a child in a child protective proceeding. *In re BZ*, 264 Mich App 286, 295; 690 NW2d 505

(2004). A decision is clearly erroneous if the reviewing court, on the entire evidence, is left with a definite and firm conviction that a mistake has been made. *In re JK*, 468 Mich 202, 209–210; 661 NW2d 216 (2003).

Generally, a circuit court determines whether it can take jurisdiction over a child in cases of parental abuse or neglect during the first of two phases of child neglect proceedings: the adjudicative phase. *In re Sanders*, 495 Mich 394, 404; 852 NW2d 524 (2014). To properly exercise jurisdiction, the circuit court must find that a statutory basis for jurisdiction exists under MCL 712A.2(b). *In re PAP*, 247 Mich App 148, 152–153; 640 NW2d 880 (2001). Jurisdiction must be established by a preponderance of the evidence either at trial or by plea. *In re SLH*, 277 Mich App 662, 669; 747 NW2d 547 (2008). A "preponderance of the evidence" means evidence of a proposition that when weighed against the evidence opposed to the proposition "has more convincing force and the greater probability of truth." *People v Cross*, 281 Mich App 737, 740; 760 NW2d 314 (2008). When the petition contains allegations against a parent under MCL 712A.2(b), and those allegations are proved by a plea or at the trial, the adjudicated parent is unfit. *Sanders*, 495 Mich at 405. Once a circuit court assumes jurisdiction over a child, the parties enter the dispositional phase where the court is to determine what measures it will take with respect to a child properly within its jurisdiction and, when applicable, against any adult. *Sanders*, 495 Mich at 406 (citation omitted).[1]

MCL 712A.2(b) provides the circuit court with jurisdiction in proceedings concerning a juvenile under age 18 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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> (2) Whose home or environment, by reason of neglect, cruelty, drunkenness, criminality, or depravity on the part of a parent, guardian, nonparent adult, or other custodian, is an unfit place for the juvenile to live in.

The original petition concerning KLA noted that respondent had a history with the circuit court and the intensive neglect services program. The petition indicated that KLA had been born

[1] If termination occurs at the initial disposition as a result of a request for termination contained in the original, or amended, petition for jurisdiction, then an attack on the adjudication is direct and raises no collateral attack concern. *In re SLH*, 277 Mich App 662, 668-69; 747 NW2d 547 (2008).

with marijuana, opiates, and benzodiazepines in his system. It also noted that respondent's rights to two other children had been terminated. The petition indicated that KLA did not reside with respondent and had supervised parenting time with him, and that placement with her was not appropriate at that time due to questions about her mental health and stability. A supplemental petition included additional allegations that respondent has a history of mental illness which has left her unable to adequately parent KLA and that respondent has a history of substance abuse. A second supplemental petition further stated that therapy reports of respondent indicated that she has a representative payee for her social security benefits, that she often feels depressed and does not feel like shopping or cooking, that she overuses pain medications at times, and that she is not interested in recreation or leisure activities due to her depression and prefers to be alone. In an amended second supplemental petition, it was requested that respondent's parental rights be terminated.

At the April 15, 2015 adjudication hearing, an employee with intensive neglect services testified that she worked with respondent and KLA from April 2007 until January 2008, during which time KLA was placed with his father. Jurisdiction over KLA was terminated in January 2008. Another intensive neglect services employee, Mary Ferranti, testified that she worked with respondent, KLA, and KLA's father from February 2009 until she dismissed the case in March 2011. Ferranti testified that during this time period, respondent was not compliant with drug screens and that respondent was unsuccessfully discharged from the family dependency treatment program. According to Ferranti, jurisdiction over KLA was terminated in March 2011 because it was felt that respondent had received the maximum benefits the court could offer. However, had respondent been KLA's sole parent, the case probably would have continued, as she felt KLA was safe because his father was in the home.

The supervisor for the neglect program testified that respondent came to the office in February 2013 and was speaking about being fearful of the letter "L" and was having difficulty speaking. Respondent was taken to a psychiatric hospital. Christopher Johnson, a child welfare specialist who acts as KLA's caseworker and who supervised respondent's visits with KLA testified that respondent completed parenting classes and was consistent with her visits. He also testified, however, that KLA does not really listen to respondent. Johnson testified that KLA has extreme behaviors when upset and he does not believe that respondent has the ability to parent KLA in that respect or control his behavior. Johnson also expressed concern about substance abuse given that respondent has a medical marijuana card.

Respondent testified that she was taken to a mental health facility in February 2013, where she spent approximately 2 ½ weeks, but has not been hospitalized since then. Respondent testified that she has a therapist and a doctor, is on medication for her bi-polar disorder, and has lived in her own one bedroom apartment for 1 ½ years. She believes her mental health has been stabilized and that she is able to care for KLA.

In adjudicating respondent, the circuit court took judicial notice of KLA's entire file, as well as other prior filings involving respondent's other children, dating back to 2001. The circuit court indicated that an initial petition regarding KLA was filed right after he was born due to KLA testing positive for marijuana and benzodiazepines at birth. The circuit court stated that it was concerned that respondent continued to use marijuana and, though she now had a medical marijuana card, one of the reasons she was unsuccessfully discharged from the family

dependency treatment court was due to the use of marijuana. The circuit court indicated that it appreciated that respondent may have attained mental stability but that stability does not equate with the type of stability needed to adequately parent KLA, who had significant behavioral issues. The circuit court further stated that prior dismissals of petitions concerning KLA were focused on the fact that his father was to be the primary caretaker. The circuit court stated that KLA had been involved in the court system over half of his life and that during that time, respondent had been involved in very intensive services with little benefit. Thus, the circuit court concluded that a preponderance of the evidence existed to find that respondent was an adjudicated parent based upon the statutory ground that respondent's home is unfit by reason of neglect and depravity on the part of respondent (MCL 712A.2(b)(2)).

We find that the circuit court's finding of respondent as an adjudicated parent was in error. The allegations in the most recent petition listed current concerns as: respondent's having supervised visitation with KLA through Friend of the Court; termination of respondent's parental right to two other children; a self-report by respondent that all four of her prior children had been removed from her care; respondent's history of mental illness; her diagnosis of bi-polar disorder, depression, hypokalemia, dehydration and chronic pain; her past history of substance abuse; and, therapy reports indicating that respondent has a representative payee for her social security benefits, that she often feels depressed and does not feel like cooking or shopping, that she at times overuses pain medications, and that she is not interested in recreational or leisure activities because of her depression and prefers to be by herself.

Testimony established that respondent's parenting time with KLA began being supervised through a Friend of the Court order when she entered an inpatient mental health treatment facility in February 2013. However, there is no indication that any investigation was done to determine whether the supervised parenting time was still required. Moreover, an independent supervisor for Friend of the Court, Patricia Campbell-Castro, testified that she supervised approximately seventeen visits between KLA and respondent from June through September 2013. Campbell-Castro testified that the visits took place at various locations, such as parks and in respondent's apartment, and that she had no concerns about how respondent took care of KLA. Campbell-Castro testified that respondent played with KLA, talked with him, read to him, gave him snacks, and redirected him when he misbehaved. KLA asked when he would be able to spend the night at respondent's home, showed bonding with her, and told her that he loved her. Campbell-Castro testified that she stopped supervising visits due to an assumption that funding was running out.

With respect to her other children, respondent testified that her other children are 31, 29, 20 and 17. Her parental rights appear to have been terminated with respect to the now 20 year old and the now 17-year-old in 2002. Respondent testified that she has contact with all of her children currently, with the exception of the 17-year-old. One of respondent's children, Rochelle, testified that she has seen a change in respondent over the last few years in regards to her mental health. She testified that she does not get upset or angry like she did when Rochelle was a child. She testified that respondent goes to the store, feeds herself, and takes care of herself. Rochelle testified that she has seen respondent with KLA and that she cooked, cleaned, and cared for him. Rochelle testified that she does activities with respondent, like take her children out to dinner with respondent, and that her children go to respondent's house and have spent the night there.

It is undisputed that respondent was admitted to a mental health facility in February 2013, for approximately 2 1/2 weeks, which apparently prompted the supervised visits with KLA. Indeed, it cannot be ignored that most previous petitions in the instant case stated that respondent's mental health was the primary concern. While we recognize that KLA came under the jurisdiction of the circuit court on at least two prior occasions, jurisdiction was ultimately terminated on those occasions and, notably, respondent was not in individualized counseling during any prior proceeding with respect to KLA. Respondent has been working with her current therapist, Kayla Cox, however, for over a year and with her current doctor for approximately two years.

Cox testified to a belief that respondent's mental health is stable and will remain so. She testified that she has seen respondent for fifteen months and that respondent has always attended her appointments and has always come in for medication injections. Cox testified that she and respondent have discussed her leisure activities including that respondent goes for walks when it is nice outside and enjoys cooking, especially for holidays.

We do not take lightly the testimony that respondent participated in a multitude of services through the circuit court until March 2011. These services included: drug screens, substance abuse counseling, parent support group, 12 step meetings, and families in transition therapy. Respondent was inconsistent with her drug screens, and substance abuse counseling, and had gone through periods of noncompliance with her parent support group. Despite her noncompliance, jurisdiction over KLA was terminated in 2011. Respondent testified that her current medications are Risperdal, klonopin, vistaril, and melatonin. She also has a medical marijuana card. Cox was not aware of respondent overusing any of her medications, and that had not come up at any team meetings. Moreover, according to Cox, respondent's main medication is an injection she gets from her psychiatrist, so she would not be able to overuse that particular medication. The therapist did testify that she was unable to comment on respondent's parenting skills but that respondent successfully completed parenting classes as ordered by the circuit court.

There has been no indication that respondent has failed to comply with any services or requirements at the present time. KLA's caseworker, Johnson, testified that no services, aside from parenting classes were offered to respondent and that she successfully completed those classes. He testified that it was never his intention to place KLA with respondent. He testified that he evaluated respondent's ability to parent KLA based on visitations and her lack of ability to control KLA in a contained room. Johnson testified that he had documents stating that respondent was attending therapy and taking all of her medications. He did not have a psychological examination performed on respondent and he has not asked respondent whether she shops and cooks for herself or what she does for recreational activities. Johnson testified that some of the parenting time visits went well, when respondent and KLA were engaged in an activity, but often, KLA did not listen to respondent and did what he wanted.

Respondent testified that although she has a representative payee for her social security benefits, she is responsible for paying her bills and taking care of the apartment she has had for 1 ½ years. There has been no testimony to indicate why respondent has a representative payee, and testimony affirmatively established that no one from neglect services has come to see her home or determine its appropriateness for KLA.

In sum, the circuit court erred in finding that jurisdiction was established under MCL 712A.2(b)(2) by a preponderance of the evidence. Under this statute, jurisdiction may be taken over a juvenile "[w]hose home or environment, by reason of neglect, cruelty, drunkenness, criminality, or depravity on the part of a parent, guardian, nonparent adult, or other custodian, is an unfit place for the juvenile to live in." KLA did not reside with respondent at the time the current petition was filed and respondent was not adequately investigated or provided with any services to properly determine whether KLA's home or environment with her would be an unfit place for him to live. Since the last assumption of jurisdiction over KLM had been terminated in 2011, the only current allegation concerning respondent was that she had suffered a mental health breakdown in February 2013. All evidence at respondent's adjudication trial indicated that her mental health issues were being addressed and that she was mentally stable. The initial petition in the instant matter was filed in January 2014 and concerned only actions of KLA's father. The final amended petition advanced assertions only with respect to respondent's history from several years prior to the petition and contains some assertions that were not supported by a preponderance of the evidence. Because respondent's adjudication was in error, and a parent must be adjudicated as unfit before the circuit court may enter dispositional orders affecting parental rights, the termination order must be vacated. *Sanders*, 495 Mich at 422.

Accordingly, we vacate the lower court's order terminating respondent's parental rights and remand for further proceedings not inconsistent with this opinion. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ Michael F. Gadola
/s/ Colleen A. O'Brien