STATE OF MICHIGAN

COURT OF APPEALS

In re CHURCHILL/BELINSKI, Minors.

UNPUBLISHED
March 15, 2018

No. 337790
Clare Circuit Court
Family Division
LC No. 16-000046-NA

Before: RONAYNE KRAUSE, P.J., and FORT HOOD and O'BRIEN, JJ.

PER CURIAM.

Respondent-mother Kathele Churchill appeals by right the trial court's order of adjudication taking jurisdiction over the minor children entered after a jury trial; and the subsequent order court transferring custody of the children to their respective fathers, granting parenting time to respondent, and directing respondent to participate in psychological therapy with a provider of her choice. The allegations in this matter primarily concern plaintiff allegedly coercing one of her children into a gender role that the child had previously expressed some interest in but ultimately did not want. The petition also raised allegations concerning the two other children, including the safety of respondent's home due to the presence of respondent's mentally ill mother and physical violence between the children. While we have some reservations about petitioner's motives, we reluctantly are required to affirm.

We note at the outset that we do not agree with any party's summation of the evidence in this matter. Respondent contends that even if everything in the petition were to be found completely accurate, it would not articulate a basis for taking jurisdiction. While somewhat tenuous, we disagree. Likewise, petitioner contends that the evidence in this matter was "overwhelming." The evidence was nothing even remotely of the sort, and indeed we affirm *only* because the applicable standards of review or mandatory inferences we are required to draw in petitioner's favor leave us with no other option. Amicus contends that this is a case of a child being taken away from a loving and concerned parent strictly for being transgendered. However, although the testimony leaves little doubt that the case worker was deeply uncomfortable with the concept, in fact the allegations were exactly the opposite: that the child was in fact *not* transgender and respondent was harming the child by *forcing* a gender identity onto the child rather than permitting one. On that last point, we emphasize that our decision in this matter, aside from our confinement by standards of review and mandatory inferences, is also based on our conclusion that the law absolutely cannot countenance, and absolutely deems abusive, forcing a particular gender on a child against the child's wishes, *no matter in which way the gender is forced*. In other words, it would constitute abuse to force a child who *is* transgender to

conform to any particular gender identity, as well. Finally, we emphasize that the complex and strange facts of this case otherwise may limit any applicability of this opinion to any other cases.

"At the adjudicative stage of termination proceedings, the probate court must determine whether sufficient facts have been alleged to support the court's assertion of jurisdiction." *Matter of Youmans*, 156 Mich App 679, 682; 401 NW2d 905 (1986). In relevant part, the probate court, or in this case the family division of circuit court, may take jurisdiction over a juvenile:

> 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. [MCL 712A.2(b)(1)]or:
>
> 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. [MCL 712A.2(b)(2)]

It is the policy of this state to keep children with their parents insofar as doing so is safely possible, and the statutory framework "shall be liberally construed" with that goal in mind. MCL 712A.1(3); *In re Mathers*, 371 Mich 516, 533-534; 124 NW2d 878 (1963). The "family court has subject-matter jurisdiction when the allegations in the petition provide probable cause to believe that it has statutory authority to act because the child's parent or guardian neglected the child, failed to provide a fit home, or committed any of the other conduct described in the statute," irrespective of whether the allegations are actually true or supported by evidence. *In re AMB*, 248 Mich App 144, 168; 640 NW2d 262 (2001).

The petition in this matter covers three children: OTC is the overwhelmingly primary focus, followed, in rough declining order of attention given, by JWC and SLB. Respondent argues that even if everything therein was accepted as true, it would not articulate a basis for the trial court to take jurisdiction over the children. Respondent also implies some concern that the stated allegations are pretextual, a concern we find entirely reasonable under the circumstances. However, our review is limited to determining whether taking jurisdiction is supported by what is *actually* alleged on the face of the petition. See *Matter of Adrianson*, 105 Mich App 300, 313; 306 NW2d 487 (1981), abrogated on other grounds by *In re Gazella*, 264 Mich App 668; 692 NW2d 708 (2005).

The family court may not take jurisdiction for trivial reasons. The state may not interfere with a parent's relationship with their child merely because the parent was not a "model" parent or because a trial judge believes the parent could have made better decisions. *Santosky v Kramer*, 455 US 745, 753; 102 S Ct 1388; 71 L Ed 2d 599 (1982); *Troxel v Granville*, 530 US 57, 72-73; 120 S Ct 2054; 147 L Ed 2d 49 (2000). However, there is no bright-line rule, and such a rule may not be possible. As would seem obvious, a parent sexually assaulting or attempting to murder their child is clearly sufficient, but merely being incarcerated is not. See *In*

re Ramsey, 229 Mich App 310, 314-316; 581 NW2d 291 (1998). A complete mental and financial inability to care for a child is also sufficient. *In re AMB*, 248 Mich App at 168. In contrast, an unclean home and even some injuries to a child are not necessarily sufficient. *Matter of Youmans*, 156 Mich App at 682-685. More extensive illnesses and injuries can indicate neglect, as can missing extensive amounts of school. See *Matter of Nash*, 165 Mich App 450; 419 NW2d 1 (1987). Clearly, it is neither possible nor wise to entomb a child in a protective bubble, and as respondent persuasively points out, jurisdiction may not be taken merely because a parent is not especially good at parenting. For better or for worse, whether to take jurisdiction is therefore to some extent a judgment call that is difficult for an appellate court to disturb.

The petition in this matter is a ramshackle conglomerate of observations of the children and of respondent made by various people, with no summary and little coherence. However, while it is not a model of elegance, we disagree with respondent that it is wholly devoid of an articulated basis for taking jurisdiction. Leaving aside whether any of the allegations are either true or supported by the evidence, the practical gravamen of the petition is that (1) OTC expressed a desire to be a girl at one point, whereupon respondent grossly overreacted and attempted to force a female gender identity after OTC decided he was no longer interested, (2) respondent's home was unfit due to her mentally unhealthy mother's presence and impliedly further shown by respondent's refusal to cooperate with home inspections, (3) all three children have some kind of mental health issue being exacerbated or untreated by respondent, and (4) respondent has an antagonistic relationship with the father of OTC and JWC. The allegations regarding JWC appear to be primarily that he exhibits behavior problems that his father can control better than respondent, and respondent erroneously believes JWC has autism. The allegations regarding SLB appear to be that SLB is gay, has expressed stress therefrom to respondent that his teacher did not notice, and was absent from school briefly after the 2016 Presidential election. There is also some general allegation that there is insufficient food and hygiene in the house.

As noted, we conclude that forcing a child to act as a gender the child does not identify with—whatever gender that is, and whatever gender the parent is attempting to coerce—is certainly the kind of mistreatment by a parent that could cause deep and lasting harm to a child. Here, OTC is allegedly not transgender, and respondent is allegedly coercing him into a female role against his wishes. Such treatment constitutes abuse, and it is therefore a sufficient basis for taking jurisdiction. Our conclusion would be identical if OTC *was* transgender and respondent was coercing him into a male role against his wishes.

The allegations regarding the other children are mostly weak, pointless, or indicative of very little. We note in particular that the petition explicitly acknowledges that JWC was actually evaluated for autism, and that the belief that JWC is not autistic is derived from the opinions of teachers and educators rather than psychiatric professionals. The fact that respondent described the father of OTC and JWC as her abuser is extremely disturbing, especially given the eventual trial testimony, including his own, that, in fact, said father actually *was* abusive. That respondent had a contentious relationship with him would neither be surprising nor indicative of her parenting or caretaking abilities. The fact that teachers failed to observe bullying reported by a child only barely constitutes evidence that no such bullying occurred, as public revelations in recent years increasingly attest. These allegations do nothing to alleviate suspicions of pretext.

However, as noted, we are constrained to accept the allegations as true, and some of them are indeed quite disturbing, including the allegation that respondent threw a cup of coffee at one child, and the other child is being prevented from sleeping by respondent's mother. The seriousness of these allegations leads us to conclude that the trial court correctly declined to dismiss the petition outright.

The matter proceeded to a jury trial. Respondent argues that the trial court should have granted her motion for directed verdict. Directed verdict must be denied "if there is any evidence from which the jury could reasonably find a verdict contrary to the moving party." *Blazo v Neveau*, 382 Mich 415, 424; 170 NW2d 62 (1969). The factfinder must be able to find by a preponderance of the evidence that at least one of the statutory requirements is satisfied. *In re PAP*, 247 Mich App 148, 152-153; 640 NW2d 880 (2001). All reasonable inferences must be drawn in favor of the nonmoving party, and although our review is nominally de novo, we are required to give deference to "the trial court's superior opportunity to observe witnesses." *Coble v Green*, 271 Mich App 382, 385-386; 722 NW2d 898 (2006); see also *McGonegal v McGonegal*, 46 Mich 66, 67; 8 NW 724 (1881).

We do agree with considerable portions of respondent's argument. For example, one teacher testified that OTC reported respondent having thrown away his "boy clothes" only to continue coming in to school wearing what the teacher regarded as typical male attire, and there was near unanimity that OTC advised everyone that there was no such thing as "boy clothes" or "girl clothes." There was testimony about a single occasion upon which OTC became upset by respondent calling him "Lisa,[1]" but admittedly numerous other occasions upon which OTC did not become upset by being called the same name. OTC's father agreed that OTC asked to be called Lisa at times, even in the absence of respondent's presence, and that following OTC's lead regarding which name to use was in fact exactly what had been recommended by experts. The evidence unambiguously established that respondent was not in fact forcing a gender identity on OTC or preventing OTC from expressing a preferred gender identity, either of which would clearly be abusive. Furthermore, there was no dispute that JWC had in fact been diagnosed with autism.

We are particularly concerned with the testimony of Katelyn Brubaker, the case investigator, who admitted, only after being told *by petitioner's own attorney* to "stop dancing around the point," that her concerns regarding mental injury involved OTC's transgender issues, which she believed she had "overwhelming evidence" of, only to prove completely unable to substantiate her concern of mental injury. She admitted further that one of her "safety" concerns was the fact that respondent had been a *victim* of domestic violence. Brubaker's testimony on this point is confusing, but seemingly indicated that she was also unable to substantiate her concern that OTC was being forced to wear clothes he did not wish to wear. She also admitted that her report had been based on information that was given to her by someone who admitted

[1] It is this Court's policy to redact names of minors. A significant issue in this matter was OTC's choice to adopt a different female name. "Lisa" is not the real name chosen, but we use it for ease of reading.

that he might have obtained it illegally. She opined that the children had been "coached" without being able to articulate any basis for that conclusion. There was essentially no substance whatsoever backing Brubaker's testimony, and we have some doubt as to either her sincerity or her competence or both.

Nevertheless, under the present state of the law, dubious motives on the part of a case worker is not technically relevant except, as usual, as to her own credibility as a witness, which we are required to leave to the jury. While not overwhelming, there was competent evidence that respondent was more subtly harming the children, partly by engaging in rigid thinking and an inability to comprehend and effectively act on professional advice, partly by creating a dramatic narrative of her life and placing the children in situations where they would feel expected to go along with that narrative, and partly by essentially being "over involved" to a smothering degree. We think this clearly teeters on the brink of merely being a less than ideal parent. However, the evidence was that the children would be psychologically harmed, and it was more than mere speculation. *Matter of Hulbert*, 186 Mich App 600, 605; 465 NW2d 36 (1990); *In re LaFrance Minors*, 306 Mich App 713, 730; 858 NW2d 143 (2014). Directed verdicts are disfavored, *Cody v Marcel Electric Co*, 71 Mich App 714, 717; 248 NW2d 663 (1976), and a review of the case law leads us to conclude that if the question is a close one, it should generally be submitted to the jury. See, e.g., *In re Frazee's Estate*, 301 Mich 164, 167; 3 NW2d 51 (1942). The trial court properly denied respondent's motion for directed verdict.

Respondent also argues that the jury's verdict was contrary to the weight of the evidence. To preserve an argument that a jury's verdict is against the great weight of the evidence, an aggrieved party must make a motion for a new trial. *Armstrong v Woodland Mut Fire Ins Co*, 342 Mich 666, 671-672; 70 NW2d 786 (1955); *Hyde v Univ of Michigan Regents*, 226 Mich 511, 525; 575 NW2d 36 (1997). Respondent made a pro-forma request at a post-judgment hearing reiterating that the petition be dismissed, but nothing that appears to be a motion for a new trial. Consequently, this issue is unpreserved.

"The test to determine whether a verdict is against the great weight of the evidence is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *People v Musser*, 259 Mich App 215, 218-219; 673 NW2d 800 (2003). Our review is similar to that of a motion for directed verdict, insofar as it is reviewed de novo in the light most favorable to the nonmoving party, with credibility issues generally left to the trier of fact. *Wilkinson v Lee*, 463 Mich 388, 391; 617 NW2d 305 (2000); *People v Lemmon*, 456 Mich 625, 642-643; 576 NW2d 129 (1998). Additionally, because this issue is unpreserved, it is reviewed even more deferentially for plain error affecting respondent's substantial rights. See *People v Cameron*, 291 Mich App 599, 616-618; 806 NW2d 371 (2011). If there is even "meager" evidence in support of petitioner's claim, this Court must therefore affirm even if it would otherwise be inclined to reverse. *Armstrong*, 342 Mich at 671-672. This Court remains obligated to reverse if there is "a total want of evidence upon any essential point." *People v Howard*, 50 Mich 239, 242-243; 15 NW 101 (1883).

The jury may not engage in complete speculation or wholly invent evidence, but the jury may pick and choose what to believe and how to put those pieces together. *Howard*, 50 Mich at 242-243; *People v Bailey*, 451 Mich 657, 673-675, 681-682; 549 NW2d 325 (1996). Respondent relies almost entirely on the evidence supporting her position, which is fair because consideration

of whether the verdict is against the great weight of the evidence calls for review of the entirety of the proofs. *Dawe v Bar-Levav & Assoc (On Remand)*, 289 Mich App 380, 401; 808 NW2d 240 (2010). However, the jury simply is not obligated to accept any of it. Furthermore, a verdict is not "against the great weight of the evidence" merely because the evidence fails to preponderate in support thereof. Rather, the evidence must *heavily* preponderate against the verdict, or there must be a total lack of evidence in support altogether.

As discussed, we think the case is a weak one and pursued with potentially questionable motives, but it is not wholly lacking in any sound basis for taking jurisdiction. We are therefore unable to find the verdict against the great weight of the evidence.

Respondent then argues that presuming the trial court properly took jurisdiction, the trial court erred by removing the children from their mother, splitting them apart, and placing them with their fathers. The trial court's orders at the dispositional phase of a child protective proceeding are reviewed for clear error and afforded considerable deference, but those orders must be "'appropriate for the welfare of the juvenile and society in view of the facts proven and ascertained.'" *In re Sanders*, 495 Mich 394, 406; 852 NW2d 524 (2014). The rules of evidence do not apply during the dispositional phase. *Id*. Either party, especially a respondent, must have "the opportunity to present evidence that was not admissible or relevant in the adjudicative phase of the proceeding in an attempt to prove" that removal of the children is not in their best interests. *In re AMAC*, 269 Mich App 533, 539; 711 NW2d 426 (2006). A dispositional order may be set aside if it is against the great weight of the evidence, but it is also proper for a reviewing court to consider whether it contravenes "basic statutory policy emphatically enunciated by the legislature." *In re Mathers*, 371 Mich 516, 533; 124 NW2d 878 (1963).

Respondent correctly observes that it is the policy of this state to keep children with their parents insofar as doing so is possible. *Mathers*, 371 Mich at 533-534. Petitioner likewise correctly points out that in *Mathers*, the respondent mother had engaged in neglect initially but had radically rehabilitated herself over the eight-year period of the litigation. *Id*. at 533-535. Additionally, *Mathers* involved outright termination of the mother's parental rights, whereas in this matter, the trial court much more modestly transferred primary physical custody from respondent mother to the children's fathers, allowing her "liberal parenting time." However, we think petitioner takes some liberties with its presentation of the latter phrase, because the trial court clarified that it was only referring to the standard "Friend of the Court guidelines," leaving it to the DHHS whether to make visitation supervised or unsupervised.

Nonetheless, the trial court has considerable discretion to craft its orders of disposition. The testimony to the effect that respondent had problems addressing the children's emotional needs, whereas the fathers were better at doing so and more supportive of the children's needs, is enough to justify changing the parenting time arrangement and providing respondent with services. The trial court noted that it was aware that changing the parenting time arrangement would be disruptive to the children. At a "best interests" stage of proceedings, the trial court's order is simply not against the great weight of the evidence, at least in the absence of any evidence that the fathers would themselves cause the children any harm. While the genesis of this proceeding is concerning in the first place, having arrived at this point, the evidence clearly supported a finding that respondent had issues of her own that interfered with her parenting abilities, and the fathers either were not so burdened or had freed themselves of such burdens.

Finally, respondent argues that the trial court made two evidentiary errors that allegedly denied her a fair trial. Respondent argues that a doctor improperly testified about changing the custody of the children, to which respondent did not object. Respondent also argues that the trial court improperly admitted hearsay statements made by OTC pursuant to the "tender years" exception to the hearsay evidence rule, over respondent's objections.

Unpreserved evidentiary errors are reviewed for plain error affecting substantial rights, except to the extent they involve interpretation of a rule or law, in which case that portion of the issue is reviewed de novo. *Hilgendorf v St John Hosp and Med Ctr Corp*, 245 Mich App 670, 700; 630 NW2d 356 (2001). Otherwise, "whether to admit evidence falls within a trial court's discretion and will be reversed only when there is an abuse of that discretion." *People v Duncan*, 494 Mich 713, 722; 835 NW2d 399 (2013). "A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes." *Id*. at 722-723. However, preliminary questions of law are reviewed de novo, and the trial court necessarily commits an abuse of discretion if it makes an incorrect legal determination. *Id*. at 723. The interpretation and application of statutes, rules, and legal doctrines is reviewed de novo. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008).

Regarding the doctor's testimony, we have reviewed it and found only one statement that appears consistent with respondent's argument, that the doctor initially "didn't find abuse or neglect that would justify removal," but subsequently agreed that he did opine in his report that respondent's psychological problems "add up to abuse and neglect requiring ending custody." Notably, however, the latter quote came from an attorney asking the doctor to confirm that finding; his actual report says precisely the opposite: "However, these psychological difficulties do not, in my opinion, add up to abuse and neglect requiring ending custody." Either the transcript is incorrect or someone mis-spoke. While potentially confusing, it was *respondent's* attorney who asked the question, so either the confusion was respondent's own fault that the doctor failed to notice, or the transcript is incorrect and there was in fact no confusion. Thus, either there was no error, or respondent cannot now complain of an error to which her attorney "contributed by plan or negligence." *Farm Credit Services of Michigan's Heartland, PCA v Weldon*, 232 Mich App 662, 684; 591 NW2d 438 (1998).

Regarding OTC's hearsay statements, the gravamen of the petition regarding OTC was, in a nutshell, that respondent was forcing OTC into a gender role that OTC did not want. The abuse, therefore, was essentially emotional in nature. Whether or not any such abuse actually occurred, the statements about which respondent complains on appeal all tend to at least circumstantially support the assertion that respondent was advocating a particular gender for OTC contrary to his wishes. Pursuant to MCL 722.622(g), "child abuse" may include "threatened harm to a child's health or welfare that occurs through nonaccidental physical or mental injury." There is no *requirement* that only physical sexual abuse will suffice, as respondent argues. Furthermore, the exception covers statements "*regarding*" an act of abuse, not necessarily proving or describing such an act. MCR 3.972(C)(2) (emphasis added). The statements of which respondent complains appear to be within the ambit of the rule.

Respondent's argument that the statements lack the requisite "adequate indicia of trustworthiness," MCR 3.972(C)(2)(a), is a closer question. Certainly, the statement about respondent having disposed of OTC's boys' clothes is patently impossible to be literally true,

given the testimony that OTC continued to wear boys' clothes. Furthermore, respondent reasonably points out that there was no known context to anything respondent might have said about OTC having a vagina one day, and there was evidence that OTC's statement about not wishing to be called Lisa was in fact not the entirety of the situation. However, those issues really impact whether the trier of fact ought to take them at face value. "Indicia of trustworthiness" include such matters as "spontaneity, consistent repetition, the mental state of the declarant, use of terminology unexpected of a child of a similar age, and lack of motive to fabricate." *In re Archer*, 277 Mich App 71, 82; 744 NW2d 1 (2007).

OTC's statement about having a vagina one day was spontaneous, and the other two appear to have been uncoached responses to interaction. None of them suggest any reason why OTC would invent them. It appears that they were mostly discrete statements, but part of an alleged pattern. Petitioner reasonably points out that OTC was consistently described as articulate and assertive. While there are very good reasons to be suspect about ascribing much weight to any of the statements, they all appear to have been admissible. Any prejudice the statements might have generated could easily be dispelled by pointing out exactly the arguments respondent makes here: that OTC's father had no way to know what generated the statement about having a vagina one day, that OTC's statement about respondent having disposed of his clothes could not possibly be accurate, and that OTC's statement about not wishing to be called Lisa was consistent with testimony that not even a professional specialist could keep up with what OTC wished to be called at any given time within a single session. The prejudice does not appear to be unfair.

Ultimately, despite our concerns, the law precludes this Court from acting as a thirteenth juror, and because it favors resolution of issues on their merits, it constrains us to conclude that the matter was properly submitted to the jury and properly disposed of by the trial court thereafter. Affirmed.

/s/ Amy Ronayne Krause
/s/ Karen M. Fort Hood
/s/ Colleen A. O'Brien