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STATE OF MICHIGAN

COURT OF APPEALS

In re B. J. MCCOMAS, Minor.

UNPUBLISHED
December 21, 2021

No. 357344
Monroe Circuit Court
Family Division
LC No. 20-025005-NA

Before: BOONSTRA, P.J., and GLEICHER and LETICA, JJ.

PER CURIAM.

Respondent appeals the trial court's May 14, 2021 order of adjudication exercising jurisdiction over his minor daughter, BM, under MCL 712A.2(b)(1) and (2). We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

On March 12, 2020, petitioner, the Department of Health and Human Services (DHHS), filed a petition in Monroe Circuit Court requesting that the trial court take jurisdiction over BM under MCL 712A.2(b)(1) and (2), and enter an order removing BM from her mother's[1] care. The petition noted respondent as BM's presumptive father, but did not contain any substantive allegations against him.

At a preliminary hearing before a referee, BM's mother entered a plea admitting to numerous allegations contained in the petition, including those related to jurisdiction. Respondent was not present for this hearing. BM's mother acknowledged respondent as BM's father, but stated that respondent was then incarcerated and had not been contacted regarding the proceedings. Noting that BM's mother had stipulated to probable cause for removal, the referee authorized the petition and recommended that BM be placed with petitioner. A pretrial hearing[2] was subsequently

[1] BM's mother was also a respondent in the proceedings below, but is not a party to this appeal. Our use of "respondent" in this opinion, outside of this footnote, refers solely to BM's father.

[2] Apart from the March 12, 2020 preliminary hearing, all proceedings referenced herein were conducted remotely due to the COVID-19 pandemic.

conducted, with respondent again absent. At that hearing, petitioner acknowledged ongoing efforts to inform respondent of his status as BM's presumptive father.

Respondent's paternity over BM was ultimately established on February 17, 2021. On March 8, 2021, petitioner filed a supplemental petition, requesting that the trial court authorize the petition, take jurisdiction over BM under MCL 712A.2(b)(1) and (2), and enter an order removing BM from *both* the mother's and respondent's care. This petition acknowledged that respondent was BM's legal father and that BM was then living with her maternal grandmother in West Virginia. It also included new allegations against respondent—specifically, that he had not visited BM since she was born, had not provided BM with the necessary financial, emotional, or physical support, and had an extensive criminal history.

An adjudication on the supplemental petition was held before a referee. The referee determined that there was a preponderance of evidence to exercise jurisdiction over BM under both MCL 712A.2(b)(1) and (2). In May 2021, the trial court entered an order confirming its jurisdiction over BM and requiring that BM remain in temporary placement with the maternal grandmother and that respondent comply with and benefit from the case service plan. The order also granted respondent supervised parenting time and directed that reasonable efforts be made to preserve and reunify the family. At that time, a home study of respondent's wife's home was ongoing. This appeal of the trial court's exercise of jurisdiction over BM followed.

II. STANDARD OF REVIEW

"To acquire jurisdiction, the factfinder must determine by a preponderance of the evidence that the child comes within the statutory requirements of MCL 712A.2." *In re Kellogg*, 331 Mich App 249, 253; 952 NW2d 544 (2020) (citation omitted). This Court reviews for clear error the trial court's determination that it may exercise its jurisdiction over a minor child. *Id.* "A finding of fact is clearly erroneous if the reviewing court has a definite and firm conviction that a mistake has been committed, giving due regard to the trial court's special opportunity to observe the witnesses." *Id.* (citation omitted).

III. ANALYSIS

Respondent argues that the trial court erred by exercising jurisdiction over BM. We disagree. The trial court exercised jurisdiction over BM under MCL 712A.2(b)(1) and (2), which provide jurisdiction over proceedings involving the abuse or neglect of juveniles; under those provisions, the court has the following authority and jurisdiction:

> (b) Jurisdiction in proceedings concerning a 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. . . .

* * *

> (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. . . . [MCL 712A.2(b).]

Because MCL 712A.2 "speaks in the present tense, . . . the trial court must examine the child's situation at the time the petition was filed." *In re Long*, 326 Mich App 455, 459; 927 NW2d 724 (2018) (quotation marks and citation omitted). To properly find jurisdiction over a child, at least one statutory ground must be proven. *In re SLH*, 277 Mich App 662, 669; 747 NW2d 547 (2008).

Respondent argues that the trial court erred in finding jurisdiction under MCL 712A.2(b)(2) because BM's home environment was not unfit. While acknowledging that he was incarcerated when the supplemental petition was filed and during the adjudication hearing, respondent points out that BM was actually living with the maternal grandmother at the time the trial court exercised jurisdiction and that no evidence was presented to show that this environment was in any way unfit. Relying on *Long*, respondent asserts that it was a mistake for the trial court to focus on respondent and his incarceration instead of the maternal grandmother who actually had custody of BM at the time. We agree. This Court in *Long* concluded that it was improper for the trial court to exercise jurisdiction under MCL 712A.2(b)(2) when the child was living with a relative whose home was not alleged to be unfit. *Long*, 326 Mich App at 462. However, because only one statutory ground is required to establish jurisdiction, we conclude that the trial court's error was harmless.

Respondent also argues that the trial court erred in finding jurisdiction under MCL 712A.2(b)(1). We disagree. Respondent argues specifically that he did provide sufficient care and support to the extent he was able, considering that he was incarcerated and had only recently discovered his paternity over BM; he notes his contact with and support for his older child also living with the maternal grandmother, his inquiries about BM during those contacts, his requests for photos of BM, his wife's sending gifts to and offering placement for BM, and his testimony that he would be released from prison in the summer of 2021.

The trial court noted that "[respondent] has been incarcerated since at least [BM]'s birth[,] . . . [he] has an extensive criminal history[,] . . . [and he] is unsure of the anticipated date of his release." The court also noted that respondent had additional pending criminal charges in West Virginia. Furthermore, the court found that respondent had not visited BM since BM's birth and had not attempted to contact BM until her first birthday in 2021, though he did arrange for his wife to provide BM with diapers, clothes, and related items for BM's birthday. The trial court did note respondent's efforts to inquire about BM through the maternal grandmother. And, despite respondent's claim that he was able to provide for BM, the trial court found that respondent had not, at that time, "provided [BM] with financial, emotional, or physical support during her lifetime."

Regarding respondent's argument that BM could have been placed with his wife, the trial court noted that this request was not made until the day of the adjudication hearing. The court also noted that the proposed home had three bedrooms that were already occupied by respondent's

wife, her daughter, and the daughter's three young children. Finally, the court found that respondent's parental rights to three other children had been terminated and that he had not regularly visited his other child adopted by the maternal grandmother, though he did provide some financial support.

Respondent correctly notes that an individual's parental rights may not be terminated solely on the basis of that person being incarcerated. See *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010) ("The state is not relieved of its duties to engage an absent parent merely because that parent is incarcerated."). However, even assuming that the rule in *Mason* applied to the trial court's initial exercise of jurisdiction rather than termination, *Mason* does not require that we grant respondent the relief he seeks.

The trial court's exercise of jurisdiction in this case was not solely based on respondent's incarceration; the record shows that the trial court also considered respondent's limited contact with and support for BM even after he was determined to be the legal father, as well as concerns related to respondent's preferred placement for BM. Further, although respondent urged the trial court to look at his conduct with regard to his other children, the fact remains that respondent's parental rights to three other children had been terminated. If anything, evidence that respondent had failed to properly care for his other children would be evidence in favor of the exercise of the trial court's jurisdiction. See *In re Gazella*, 264 Mich App 668, 680-681; 692 NW2d 708 (2005) ("A child may come within the jurisdiction of the court solely on the basis of a parent's treatment of another child. Abuse or neglect of the second child is not a prerequisite for jurisdiction of that child . . . ."), superseded in part on other grounds by statute as stated in *In re Hansen*, 285 Mich App 158 (2009), vacated on other grounds 486 Mich 1037 (2010).

Furthermore, the mere fact that a respondent can articulate a plan for caring for the child does not mean that the trial court may not exercise its jurisdiction. See *In re Baham*, 331 Mich App 737, 748-751; 954 NW2d 529 (2020) (concluding it was not plain error for the trial court to exercise jurisdiction when the respondent-mother did have a plan for the child, but that plan was inappropriate and not implemented before the petition was filed). Like the mother in *Baham*, respondent was able to articulate a plan for BM to stay at his wife's home, but no such plan had been implemented or was anywhere close to being implemented at the time the supplemental petition was filed. And the trial court had concerns over the appropriateness of this proposed plan considering the existing occupants and limited space in that home.

Accordingly, although the record does establish certain efforts by respondent to care for BM, we are not left with a "definite and firm conviction" that the trial court was mistaken in determining that the facts, in totality, established by a preponderance of the evidence respondent's lack of care and custody under MCL 712A.2(b)(1). *Kellogg*, 331 Mich App at 253. We therefore conclude that the trial court did not err in exercising jurisdiction over BM under MCL 712A.2(b)(1).

Affirmed.

/s/ Mark T. Boonstra
/s/ Elizabeth L. Gleicher
/s/ Anica Letica