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STATE OF MICHIGAN

COURT OF APPEALS

In re JM, Minor.

UNPUBLISHED
January 13, 2022

No. 356510
Oakland Circuit Court
Family Division
LC No. 2018-859673-NA

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

PER CURIAM.

Respondent appeals as of right the order of adjudication entered by the family division of the circuit court exercising jurisdiction over her child, JM. We affirm.

I. FACTS

Respondent is the mother of three children, AM, JM, and MM. Respondent had an extensive CPS history, beginning in 2012, that included substantiated physical abuse of AM and failure to protect JM and MM from sexual abuse perpetrated by AM. In November 2017, AM was clinically evaluated and found to be an "extreme risk to others," but respondent refused to cooperate with the recommended inpatient treatment.

In January 2018, petitioner filed a neglect petition to remove the children from respondent's home when it was discovered that respondent had failed to protect JM and MM from AM's sexual abuse. AM was placed in a facility and provided with needed mental-health services. JM and MM were placed in nonrelative foster care. The court exercised jurisdiction over the children and respondent after she pleaded no-contest to all of the petition allegations.[1] Respondent was ordered to comply with, and benefit from, a parent-agency treatment plan that included individual and family counseling, which respondent successfully completed. Petitioner closed its

[1] Respondent's assertion on appeal that she had not come under a previous adjudication is a misstatement of the lower-court record. See *In re Sanders*, 495 Mich 395, 405; 852 NW2d 524 (2014) ("When the petition contains allegations of abuse or neglect against a parent, and those allegations are proved by a plea or at the trial, the adjudicated parent is unfit.").

case as it related to JM, MM, and respondent. The trial court terminated jurisdiction over respondent with regard to JM and MM on August 26, 2019, but retained jurisdiction over JM and MM with regard to a pending petition regarding their father. Respondent remained a respondent in the proceedings regarding AM. Thus, after August 26, 2019, respondent was not required to participate in any services regarding JM, although petitioner was able to continue to offer services to JM because he was under the court's jurisdiction concerning a petition to terminate his father's parental rights.

Petitioner returned its attention to JM in early August 2019 when respondent reported that JM was "having behaviors," meaning lying, stealing, and suicidal ideation, after AM's sexual abuse. On November 1, 2019, respondent's partner observed JM atop MM, moving up and down, on a camera system that had been installed in the home because of AM's earlier sexual abuse. When respondent's partner, now spouse, yelled at JM, he jumped off MM and pulled his pants up. In a subsequent forensic interview, MM revealed that JM had penetrated her while respondent's spouse was in the room distracted by her phone and respondent was at work. Contrary to respondent's position on appeal that this was the only time JM had assaulted MM, MM later reported that there were at least two, and possibly three, assaults during a forensic interview. Petitioner implemented a safety plan to keep the children from being alone, and recommended outpatient mental-health treatment for JM so that he could safely remain in the home.

On December 26, 2019, a delinquency case was initiated against JM, charging him with second-degree criminal sexual conduct. JM was removed from the home on January 8, 2020, and was placed in a detention facility pending a delinquency hearing. On February 27, 2020, the trial court terminated the father's parental rights and released JM and MM from its jurisdiction.

On March 10, 2020, a referee recommended dismissing the delinquency proceeding because ten-year-old JM was found to be incompetent to stand trial. The same day, petitioner filed a petition to take JM into protective custody because respondent had refused to take him home for fear that he would sexually assault MM. The petition was authorized and the court concluded after an adjudication trial that there were sufficient statutory grounds to assume jurisdiction over JM.

On appeal, respondent argues that JM did not come within the provisions of MCL 712A.2(b)(1) and (2) because respondent did not willfully abandon JM and had continued to provide him with proper care. Respondent further asserts that she was not neglectful because she feared for her children's safety and had taken adequate steps to protect them. We disagree.

II. STANDARDS OF REVIEW

We review for clear error whether a preponderance of the evidence supported a trial court's decision to exercise jurisdiction. *In re BZ*, 264 Mich App 286, 295; 690 NW2d 505 (2004). See also MCR 3.972(C)(1) ("Except as otherwise provided in these rules, the rules of evidence for a civil proceeding and the standard of proof by a preponderance of evidence apply at the trial . . . ."). "Proof by a preponderance of the evidence means that the evidence that a statutory ground alleged in the petition is true outweighs the evidence that that statutory ground is not true." M Civ JI 97.37.

When deciding a challenge to a court's assumption of jurisdiction over a minor child, this Court must determine whether any error in the matter "was of such magnitude that, but for it, there was an insufficient basis for the . . . court to assume jurisdiction." *In re Toler*, 193 Mich App 474, 476; 484 NW2d 672 (1992). The interpretation and application of statutes and court rules is reviewed de novo, meaning independently and without deference to the trial court. *In re Ferranti*, 504 Mich 1, 14; 934 NW2d 610 (2019).

III. ANALYSIS

The trial court did not clearly err in finding by a preponderance of the evidence that there was a statutory ground to exercise jurisdiction over JM.

"In Michigan, child protective proceedings comprise two phases: the adjudicative phase and the dispositional phase." *In re Sanders*, 495 Mich 394, 404; 852 NW2d 524 (2014). "Generally, a court determines whether it can take jurisdiction over the child in the first place during the adjudicative phase." *Id.* "The question at adjudication is whether the trial court can exercise jurisdiction over the child (and the respondents-parents) under MCL 712A.2(b) so that it can enter dispositional orders, including an order terminating parental rights." *In re Ferranti*, 504 Mich at 15. For the trial court to acquire jurisdiction over a minor child, the petitioner must establish by a preponderance of the evidence a statutory basis for jurisdiction under MCL 712A.2. *In re Brock*, 442 Mich 101, 108-109; 499 NW2d 752 (1993). In pertinent part MCL 712A.2 states:

> (b) Jurisdiction in proceedings concerning a juvenile under 18 years of age found within the county:
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> (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, nonparent adult, or other custodian, is an unfit place for the juvenile to live in . . . .[2]

MCL 712A.2 "speaks in the present tense, and, therefore, the trial court must examine the child's situation at the time the petition was filed." *In re MU*, 264 Mich App 270, 279; 690 NW2d 495 (2004).

[2] MCL 712A.2 has been amended, effective October 1, 2021. 2019 PA 113.

The evidence supported the trial court's decision to assume jurisdiction over JM, pursuant to MCL 712A.2(b)(1), because JM was without proper custody or guardianship.

Respondent was legally responsible for JM at the time petitioner filed a neglect petition on March 10, 2020. On that day, JM was found to be incompetent to stand trial and the delinquency case was dismissed, resulting in his discharge from the detention facility. A caseworker testified that JM was not under a guardianship, and the court had previously dismissed JM from its jurisdiction on February 27, 2020. Respondent—not petitioner or the trial court—was responsible for JM's custody and care.

The record supports the trial court's conclusion that, on March 10, 2020, respondent refused to take JM home and was otherwise unwilling to provide him with custody or care "at that time." On appeal, respondent argues in general terms that she refuted the caseworker's testimony that she was unwilling to take JM home in November 2019. However, she does not specifically challenge the abundant evidence that, from late November 2019 until the October 2020 adjudication, she had repeatedly stated that JM could not return home, including on March 3 and 10, 2020. At the adjudication trial, respondent remained steadfast in her unwillingness to take him back into her home, stating that she did not believe that she could keep MM safe from him. Respondent had informed caseworkers that there were no relatives to care for him and that she had no plans for his placement or mental-health treatment. Petitioner had also explored, without success, the possibility of placing JM with relatives or others outside of respondent's home.

Further, on March 10, 2020, petitioner filed a petition to take JM into temporary custody in order to give him a place to stay and provide him with proper care, after which petitioner arranged to have JM admitted to Havenwyck Hospital, which had a very rigorous sexual reactive program. Respondent's assertion, however, that she had provided proper care for JM on March 10, 2020, by voluntarily admitting him to Havenwyck is not supported by the record. JM's guardian ad litem reported that respondent "expressed some serious concerns about [JM] going to Havenwyck" as "[respondent] and her partner had heard very negative things about Havenwyck." Although respondent gave written consent for JM's medical treatment at Havenwyck, a caseworker explained that when a child is in petitioner's protective custody, parental consent or a court order is required for medical treatment. The caseworker further stated that all planning, placement, and payment for inpatient treatment at Havenwyck was through petitioner, not respondent.

The evidence also supported the trial court's decision to assume jurisdiction over JM pursuant to MCL 712A.2(b)(1) because respondent subjected JM to a substantial risk of harm to his mental wellbeing. It is undisputed that JM required intensive treatment to overcome his trauma from AM's sexual abuse. The evidence showed that respondent was unable or unwilling to promptly provide him with necessary mental-health treatment. Petitioner offered services that

included enrolling JM in a Serious Emotionally Disturbed (SED) waiver program. Before November 1, 2019, respondent did not enroll JM in that program ostensibly because of scheduling issues.

Moreover, the record supports the trial court's finding that respondent did not immediately report the sexual abuse. Instead, she waited five days before telling a therapist about the incidents.[3]

In addition to developing safety measures to ensure that JM would not be alone with MM, petitioner again proposed that JM be placed in a SED waiver program which would allow him to remain at home and receive intensive treatment. Respondent would also be eligible for respite services. Two caseworkers testified that respondent did not promptly participate in treatment for JM because she reportedly was overwhelmed in dealing with AM's escalating aberrant sexual behavior while in an inpatient facility, and because respondent preferred to have JM removed from her home. Respondent only had Medicaid to pay for JM's treatment if the court decided not to take jurisdiction over him.

The record evidence demonstrated that respondent was unwilling or unable to take the steps required to ensure that JM received necessary treatment after AM's sexual abuse. Respondent was either "overwhelmed" or "too busy," and admitted that she turned down an additional service as "too much." Respondent also opted not to allow JM to come home to see if the SED waiver program would work for him because she was "scared" and "unwilling to risk it" based on her experience with AM, even though AM had not been through that program. Accordingly, the court did not err in determining that JM was subject to a substantial risk of harm to his mental well-being if he remained in respondent's home. MCL 712A.2(b)(1).

Given these proofs, including the prevalence of sibling-on-sibling sexual abuse and respondent's repeated failure to keep her children safe from it, the trial court also did not clearly err in concluding that the home, by reason of neglect or criminality, was an unfit place for JM to live. MCL 712A.2(b)(2). Because child protective proceedings are deemed single continuous actions, *In re LaFlure*, 48 Mich App 377, 391; 21 NW2d 482 (1973), the trial court properly took judicial notice of, and considered, evidence of respondent's CPS history, which began in 2012 and included the 2018 neglect proceeding. Respondent's primary reason for refusing to take JM back into her care was that she was unable to adequately supervise him to prevent him from again sexually assaulting MM.

Respondent's argument that JM did not come within the provisions of MCL 712A.2(b)(1) and (2) because she did everything that was required of her to protect her children, including not leaving JM alone with MM, is unpersuasive. Petitioner acknowledged that, after November 1, 2019, respondent did not leave JM unsupervised with MM and there was no evidence of further abuse. We note, however, that JM was not in the home after January 8, 2020, due to respondent's request that he be removed and the delinquency matter. The record also showed that respondent conceded that she was overwhelmed, unable to adequately supervise JM, had no plan to address

[3] Respondent's spouse explained that they delayed reporting the matter because "it was a lot to process."

his mental-health needs, and understood that as a consequence a petition would be filed to take jurisdiction over him.

The record reflects that the court properly exercised its jurisdiction so that JM could receive treatment. Five months after the petition was filed, respondent indicated that JM's treatment at Havenwyck needed to continue. As petitioner explained, in order for JM to remain at Havenwyck, the court needed to take jurisdiction over him, otherwise JM would have been sent home. At the adjudication proceeding in October 2020, respondent still did not believe that JM was ready to return home. Although respondent stated at the end of the hearing that she was willing to take JM home, she had earlier testified that she had no plan for him, was unable to care for him, and was concerned that she would not be able to adequately supervise him to stop him from sexually assaulting MM again. To keep JM away from MM when they were not at school or being watched by respondent's partner, respondent brought one or both children with her to the beauty-supply store where she worked from 9:00 a.m. to 8:00 p.m. five to six days a week. Although this may have been a temporary solution to the problem of supervising the children, it offered no long-term solution to addressing JM's sexual trauma. When asked what she would do if JM had been returned to her home on March 10, respondent replied:

> (Indiscernible) my kids 24/7 like a crazy woman, and not being able to deal with the situations on top of [AM]'s situations. I, I don't really know what my plan is for [JM]. I just hope and pray that he gets the help he needs, and can really control his situation that he deals with.

Respondent added that if JM were sent home and received in-home services, she was "really scared" about what would happen at night after the in-home workers left.

The underlying basis for respondent's objection to the court's acquiring jurisdiction over JM appears to be her belief that it was unnecessary because she loves her children and had done everything she could to keep them safe. But "[t]he purpose of a child protective proceeding is the protection of the child." *In re Brock*, 442 Mich at 107 (1993). And this case is akin to *In re Hockett*, ___ Mich App ___; ___ NW2d ___ (2021) (Docket No. 353132, issued October 21, 2021). In that case, the mother, who was homeless, refused to retrieve her child because she was unable to manage the child's complex mental-health needs. In affirming the trial court's exercise of jurisdiction, this Court concluded that, although it was disconcerting that respondent was now labeled "unfit," "culpability is not a prerequisite for probate court intervention under § 2(b)(2)." *Id.* at ___ (quotation marks and citation omitted); slip op at 2.

In this case, respondent chose not to return JM to her home so that he might receive the more intensive treatment that she believed he needed and to protect MM from further sexual abuse. As in *Hockett*, respondent's admitted inability, not her unwillingness, to manage and care for JM's

special mental-healthcare needs rendered her home statutorily unfit. Child protective proceedings are appropriate when, as in this case, a child needs safety and care that a parent, despite unquestionable love and best efforts, is unable to provide.[4]

Affirmed.

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

[4] Respondent also argues that she did not abandon JM. The trial court's order, however, does not include abandonment as a basis for exercising jurisdiction and we decline to address this argument.