# STATE OF MICHIGAN

# COURT OF APPEALS

UNPUBLISHED
December 20, 2011

In the Matter of MCCLAIN/WATERS/SKINNER, Minors.

Nos. 302460; 304192
Genesee Circuit Court
Family Division
LC No. 10-127245-NA

Before: SAAD, P.J., and STEPHENS and RONAYNE KRAUSE, JJ.

PER CURIAM.

In this child protection action, respondent S. Waters appeals as of right in Docket No. 302460 from the trial court's January 25, 2011, order denying her objections to the court's preliminary hearing decision authorizing a petition for temporary jurisdiction over respondent's minor children pursuant to MCL 712A.2(b)(1) and (2), and continuing the children's placement outside respondent's home pending a trial on the petition. In Docket No. 304192, respondent appeals as right from the trial court's February 24, 2011, initial dispositional order in which the court determined that it had jurisdiction over the children pursuant to pleas tendered by the children's fathers, and ordered respondent to participate in services. We affirm.

## I. DOCKET NO. 302460

The preliminary hearing in a child protective proceeding is a statutory proceeding at which a court may authorize a petition requesting that the court exercise jurisdiction over a child and remove the child from his or her home. See *In re Mason*, 486 Mich 142, 154; 782 NW2d 747 (2010). "The court may authorize the petition upon a showing of probable cause that 1 or more of the allegations in the petition are true and fall within the provisions of [MCL 712A.2(b)]." MCL 712A.13a(2); see also MCR 3.965(B)(11). The court acquires subject-matter jurisdiction over the case when probable cause is established. *In re AMB*, 248 Mich App 144, 168; 640 NW2d 262 (2001). If the court authorizes the petition, the court must decide whether the child should remain in the home, return home, or be placed in foster care. MCR 3.965(B)(11). However, the child does not come within the court's jurisdiction and become a court ward until adjudication is held on the merits of the petition. *In re AP*, 283 Mich App 574, 593; 770 NW2d 403 (2009). A trial court is not required to find that jurisdiction exists with respect to each parent of a child because its jurisdiction is tied to the child. *In re CR*, 250 Mich

App 185, 205; 646 NW2d 506 (2001).[1] Once the court acquires jurisdiction over a child, it may enter dispositional orders that control or affect the conduct of a parent who is not the subject of the adjudicative decision. *Id.* at 203; see also MCR 3.973(A).

We conclude that it is unnecessary to address respondent's substantive and procedural arguments relating to the trial court's probable cause determination at the preliminary hearing because, as discussed in part II of this opinion, the court subsequently acquired jurisdiction over the children on the basis of pleas tendered by the children's fathers. Because the court was able to acquire jurisdiction over the children independent of the proceedings relating to respondent, respondent's arguments concerning the authorization of the petition at the preliminary hearing are moot. An issue is moot when an event occurs that renders an appellate court unable to grant relief. *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998). Because respondent's arguments related to the authorization of the petition do not raise issues of public significance that are likely to recur and evade judicial review, and this Court need not reach a moot issue that has no practical effect on a case, *Ryan v Ryan*, 260 Mich App 315, 330; 677 NW2d 899 (2004), we decline to consider respondent's arguments related to the authorization of the petition.

However, we shall consider respondent's arguments that implicate the portion of the trial court's order removing the children from her home based on the preliminary hearing, and the court's order denying her motion for rehearing of that decision in her "objection to the authorization of petition." The trial court's exercise of jurisdiction over the children pursuant to the fathers' pleas did not render the removal decision moot. Indeed, it was the removal of the children from the home that enabled respondent to file an appeal as of right in Docket No. 302460. See MCR 3.993(A).

To the extent that respondent's issues implicate constitutional rights, statutory requirements, and the court rules, we review her claims de novo as questions of law. *Reed v Yackell*, 473 Mich 520, 546; 703 NW2d 1 (2005); *In re CR*, 250 Mich App at 200-203. To the extent that respondent challenges the trial court's denial of her motion for rehearing sought in her "objection to authorization of petition," her reliance on the seven-day rule in MCR 3.991 is misplaced. That rule governs requests for review of a referee's recommendations. In this case, the December 6, 2010, order authorizing the petition and continuing the children's emergency placement outside the home was entered by the trial court. Thus, reconsideration of that order is governed by MCR 3.992. See MCR 3.991(A)(4); see also *In re AMB*, 248 Mich App at 220, and MCL 712A.21(1) (statutory basis for rehearing in child protection proceedings). Further, because respondent's motion effectively sought rehearing of the trial court's December 6, 2010, order, we review the trial court's decision denying relief from that order for an abuse of discretion. See *Flanders Indus, Inc v State of Mich*, 203 Mich App 15, 18 n 1; 512 NW2d 328

[1] We note that our Supreme Court granted leave in *In re Mays*, 489 Mich 857; 795 NW2d 6 (2011), to address, among other issues, whether a respondent-father could be ordered to comply with a treatment plan absent an adjudication of unfitness and to consider the "so-called 'one-parent' doctrine" in *In re CR*, 250 Mich App at 185.

(1993) (mislabeling of motion does not preclude appellate review where the record otherwise permits it); *In re Toler*, 193 Mich App 474, 478; 484 NW2d 672 (1992). "An abuse of discretion occurs when the trial court chooses an outcome that falls 'outside the range of principled outcomes.'" *In re Utrera*, 281 Mich App 1, 15; 761 NW2d 253 (2008), quoting *Barnett v Hidalgo*, 478 Mich 151, 158; 732 NW2d 472 (2007). While MCR 3.992 does not state what should cause a court to reconsider an earlier decision, relief is appropriate only if the court's refusal to do so is inconsistent with substantial justice. *In re Alton*, 203 Mich App 405, 409; 513 NW2d 162 (1994); see also MCR 3.901(A), and MCR 2.613(A).

Although the trial court commented that respondent's motion was untimely, the record establishes that the motion was filed on December 22, 2010, which was within the 21-day period prescribed in MCR 3.992(A). Accordingly, the motion was timely filed. However, the trial court considered the merits of respondent's motion. We will not disturb a trial court's decision when it reaches the right result. *Netter v Bowman*, 272 Mich App 289, 308; 725 NW2d 353 (2006), overruled in part on other grounds *McCormick v Carrier*, 487 Mich 180, 197 n 11; 795 NW2d 517 (2010).

We reject respondent's argument that she was constitutionally entitled to counsel at the preliminary hearing. Respondent's reliance on *Reist v Bay Circuit Judge*, 396 Mich 326, 346; 241 NW2d 55 (1976), is misplaced because that case involved a hearing to terminate parental rights. Similarly, this Court's decision in *In re Williams*, 286 Mich App 253, 275-278; 779 NW2d 286 (2009), recognized that "the constitutional right of due process confers on indigent parents the right to appointed counsel at hearings that may involve the termination of their parental rights." Due process is a flexible concept that requires fundamental fairness. *In re Brock*, 442 Mich 101, 111; 499 NW2d 752 (1993). It requires consideration of the particular situation at hand by considering relevant precedent and assessing the interests at stake. *Id.* Respondent has not cited any authority recognizing that the absence of counsel at the preliminary removal proceeding in this case implicated her right to due process. Despite concerns that the respondent did not appreciate her right to either ask for an adjournment or present evidence, we decline to find that reversal is required in this instance where competent and assertive counsel was promptly appointed after the preliminary hearing and respondent had the opportunity to move for relief from the trial court's order after counsel was appointed.

Respondent also argues that she was not properly advised of various rights established by statute and the court rules. MCL 712A.17c(4)(a) and (b) require that respondent be advised of her right to an attorney "at each stage of the proceeding" and of the "right to a court-appointed attorney if the respondent is financially unable to employ an attorney." MCR 3.965(B)(6) provides that the "court must advise the respondent of the right to the assistance of an attorney at the preliminary hearing and any subsequent hearing pursuant to MCR 3.915(B)(1)(a)[,]" which in turn provides that a respondent must be advised at the first court appearance of "the right to retain an attorney to represent the respondent at any hearing conducted pursuant to these rules" and "the right to a court appointed attorney if the respondent is financially unable to retain an attorney." MCR 3.915(B)(1)(a).

Contrary to respondent's argument on appeal, neither the statute nor the court rules require that a respondent be advised that he or she may request an adjournment so that counsel may be present. Court rules are construed in the same manner as statutes. *Kloian v Domino's*

*Pizza, LLC*, 273 Mich App 449, 458; 733 NW2d 766 (2006). While it may be a better practice to provide more detailed advice of rights, nothing may be read into a statute that is not within the legislative intent derived from the statutory language itself. *Robinson v City of Lansing*, 486 Mich 1, 15; 782 NW2d 171 (2010).

The record does not support respondent's claim that she was not properly advised of her right to counsel at the preliminary hearing. The testimony of the child protective services worker was that respondent was advised of her right to counsel at both an informal preliminary hearing on December 4, 2010. The transcript of the December 6, 2010, preliminary hearing also indicates that respondent was advised of her right to an attorney, although the referee did not state that the right to counsel pertained to "each stage of the proceeding" as set forth in MCL 712A.17c(4), to "any hearing" as set forth in MCR 3.915(B)(1)(a), or the preliminary hearing itself as set forth in MCR 3.965(B)(6). But regardless of whether there was a deficiency in the referee's advice of rights, respondent had the opportunity to move for rehearing though counsel and did in fact timely file such a motion. We agree with the trial court that respondent failed to establish any prejudice from any deficiency in the court's advice.

Respondent has also failed to establish that she was prejudiced by any deficiency at the December 6, 2010, preliminary hearing with respect to the requirement in MCR 3.965(B)(8) that "[t]he court shall allow the respondent an opportunity to deny or admit the allegations and make a statement of explanation." The court treated the petition as a contested petition. The petition contained several allegations that went beyond the allegation involving the discovery of one child without proper supervision, including allegations describing respondent's unstable housing situation and inability to care for the children. The petition itself contained respondent's explanation for why her child was found alone by a Life Skills worker. The trial court afforded respondent the opportunity to provide an additional explanation at the January 25, 2011, hearing on her motion but observed that she had nothing more of substance to add. Given respondent's acknowledgment by silence of her long history of services, unstable and chaotic housing, and her admission, albeit with explanation, that the children were unsupervised for a period of time, we find that she failed to establish prejudice from any deficiency in the advice of rights.

Lastly, although MCR 3.965(C)(2) establishes criteria for considering whether a child may remain in the home, the record establishes that the original removal of the children was principally based on the improper supervision that, according to respondent's explanation, involved her sister leaving one child alone in the home. At the subsequent hearing, respondent, through counsel, moved to have the children placed with her at the YWCA, which occurred after the petition was authorized. Under MCR 3.966(A)(1), "[o]n motion of a party, the court must review the placement order . . . and may modify the order . . . if it is in the best interest of the child and, if removal from the parent, guardian, or legal custodial is requested, determine whether the conditions in MCR 3.965(C)(2) exist."

This appeal does not involve a decision on a motion for a change in placement, but rather the original order of removal. See MCR 3.993(A)(1). But having reviewed the trial court's reasons for denying respondent's motion for rehearing of the children's placement, it is apparent that the court found it contrary to the children's welfare to place them with respondent at the YWCA. Respondent has not shown that the trial court abused its discretion in denying relief from the original removal decision.

In sum, we decline to consider respondent's arguments relating to the authorization of the petition requesting temporary jurisdiction over the children because those arguments are moot in light of the trial court's subsequent exercise of jurisdiction over the children pursuant to the fathers' pleas. Further, we affirm the trial court's decision denying rehearing with respect to its removal of the children from respondent's home.

## II. DOCKET NO. 304192

In Docket No. 304192, respondent seeks reversal of the trial court's February 24, 2011, dispositional order on the ground that she was not afforded a separate adjudicative trial to determine her parental fitness before the trial court ordered her to participate in services.

We conclude that respondent waived any challenge to the trial court's jurisdictional decision through her counsel's affirmative statement that there was a sufficient basis for the court to take jurisdiction over the children based on the fathers' pleas. A waiver extinguishes any error and precludes appellate review. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000).

In any event, this case is unlike *In re SLH, AJH, & VAH*, 277 Mich App 662, 668-671; 747 NW2d 547 (2008), in which a child's father sought relief from a trial court's jurisdictional decision by attacking the sufficiency of the mother's plea as a basis for establishing that the mother committed an offense[2] against the child, and *In re Bechard*, 211 Mich App 155, 160-161; 535 NW2d 220 (1995), in which this Court determined that a mother could not consent to jurisdiction based on claims against the father. The thrust of respondent's claim in this case is that she has a due process right to an adjudicative trial, regardless of the fathers' pleas, before the trial court can exercise its dispositional authority against her, including the children's continued placement in foster care. Because respondent failed to timely present this issue to the trial court, our review is limited to plain error affecting respondent's substantial rights.[3] *In re Mitchell*, 485 Mich 922; 773 NW2d 663 (2009); *In re Utrera*, 281 Mich App at 8.

Given this Court's decision in *In re CR*, 250 Mich App at 202-205, respondent has not established any entitlement to an adjudicative trial to determine her parental fitness before the trial court could exercise its dispositional authority. Respondent's reliance on *Stanley v Illinois*, 405 US 645; 92 S Ct 1208; 31 L Ed 2d 551 (1972), is misplaced because an adjudicative proceeding in Michigan does not determine whether a child should be removed from a parent's custody. The adjudicative proceeding determines whether the trial court may exercise

[2] An "offense against a child" means "an act or omission by a parent, guardian, nonparent adult, or legal custodian asserted as grounds for bringing the child within the jurisdiction of the court pursuant to the Juvenile Code." MCR 3.903(C)(7).

[3] While respondent raised a due process claim as part of a supplement to a previously filed motion for rehearing, the trial court found that the supplemental motion was not timely filed. Respondent does not challenge that ruling.

jurisdiction over the child. *In re Mason*, 486 Mich at 154; *In re Brock*, 442 Mich at 108. "Not every adjudicative hearing results in removal of custody." *In re Brock*, 442 Mich at 111.

In addition, respondent has failed to establish a plain error affecting her substantial rights in connection with the trial court's dispositional ruling continuing its prior order placing the children outside her home and ordering her to participate in services. As discussed previously, procedural due process is a flexible concept that requires fundamental fairness. *In re Brock*, 442 Mich at 111. Rudimentary requirements of due process include notice and an opportunity to be heard. *In re AMB*, 248 Mich App at 213. "In Michigan, procedures to ensure due process to a parent facing removal of his child from the home . . . are set forth by statute, court rule, DHS policies and procedures, and various federal laws." *In re Rood*, 483 Mich 73, 93; 763 NW2d 587 (2009) (opinion by Corrigan, J.). There is no presumption that a child must be removed from the home, or continued in foster care placement, during the dispositional phase of the proceeding. To remove a child from the home, a trial court must find that it is contrary to the child's welfare to remain in the home. MCR 3.965(C). The removal decision is subject to review on motion of a party, which includes a mother. MCR 3.903(A)(17); MCR 3.966(A). At the dispositional hearing, the trial court must nonetheless determine, where appropriate, if reasonable efforts were made to rectify the conditions that caused the removal. MCR 3.973(F)(3).

In addition, the trial court's dispositional orders against a parent such as respondent, whose conduct is not used to establish jurisdiction over the child, must be necessary for the physical, mental, or moral well-being of the child. MCL 712A.6; *In re CR*, 250 Mich App at 202-203. Again, there is no presumption that a parent must be ordered to participate in services.

Here, there is no indication in the record that respondent sought a change in the children's placement at the February 24, 2011, dispositional hearing. Respondent also failed to request unsupervised parenting time with the children, notwithstanding the trial court's inquiry to a caseworker whether there was any recommendation that respondent have unsupervised parenting time. To the contrary, with respect to supervised parenting time in the foster home, respondent's counsel remarked, "I think that's wonderful. . . . I would love to see it every week." Further, the trial court responded by authorizing increased parenting time if it could be arranged with the foster parents. Respondent's counsel also sought, and was granted, assistance for respondent in obtaining housing for the children. Counsel also asserted that respondent was willing to engage in services and "whatever position I take, she's still engaging in services and she's going to do whatever they want her to do."

Considering the record as a whole, the procedures were fundamentally fair because respondent had an opportunity to be heard with respect to matters affecting the continued removal of the children and her participation in services, and sufficient safeguards existed to ensure that the services was necessary for the physical, mental, or moral well-being of the children. Accordingly, we find no plain due process error, let alone an error affecting respondent's substantial rights.

Respondent also argues that the trial court erred in entering the February 24, 2011, dispositional order after it received verbal notice that this Court had granted her motion for a stay in Docket No. 302460. This Court previously denied respondent's motion to reverse that dispositional order on this ground. *In re McClain/Waters/Skinner*, unpublished order of the

Court of Appeals, entered March 11, 2011 (Docket No. 302460). Further, we are not persuaded that any purpose would be served by vacating the February 24, 2011, order and remanding this case for entry of a new order containing the court's adjudicative and dispositional rulings, even assuming that the trial court erred in entering the order after receiving verbal notice of the stay.

A claim of appeal typically divests a trial court of jurisdiction to set aside or amend the order appealed from. MCR 7.208(A); *Ypsilanti Fire Marshal v Kircher (On Reconsideration),* 273 Mich App 496, 542; 730 NW2d 481 (2007), mod in part on other grounds 480 Mich 910 (2007); see also *Wilson v Gen Motors Corp,* 183 Mich App 21, 41; 454 NW2d 405 (1990) (violation of MCR 7.208(A) may be remedied by reversing the amended order, without prejudice to the moving party renewing the motion for amendment). But there was no change in the order appealed in Docket No. 302460, which involved the removal of the children from respondent's home. The removal order was appealable by right. See MCR 3.993(A)(1) (order "removing the minor from the home" is appealable as of right). Rather, the stay ordered by this Court on February 24, 2011, related to proceedings to determine jurisdiction over the children. Such an order is separately appealable by right. See MCR 3.993(A)(1) ("order of disposition placing a minor under supervision of the court" is appealable as of right); *In re SLH, AJH & VAH,* 277 Mich App at 668 n 11 (challenge to a trial court's exercise of jurisdiction over a child may only be made by a direct appeal of the jurisdictional decision). The trial court was not divested of jurisdiction to conduct adjudicative and dispositional proceedings because of the appeal filed in Docket No. 302460.

While MCR 7.209(D) nonetheless provides that this Court "may grant a stay of proceedings in the trial court or stay of effect or enforcement of any judgment or order of a trial court on the terms it deems just," MCR 7.209 does not contain a remedy for a trial court's violation of a stay order. Indeed, a trial court's violation of a stay can be moot. *Bayati v Bayati,* 264 Mich App 595, 602; 691 NW2d 812 (2004). Moreover, this Court has discretion to "enter any judgment or order or grant further or different relief as the case may require." MCR 7.216(A)(7).

Considering the circumstances of this case and the fact that child protection proceedings are treated as continuing proceedings, *In re LaFlure,* 48 Mich App 377, 391; 210 NW2d 482 (1973), we conclude that it would be futile to reverse the trial court's initial dispositional order, without prejudice, and require the initial dispositional order to be entered anew. Other proceedings, including the review established by MCR 3.975 where a child is in foster care, are available to the trial court to review the disposition. Therefore, even assuming that the trial court entered the initial dispositional order prematurely, relief is not warranted. Accordingly, we uphold the trial court's adjudicative decision and dispositional actions taken against respondent in that order.

Affirmed.

/s/ Henry William Saad
/s/ Cynthia Diane Stephens
/s/ Amy Ronayne Krause