

STATE OF MICHIGAN
COURT OF APPEALS

UNPUBLISHED
March 14, 2013

In the Matter of T. BELCHER, Minor.

No. 312847
Wayne Circuit Court
Family Division
LC No. 12-506221-NA

Before: TALBOT, P.J., and DONOFRIO and SERVITTO, JJ.

PER CURIAM.

In this child protective proceeding, the minor child appeals as of right the trial court's order of adjudication dismissing a petition seeking jurisdiction over the minor child and requesting termination of respondent father's parental rights at the initial dispositional hearing. Because the trial court dismissed the petition without determining whether there existed a statutory basis for jurisdiction under the preponderance of the evidence standard, we vacate the adjudication order and remand for further proceedings.

In March 2012, the Department of Human Services (DHS) filed a petition for court jurisdiction over the minor child and seeking termination of respondent's parental rights at the initial dispositional hearing under MCL 712A.19b(3)(b), (g), (h), (j), (k), and (n). The petition alleged that respondent sexually abused the child during a weekend visit. Following a bench trial, the court determined that the DHS had not established a statutory ground for termination by clear and convincing evidence as required for termination of parental rights and dismissed the petition.

On appeal, the minor child argues that the trial court erred by dismissing the petition because, while it found that a statutory ground for termination had not been proven by clear and convincing evidence, it failed to separately determine whether a statutory basis for jurisdiction existed, which is determined under the lesser preponderance of the evidence standard. "We review the trial court's decision to exercise jurisdiction for clear error in light of the court's findings of fact." *In re BZ*, 264 Mich App 286, 295; 690 NW2d 505 (2004). "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.* at 296-297.

In a child protective proceeding, the court has jurisdiction over "a juvenile under 18 years of age found within the county" if certain circumstances exist, one being if the juvenile's "home or environment, by reason of neglect, cruelty, drunkenness, criminality, or depravity on the part

of a parent . . . is an unfit place for the juvenile to live in.” MCL 712A.2(b)(2). The petition in this case alleged that respondent’s home was an unfit place for the child to live because of his criminality or depravity involving his sexual abuse of the child.¹ Whether the court has jurisdiction is determined by a parent’s plea of admission or no contest, MCR 3.971, or by the court or a jury at a trial, MCR 3.911(A); MCR 3.972. If the court conducts a trial, the trier of fact must find that one or more of the statutory grounds for jurisdiction have been proven by a preponderance of the evidence. MCR 3.972(C)(1) and (E); *In re S R*, 229 Mich App 310, 314; 581 NW2d 291 (1998).

Once jurisdiction has been established, the court must hold a dispositional hearing to determine what measures it will take concerning the child. MRE 3.973(A). The court may terminate parental rights at the initial dispositional hearing if (1) the original or amended petition requests termination, (2) the trier of fact finds by a preponderance of the evidence adduced at the trial or plea proceedings that grounds for the assumption of jurisdiction under § 2(b) have been established, (3) the court finds on the basis of clear and convincing legally admissible evidence that was introduced at the trial or the dispositional hearing that one or more facts alleged in the petition are true and establish grounds for termination under §§ 19b(3)(a), (b), (d), (e), (f), (g), (h), (i), (j), (k), (l), (m), or (n), and (4) the court finds that termination of parental rights is in the child’s best interests. MCR 3.977(E). Regardless of the evidence presented at trial, the court cannot terminate parental rights under § 19b(3) at the conclusion of the trial. The court must hold a separate dispositional hearing to determine, in part, whether termination is in the child’s best interests. *In re AMAC*, 269 Mich App 533, 539-540; 711 NW2d 426 (2006). Jurisdiction must first exist under § 2(b) before a court can terminate parental rights under § 19b(3). *In re S R*, 229 Mich App at 314.

In this case, the trial court did not determine whether it had jurisdiction over the child before it reached the issue of termination. The court never discussed or determined whether the allegations of sexual abuse had been established by a preponderance of the evidence. In addressing the evidence adduced at the trial, the court focused solely on whether the allegations of sexual abuse had been proven by clear and convincing evidence, which was necessary, but not alone sufficient, for termination of parental rights under §§ 19b(3)(b)(i) or (k)(ii). The evidence

¹ The petition alleged that respondent digitally penetrated the child’s vagina and touched her breasts in March 2012, when the child was 12 years old. Sexual penetration of a 12-year-old child constitutes first-degree criminal sexual conduct, MCL 750.520b(1)(a), and sexual contact with a 12-year-old child constitutes second-degree criminal sexual conduct, MCL 750.520c(1)(a). While the child’s testimony regarding the sexual abuse was not identical to the allegations in the petition, she did testify that respondent touched her breasts and her vaginal area, which acts constitute second-degree criminal sexual conduct. A parent’s sexual abuse of a child is a basis for termination of parental rights if the court finds by clear and convincing evidence that there is a reasonable likelihood that the child will be abused in the foreseeable future if placed in the parent’s home, MCL 712A.19b(3)(b)(i), or if the abuse amounted to criminal sexual conduct involving penetration, attempted penetration, or assault with intent to penetrate, MCL 712A.19b(3)(k)(ii).

adduced at trial, however, need not establish a basis for termination of parental rights. The court may find by a preponderance of the evidence adduced at the trial that it has jurisdiction over a child under § 2(b)(2) and subsequently determine whether legally admissible evidence adduced at the dispositional hearing clearly and convincingly establishes a statutory ground for termination under § 19b(3). MCR 3.977(E)(2) and (3). In other words, it is permissible, but not necessary, for the court to determine at trial whether there is clear and convincing evidence supporting a statutory basis for termination. Assuming that petitioner did not intend to offer any evidence at the dispositional hearing in addition to the child's testimony, the trial court could determine that the statutory grounds for termination had not been proven by clear and convincing evidence, but that alone does not mandate dismissal of the petition at the conclusion of the trial. The court can only dismiss the petition at the conclusion of the trial if the trier of fact finds that the requirements for jurisdiction under § 2(b) were not proven by a preponderance of the evidence. Because such a finding was never made, the trial court erred by dismissing the petition.

We note that the adjudication order of dismissal contains the statement that the referee "did not believe the allegations [sic] in the petition or the testimony provided in support of the allegations[.]" The referee, however, never expressly determined that the child's testimony was incredible and did not indicate that he did not believe the child's testimony. The referee found only that the allegations of sexual abuse had not been proven by clear and convincing evidence. While the referee may have implicitly determined that the child's testimony was not credible, he did not state that such was the case. Finally, the reason stated on the record, which apparently supported the finding that the child's testimony was not credible, was that the child's testimony was consistent with respondent's explanation to a Child Protective Services worker. The worker testified that respondent had told her that he did not touch the child. Rather, he kissed the child's cheek while in bed with her and then left because the child did not want to accompany him on a religious outing. Respondent's statement was substantially consistent with the child's testimony that respondent kissed her on the neck and lips while in bed with her on Saturday afternoon and then left for a religious activity that she did not want to attend. The child also testified, however, that respondent touched her breasts and vaginal area the next morning. Respondent's statement to the worker that he did not touch the child was not consistent with this latter testimony. Thus, the finding that the child's testimony was not credible because it was consistent with respondent's explanation that nothing untoward happened is clearly erroneous.

Because the trial court dismissed the petition without addressing or determining whether a statutory basis for jurisdiction existed under the lesser preponderance of the evidence standard, we vacate the trial court's order of adjudication and remand this case for a determination of whether a preponderance of the evidence adduced at trial provided a basis for the assumption of jurisdiction under § 2(b)(2) and, if so, for further proceedings consistent with MCR 3.973 and MCR 3.977(E).

Vacated and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Pat M. Donofrio
/s/ Deborah A. Servitto