STATE OF MICHIGAN

COURT OF APPEALS

In re C. JEROME, Minor.

UNPUBLISHED
January 23, 2020

No. 349689
Wexford Circuit Court
Family Division
LC No. 2018-028277-NA

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

PER CURIAM.

Petitioner, the Department of Health and Human Services (DHHS), appeals as of right the trial court's order finding that petitioner failed to establish a ground for jurisdiction of the minor child, CJ, under MCL 712A.2. We affirm.

I. ADJUDICATION TRIAL

Petitioner filed a petition seeking jurisdiction of CJ, alleging that (1) respondent[1] failed to provide proper care and custody, (2) CJ's well-being was at a substantial risk of harm in respondent's care, and (3) respondent's home was unfit due to criminality. In an amended petition, petitioner alleged a history of criminality involving the child's mother, Leah Beaudet. Respondent contested the grounds for jurisdiction, and the trial court held an adjudication trial on April 29, 2019.

A. PETITIONER'S CASE FOR RESPONDENT'S HISTORY OF CRIMINALITY AND THE RISK OF HARM TO CJ

At the adjudication trial, petitioner presented numerous witnesses attempting to show that respondent had a history of criminality and that CJ's well-being was at a substantial risk of harm

[1] CJ's mother, Leah Beaudet, is a respondent in the case, but pleaded to the trial court's jurisdiction. Thus, she is not a party to this appeal. This opinion uses "respondent" to refer only to CJ's father.

in respondent's care. Petitioner presented evidence that, in 2015, respondent pleaded guilty to assault with intent to do great bodily harm less than murder. Petitioner also presented evidence that, on April 12, 2018, respondent was arrested for a probation violation when he was found at a motel with Leah and CJ. At the time, respondent had a No Contact Order with Leah.

Petitioner also introduced evidence seeking to prove that respondent had a history of domestic violence. Sheryl Beaudet, Leah's mother, testified about an incident in December 2017 when she walked into her kitchen and saw respondent with his hand around her daughter's throat. Sheryl testified that CJ was not present at the time. Sheryl also testified that respondent and Leah argued constantly.

Leah testified that her relationship with respondent was "[v]olatile" with "lots of physical abuse" due to respondent's "[a]nger issues" and her "alcohol addiction." She explained that they would "argue over anything" and that the arguments would get physical. Leah testified that she accused respondent of domestic violence on several occasions, but that he was never convicted. She admitted that she also accused her fiancé, Zachary Hunt, of domestic violence.

Petitioner also introduced considerable testimony about an incident at an Economy Inn on November 1, 2018. Sergeant Jeff Izzard, a police officer for the City of Cadillac, testified that on November 1, 2018, he was involved in an investigation related to respondent. On that day, he went to the Economy Inn around 8:50 a.m. and could hear arguing. He eventually entered the room where the arguing was coming from. Inside the room was respondent, Leah, and CJ. Sergeant Izzard testified that when he spoke to Leah, he saw "some swelling on her jaw, a mark on her jaw, and some swelling to her left cheek." Sergeant Izzard testified that he could not say how the swelling occurred. Officers arrested respondent for domestic assault.

Leah testified that she was at the Economy Inn on November 1, 2018, because she "had been fighting" with Hunt, and she "distanced" herself from him. While she was there, respondent came with CJ, and Leah and respondent ultimately got into an argument. Leah admitted that she had been drinking. According to Leah, as a result of that argument, respondent hit her while CJ was in the room. Leah testified that respondent "punched [her] in the face one time uh—the night prior and one time in the morning while [she] was on the phone with [her] father. And then [respondent] threw the car seat at [her] and sliced open [her] finger as well." Leah clarified that respondent was at the Economy Inn the night before November 1, 2018, but he left and then came back in the morning.

B. PETITIONER'S CASE THAT CJ WAS WITHOUT PROPER CUSTODY

Sergeant Izzard testified that, following the November 1, 2018 incident, officers arrested respondent for domestic assault, and also arrested Leah "for a valid warrant" and "for [a] probation violation." According to Sergeant Izzard, after the parents were arrested, there was no one there to provide care and custody for CJ. Sergeant Izzard testified that officers called respondent's mother who came to pick up the child. She was there "between 15 minutes to 30 minutes" after the arrests.

Danielle Keeler with the DHHS testified that she worked on a previous case involving respondent that was open for "seven or eight months," but was ultimately closed in either August

or September 2018. According to Keeler, during the course of the previous case, there was one point when "[respondent] was arrested on a probation violation [referring to the April 12, 2018 arrest] and once he got out of jail he was gone for two weeks and [Keeler] could not get ahold of him." During the two weeks that Keeler could not get ahold of respondent, respondent's parents were caring for CJ.

C. RESPONDENT'S DEFENSE

Respondent testified about the December 2017 incident referred to by Sheryl. According to respondent, Leah was upset because respondent would not allow her to visit CJ if she was not sober. In response, Leah went into the kitchen, where respondent "witnessed her cutting herself," so respondent "went to remove a razor blade from her and that's what her ma had witnessed . . . ."

Respondent testified that in April 2018, Leah "called [him] due to a uh—domestic violence or a domestic dispute" she was having with Hunt. Respondent went to pick her up, but told her that she could not stay with him, so they went to "the Econo Lodge" and she stayed there for the night. According to respondent, he went back "the next morning to give her a ride to her father's house at checkout time." But "at that point in time [he] was turned in for a no contact . . . ." This was the April 12, 2018 arrest. CJ was with him when he was arrested.

Respondent also testified about the November 1, 2018 incident at the Economy Inn. According to respondent, Leah asked to see CJ the night before, but respondent went over there first to make sure that she had not been drinking. After he saw that she had not been drinking, he went to get CJ and brought him back the following morning, November 1, 2018. But when respondent returned, he saw that Leah had been drinking. According to respondent, he tried to leave, which led to a fight. Respondent denied, however, that things between him and Leah got physical. Respondent testified that the bruises on Leah were from her falling.

Respondent testified that when he was arrested and his parents had to pick up CJ, CJ was not without proper care and custody. He explained that on "each occasion," he was "immediately . . . on the phone with one of [his] parents to have [CJ] [sic]." He testified that he resided at "their residence and there had been a Power of Attorney signed over and medical properly taken care of to my parents' behalf [sic]."

Respondent testified that he had never physically abused Leah, but acknowledged that he had been arrested for domestic violence twice. Both cases were dismissed, however. Respondent disputed Keeler's testimony that he went missing for two weeks. He testified that if he was working out of town, CJ was residing with his parents and he was "in full contact with them."

Respondent also elicited testimony about Leah's credibility. Leah admitted that she has "short term memory relapse," and she conceded that she has "a lot of memory issues" but said that she can "remember certain events." Leah also admitted to an alcohol addiction, but she testified that she did not "black out" when drinking. She explained that she "maintain[s] throughout the day" but she does not "get belligerent." She said that she has "memory problems all the time. Even when [she is] not drinking." Sergeant Izzard testified that officers

administered a breath test to Leah after the November 1 incident that showed she had a .215 blood alcohol concentration.

D. TRIAL COURT'S RULING

After hearing the evidence, the trial court issued an oral opinion on the record. The trial court began by noting that the case was not "clear cut one way or the other." Turning to the evidence, the trial court stated that "the 2014 arrest" was "too far away, too unrelated to take into consideration[.]" The trial court noted Leah's testimony about respondent, but stated that "[h]er testimony has to be weighed cautiously because she admits that she has memory issues, she uh—admits to being—well, intoxicated." The trial court ultimately ruled that petitioner failed to meet its burden of proving by a preponderance of the evidence that the home was unfit due to criminality. The trial court also addressed whether there was a substantial risk of harm to CJ's well-being, but did not explicitly state whether this ground was proven. Likewise, the trial court did not explicitly state whether petitioner met its burden of proving that CJ was without proper care and custody. Nonetheless, the trial court stated that "after trial there is no statutory grounds to exercise jurisdiction over [respondent]." In an order following trial, the trial court stated, "following the sworn testimony of eleven witnesses, the Court found that there was not a factual basis for the Court to assert jurisdiction as it relates to [respondent]."

Petitioner filed a motion for reconsideration on May 22, 2019. In its brief, petitioner mentioned that it was requesting jurisdiction in part on the basis that CJ was without proper custody after respondent and Leah were arrested and respondent's parents had to come to pick up CJ. The trial court, however, denied petitioner's motion without additional comment.

Petitioner now appeals as of right.

II. TRIAL COURT'S JURISDICTION

On appeal, petitioner argues that it met its burden of proving at least one statutory ground for jurisdiction by a preponderance of the evidence, and the trial court's ruling to the contrary was error. We disagree.

A. STANDARD OF REVIEW

In child protective proceedings, jurisdiction is established if the trial court finds that petitioner established one of the grounds for jurisdiction in MCL 712A.2 by a preponderance of the evidence. *In re Long*, 326 Mich App 455, 460; 927 NW2d 724 (2018). The trial court's factual findings that it bases its decision on are reviewed for clear error. *In re BKD*, 246 Mich App 212, 215; 631 NW2d 353 (2001). "A finding is 'clearly erroneous' if, although there is evidence to support it, we are left with a definite and firm conviction that a mistake has been made." *In re HRC*, 286 Mich App 444, 459; 781 NW2d 105 (2009). The trial court's

application of its findings of facts to a statute, as well as the interpretation of the statute itself, are reviewed de novo. *In re Sanders*, 495 Mich 394, 404; 852 NW2d 524 (2014).[2]

B. ANALYSIS

"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 Brock*, 442 Mich 101, 108-109; 499 NW2d 752 (1993). As relevant here, MCL 712A.2(b) provides that "[t]he court has the following authority and jurisdiction":

> (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.[3]

"To properly exercise jurisdiction, the trial court must find that a statutory basis for jurisdiction exists." *In re BZ*, 264 Mich App 286, 295; 690 NW2d 505 (2004).

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[2] In *In re Long*, 326 Mich App at 460, this Court quoted *In re BZ*, 264 Mich App 286, 295; 690 NW2d 505 (2004) for the statement, "We review the trial court's decision to exercise jurisdiction for clear error in light of the court's findings of fact." This statement should not be read as suggesting that review of a trial court's decision whether to exercise jurisdiction is for clear error. *In re BZ* cited its statement to *In re SR*, 229 Mich App 310, 314; 581 NW2d 291 (1998), which only references the "clear error" standard when it states, "This Court reviews factual findings with respect to termination of parental rights under the clearly erroneous standard." *In re SR* otherwise states, "We find that the probate court erred in declining to assume jurisdiction over the child under MCL 712A.2(b). Statutory interpretation is a question of law reviewed de novo on appeal." Findings of fact are reviewed for clear error, and the application of the MCL 712A.2 to those facts is reviewed de novo.

[3] Since this case was decided, the Legislature amended MCL 712A.2, but the relevant provisions remain unaffected. See 2018 PA 58.

In the court below, petitioner argued that the trial court could exercise jurisdiction under MCL 712A.2(b)(1) or (2). Under MCL 712A.2(b)(2), petitioner argued that respondent's home was unfit for CJ due to criminality. When making its ruling, the trial court noted that, though respondent had faced several charges, all but one was either dismissed or he was acquitted. The one that respondent pleaded guilty to was from 2014, which the trial court found was too far removed to be probative of respondent's criminality. At trial, respondent denied any allegation of domestic violence. While Leah testified that respondent abused her while they were dating, the trial court recognized that its decision turned on the witnesses' credibility; it stated that the case "comes down to he said, she said." And the trial court ultimately found that Leah was a less credible witness due to her memory issues and problems with alcohol. We are constrained to defer to this credibility determination. See *In re Rood*, 483 Mich 73, 112; 763 NW2d 587 (2009).[4] On this evidence, the trial court concluded that petitioner had not established by a preponderance of the evidence that respondent's home was unfit for CJ due to criminality.

On appeal, petitioner simply restates the evidence that tends to support that respondent's home was unfit for reasons of criminality, but it does not explain why the trial court's findings were clearly erroneous. The evidence at trial was in irreconcilable conflict; it could not be true that respondent did not abuse Leah (as respondent testified), and that he repeatedly abused Leah (as Leah testified). The only way to resolve the conflicting evidence was to assess the witnesses' respective credibility. It is apparent that the trial court did this, and determined Leah to be the less credible witness. Giving deference to this determination, petitioner has not demonstrated that the trial court's findings of fact were clearly erroneous. In light of the court's findings that there was minimal if any relevant criminality in respondent's home, the trial court's decision to not exercise jurisdiction under MCL 712A.2(b)(2) was proper.

Petitioner also sought jurisdiction under MCL 712A.2(b)(1), in part alleging that CJ was at a substantial risk of harm in respondent's care. The trial court ultimately found that no grounds for jurisdiction were established, implicitly concluding that this ground was not found. The trial court addressed the volatility of Leah and respondent's relationship, and recognized that it could not "discount the number of incidents that have been reported," but, again, appeared to find Leah the less credible witness. It also noted that most of the incidents occurred away from CJ; the only alleged assault to have occurred in front of CJ was the November 1 assault at the Economy Inn, and otherwise CJ was sometimes exposed to verbal arguments between the parents. The trial court emphasized that it was a close case, that it was ultimately a "he said, she said," and that its decision would likely be different if there was "one more occasion" of "assaultive behavior in front of the child . . . ." In short, the trial court found that respondent and

[4] Petitioner argues that our deference is not "blind." In support of this proposition, petitioner cites an unpublished opinion, which is not binding and is disfavored. See *Shinn v Michigan Assigned Claims Facility*, 314 Mich App 765, 772 n 7; 887 NW2d 635 (2016). We nevertheless agree that deference is not absolute. However, although the record may leave some doubt whether we would have arrived at the same conclusion as the trial court, the record is not unambiguous, and mere doubt is not a sufficient basis for finding clear error. See *McGonegal v McGonegal*, 46 Mich 66, 67; 8 NW 724 (1881).

Leah had a volatile relationship, but that volatility took place mostly away from CJ. Once again, petitioner on appeal does not offer any persuasive argument that these findings of fact were clearly erroneous; petitioner simply recites evidence that could support finding jurisdiction without addressing the evidence (and credibility determinations) that the trial court relied on when rendering its decision. Thus, we conclude that the trial court's factual finding that the volatility of respondent's relationship with Leah took place mostly away from CJ was not clearly erroneous. And in light of the trial court's findings, the trial court properly declined to exercise jurisdiction because there was not a substantial risk of harm to CJ's well-being in respondent's care.

Petitioner alternatively sought jurisdiction under MCL 712A.2(b)(1) because, according to petitioner, CJ was left without proper custody when (1) respondent and Leah were arrested while CJ was with them and respondent's parents had to come pick up CJ and (2) Keeler was unable to contact respondent for two weeks following his April 2018 arrest. Both parties recognize on appeal that the trial court did not explicitly address this ground for jurisdiction. Respondent argues that petitioner waived review of this issue by not objecting to the trial court's ruling, but that argument is meritless because a party is not required to object to a trial court's decision. MCR 2.517(A)(7). Moreover, petitioner raised this argument before trial, and raised it again in a motion for reconsideration. An issue is properly preserved for appeal if the appealing party raised it in the trial court and pursues it on appeal, irrespective of whether the issue is addressed or decided by the trial court. *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994).

Petitioner points to evidence at trial showing that, after respondent and Leah were arrested in November 2018, CJ was with the police for 15 to 30 minutes while respondent's parents came to get him. Petitioner argues that, theoretically, CJ was without proper custody for this short amount of time, and it concludes that, therefore, it met its burden of establishing that CJ was without proper custody under MCL 712A.2(b)(1). Petitioner also points to Keeler's testimony that CJ stayed with respondent's parents for two weeks following respondent's April 2018 arrest, and argues that, during this time too, CJ was without proper care and custody.

We conclude that petitioner's argument—that CJ was without proper custody because he had to sit with police officers for 15 to 30 minutes while waiting to be picked up by his grandparents, and because he stayed with his grandparents for two weeks in April 2018—fails as a matter of law. In *In re Systma*, 197 Mich App 453, 455; 495 NW2d 804, 805 (1992), abrogated on other grounds by *In re Mason*, 486 Mich 142; 782 NW2d 747 (2010), this Court stated, "a child who is placed by the custodial parent in the temporary care of relatives is not 'without proper custody or guardianship' unless the care being provided is neglectful." In *In the Matter of Taurus F*, 415 Mich 512, 535; 330 NW2d 33 (1982), the Michigan Supreme Court held that "if a mother gives custody to a sister, that can be 'proper custody,' " and "a mother can give custody of her child to her sister without court intervention." The *In the Matter of Taurus F* Court noted its agreement with appellate cases that "concluded that where a child has been given into otherwise proper custody of a relative the child is not 'otherwise without proper custody' and the probate court cannot establish jurisdiction." *Id*. at 536, citing *In the Matter of Ward*, 104 Mich App 354; 304 NW2d 844 (1981) and *In the Matter of Curry*, 113 Mich App 821; 318 NW2d 567 (1982).

When respondent was arrested, he called his parents to come get CJ. CJ waited with police officers for 15 to 30 minutes until his grandparents arrived. By all accounts, respondent's parents were able to address CJ's needs. Thus, CJ was not "without proper custody or guardianship" under MCL 712A.2(b)(1) because respondent placed CJ into the temporary care of his parents, and respondent's parents were not neglectful. See *In re Systma*, 197 Mich App at 455. As in *In the Matter of Taurus F*, 415 Mich at 535-536, respondent giving his parent's custody—both when he was arrested and when Keeler was unable to contact him for two weeks in April 2018—constituted "proper custody," so the trial court could not establish jurisdiction for lack of proper custody under MCL 712A.2(b)(1).

Petitioner on appeal goes so far as to argue that respondent "abandoned the minor child (however briefly)" when the child had to wait 15 to 30 minutes for his grandparents to pick him up after respondent and Leah were arrested on November 1, 2018. This argument is simply untenable. Respondent did everything in his power to provide care and custody for CJ given the situation; he certainly did not "abandon" CJ. The purpose of child protective proceedings is the protection of the child. *In re Brock*, 442 Mich at 107. This purpose is not served by stretching MCL 712A.2(b)(1) to conclude that CJ was without proper custody because, despite respondent's attempt to arrange proper custody, CJ had to wait 30 minutes before his grandparents could pick him up. Such a result punishes respondent for being arrested instead of protecting CJ. See *id*. at 108 ("The juvenile code is intended to protect children from unfit homes rather than to punish their parents.").

In sum, because CJ was in proper custody with his grandparents both after respondent was arrested and while respondent was away for two weeks in April 2018, petitioner's argument that he was "without proper custody" fails as a matter of law. *In the Matter of Taurus F*, 415 Mich at 535-536.

Affirmed.

/s/ Colleen A. O'Brien
/s/ Amy Ronayne Krause
/s/ Michael F. Gadola