S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

In the Matter of ELISE MOILANEN, a minor.

DEPARTMENT OF SOCIAL SERVICES, Petitioner-Appellee,	UNPUBLISHED December 3, 1996
v BRUCE MOILANEN, Respondent-Appellant, and DAVID BLAKE and YVONNE BLAKE, Respondents.	No. 178179 LC No. 94-000748-NA

Before: Hood, P.J., and Markman and A. T. Davis,* JJ.

PER CURIAM.

Respondent Moilanen appeals by right a dispositional order of the Ontonagon County Probate Court relating to his daughter, Elise Moilanen (D/O/B 6/16/89), a minor, on the basis that the probate court did not have jurisdiction over the child. The order was entered after an adjudicative proceeding in which a jury determined that the probate court had jurisdiction. Respondent also contends that he was denied effective assistance of counsel. We affirm.

On November 29, 1992, Judy Blake Moilanen, wife of respondent and mother of the child, was shot and killed. The child thereafter continued to reside with respondent until April 23, 1993, when respondent confessed to shooting and murdering Judy Moilanen. On the day of his confession and arrest, respondent arranged for the child to reside with her godparents, David and Yvonne Blake,

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* Circuit judge, sitting on the Court of Appeals by assignment.

Judy's brother and his wife. The child has resided with the Blakes since that time. In a separate legal proceeding in June 1993, the Blakes petitioned the probate court to be appointed as the child's legal guardians. The petition was granted.

On December 15, 1993, following a jury trial, respondent was found guilty of first-degree murder and possession of a firearm during the perpetration of a felony. He was subsequently sentenced to life in prison without the possibility of parole. This Court affirmed his conviction in *People v Bruce R Moilanen*, unpublished opinion per curiam of the Court of Appeals (Docket No. 172294, issued 8/2/96).

Following the conviction, the Department of Social Services (DSS), filed a petition requesting that the probate court assert jurisdiction over and take temporary custody of the minor child on the basis that respondent had neglected the child by placing her at substantial risk of harm to her mental well-being by murdering her mother and that respondent could not provide the child with a proper and fit home because of his criminality. See MCL 712A.2(b)(1) and (2); MSA 27.3178(598.2)(b)(1) and (2). At a preliminary proceeding, the court ordered respondent to stop contacting the child by telephone because such contact because of allegations that the child became agitated and upset after such contact. A jury determined that the probate court had jurisdiction over the child for the reasons stated in the petition. At the subsequent dispositional hearing, the court entered an order asserting jurisdiction. The court did not terminate respondent's parental rights. Rather, the court simply maintained the status quo, enabling the child to remain with the Blakes. In addition, the court continued its order suspending telephone contact between respondent and the child. Respondent appeals the probate court's exercise of jurisdiction.

We are faced with the purely legal question whether the probate court may assert jurisdiction in a situation where an incarcerated parent has made arrangements for his minor daughter to live in a home that all parties agree is appropriate and proper.

Probate courts are courts of limited jurisdiction and may only exercise jurisdiction as allowed by statutory and constitutional provisions. *In Re Nelson*, 190 Mich App 237, 239; 475 NW2d 448 (1991); *In the Matter of Taurus F*, 415 Mich 512, 526-527; 330 NW2d 33 (1982). We may not enlarge or diminish this jurisdiction. *In re Hatcher,* 443 Mich 426, 433; 505 NW2d 834 (1993). If the court has jurisdiction, it may then terminate parental rights or make other dispositional orders regarding the child. *Id.* The DSS may petition the probate court to exercise jurisdiction over a child if the situation at issue would support a finding of such jurisdiction. See, for example, *Taurus F*, *supra*. The petition must include a citation to the section of the juvenile code, MCL 712A.1, *et seq.*; MSA 27.3178(598.1), *et seq.*, relied upon for jurisdiction. MCR 5.961(B)(4). The probate court then holds an adjudicative proceeding to determine if there is jurisdiction pursuant to the sections relied upon in the petition. *Hatcher*, *supra* at 434-435. To assume jurisdiction, the allegations contained in the petition must be proven by a preponderance of the evidence. *Nelson*, *supra* at 240.

MCL 712A.2(b)(1) and (2); MSA 27.3178(598.2)(b)(1) and (2), the sections under which the DSS petitioned here, provide in pertinent part:

The juvenile division of the probate court has the following authority and jurisdiction:

* * *

(b) Jurisdiction in proceedings concerning any child under 18 years of age found within the county:

(1) Whose parent or other person legally responsible for the care and maintenance of the child, 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 . . . 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, or other custodian, is an unfit place for the child to live in.

Here, the petition was not based on the conduct of the *guardians*, the Blakes, but on the conduct of the *respondent*:

> Therefore, due to the criminality of Bruce Moilanen, Elise's father, the home is an unfit place for Elise Moilanen to live. It is further alleged that Bruce Moilanen neglected his daughter by placing her at substantial risk of harm to her mental well-being by murdering his wife, Elise's mother, Judy Moilanen, contrary to MCLA 712A.2(b)(1).

Respondent contends that the probate court should have dismissed the petition because, at the time of the petition, the child was living with court-appointed legal guardians whose home was not unfit due to criminality or neglect. He further argues that the jurisdictional statute confers jurisdiction only if the situation in which the child is presently living is unfit or if the child is presently at risk of substantial harm.

"The starting point in every case involving construction of a statute is the language itself." *Chandler v Dowell Schlumberger,* 214 Mich App 111, 113; 542 NW2d 310 (1995). "[O]ur goal is to ascertain and effectuate the intent of the Legislature." *Folands Jewelry Brokers, Inc v Warren*, 210 Mich App 304, 307; 532 NW2d 920 (1995). The language of the jurisdictional statute at issue is written in the present tense and appears to confer jurisdiction only if the child *is* at substantial risk of harm or if the present situation of the child *is* unfit. See MCL 712A.1(2); MSA 27.2178(598.1)(2). "The juvenile code is intended to protect children from unfit homes rather than to punish their parents." *In re Brock,* 442 Mich 101, 108; 499 NW2d 752 (1993). Its purpose is to ensure that all children coming within the jurisdiction of the courts receive the "care, guidance and control, preferably in his or her own home, as will be conducive to the child's welfare and the best interest of the state." MCL 712A.1(2); MSA 27.2178(598.1)(2). The Legislature intended to allow the courts to intervene in unfortunate situations which may necessitate the termination of parental rights. *Taurus F, supra* at 526 n 8 (Williams, J).

Given the purpose of the statute and the fact that it is written in the present tense, the logical conclusion is that the Legislature did not intend for the probate court to intervene where a child is presently living in a safe and favorable environment. In fact, we have previously stated that "[t]he state should not inject itself into the lives of its citizens except when specifically authorized by law and when necessary to prevent abuse and neglect." *In the Matter of Curry*, 113 Mich App 821, 830; 318 NW2d 567 (1982).

Generally, "the placement by a parent of a child in a relative's home where the child receives adequate care does not render the child "without proper custody or guardianship" for purposes of § 2(b)(1) of the statute." *Nelson*, *supra* at 241. In *In the Matter of Carlene Ward*, 104 Mich App 354; 304 NW2d 844 (1981), this Court held that where the mother of a minor child placed the child with a relative who was providing proper care, the child was not "without proper custody or guardianship" and thus not subject to the jurisdiction of the probate court. In doing so, this Court stated:

> Most parents raise their children themselves. Some parents, however, because of illness, incarceration, employment or other reason, entrust the care of their children for extended periods of time to others. This they may do without interference by the state so long as the child is adequately cared for. [*Id.* at 360, citing *In re Weldon,* 397 Mich 225, 296; 224 NW2d 827 (opinion by Levin, J) (1976), overruled on other grounds, *Bowie v Arder*, 441 Mich 23; 490 NW2d 568 (1993).]

In *Curry*, *supra*, both the father and the mother of the children at issue were incarcerated. The children were residing with grandparents at the time of the petition. The *Curry* Court held there was no evidence that the home of the grandparents was unfit because of the criminality of the parents. *Id.* at 828-829. It also held that the criminal status of parents, alone, is not a sufficient basis for the probate court to assume jurisdiction. *Id.* at 830. These cases indicate that MCL 712A.2; MSA 27.3178(598.2) confers jurisdiction only where the terms of the statute are satisfied at the time the petition is filed. Unless there is potential for such intervention by the probate court to have some positive effect upon the child's welfare or assist the child in obtaining appropriate care or guidance, we do not believe that intervention by the DSS or the probate court was contemplated by the Legislature.

Here, we look at the child's situation at the time the petition was filed. Proper arrangements for the child had already been made by the incarcerated parent. The State, through a previous order of the probate court, had already made the Blakes the legal guardians of the child. Further, the DSS wanted the Blakes to retain custody of the child and conceded that they were providing appropriate care for the child. Clearly, there was no basis under the "without proper care or custody" prong of § 2(b)(1) for the DSS or the probate court to inject itself into this family situation.

However, here, the DSS petitioned under both the "subject to a substantial risk of harm to his or her mental well-being" prong of § 2(b)(1) and under § 2(b)(2) -- the "home or environment, by reason of . . . criminality . . . on the part of a parent . . . is an unfit place for the child to live in." Generally, placement of a child with guardians who provide proper care will leave the probate court without jurisdiction under these provisions. However, the continuing effect of a parent on a child despite such alternative arrangements may still subject the child to a substantial risk of harm to the child's mental

well-being and/or make the child's "environment" "unfit." Here, respondent obviously caused serious emotional harm to the well-being of the child by murdering her mother; such harm may forever affect the child. Further, contact between respondent and the child has upset the child to the extent that the court has ordered that he not engage in further telephone contacts with her. This evidence indicates that, despite the alternative arrangements for the child's care, respondent has continued to subject the child to emotional harm. Accordingly, there was sufficient evidence for the jury to find by a preponderance of the evidence that, at the time the petition was filed, the child was subject to a substantial risk of harm to her mental well-being pursuant to § 2(b)(1). See *Nelson*, *supra* at 240.

In reaching this conclusion, we specifically reiterate that mere status as a criminal is insufficient, alone, to provide the probate court with jurisdiction. *Curry*, *supra*. Here, respondent's specific criminal act -- murdering the child's mother -- directly affected the child. This case is distinguishable on this basis from cases in which a parent is incarcerated for criminal acts that do not directly affect the child. The relevant inquiry is whether the parent has subjected the child to a substantial risk of harm to the child's mental well-being or the parent's criminality has made the child's environment unfit at the time the petition was filed.

Another distinguishing characteristic of the case at bar is that respondent has virtually no prospect of resuming custody of his child. In situations where a parent will be unavailable to care for a child for a long period of time and makes alternative arrangements for a child, the child should have the opportunity for permanent placement or adoption. In his opinion in *Taurus F*, *supra* at 543, Justice Williams stated:

> If the parent who is about to give up custody is suffering from some temporary inability to provide proper care, then it would seem to be in the child's best interest as well as that of the parent that the custody also be temporary so that child and parent can be reunited within a reasonable time and preserve the family relationship and the child's best interest. However, if the parent is suffering not a temporary, but a long or permanent disability, then it is probably in the child's best interest that the separation from the parent and the custody be permanent.

The probate court did not terminate respondent's parental rights during the hearing at issue. However, that option, and the possibility of permanently placing the child with the Blakes, is available only if the court has jurisdiction over the child.

While the result of the dispositional order at issue was to leave the child in the Blake's care as respondent had arranged, we note several additional benefits that derive from a finding of jurisdiction in this matter. First, oversight by the probate court makes the Blake's guardianship over the child less susceptible to revocation by respondent. Second, it allows the court to limit respondent's contact with the child, as it has done here. Third, it makes the child potentially available for permanent placement or adoption. Finally, it would allow judicial intervention before respondent would be able to resume custody of the child, if he were ever to be released from prison.

In conclusion, there must be a specific finding of jurisdiction pursuant to the jurisdictional statute before the probate court can take action with regard to a child**.** The statute is clear that the probate court is to evaluate the *present* situation of the child to determine if there is jurisdiction. We find that the probate court appropriately assumed jurisdiction on the basis of evidence that, at the time the petition was filed, respondent's murder of the child's mother subjected the child to a substantial risk of harm to her mental well-being pursuant to § 2(b)(1).[1]

Respondent next claims that his counsel was ineffective. "In analyzing claims of ineffective assistance of counsel in termination proceedings, this Court must apply by analogy the test for claims of ineffective assistance of counsel in the criminal setting." *In Re Rogers*, 160 Mich App 500, 502; 409 NW2d 486 (1987). In order to justify reversal of an otherwise valid conviction on the basis of ineffective assistance of counsel, "a defendant must show that a counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial." *People v Pickens*, 446 Mich 298, 302-303: 521 NW2d 797 (1994).

Here, respondent raises numerous claims of ineffective assistance of counsel, primarily failures to object to questions and testimony. The objections he claims should have been made would not likely have been meritorious. None of the claimed errors indicate that his counsel's performance fell below an objective standard of reasonableness or so prejudiced respondent as to deprive him of a fair hearing. Further, the record reflects that respondent's counsel vigorously represented him, e.g., by making appropriate pre-trial motions, effectively cross-examining petitioner's witnesses, and properly preserving the issue of lack of jurisdiction for appeal. Accordingly, respondent fails to establish that he received ineffective assistance of counsel.

For these reasons, we affirm the dispositional order of the probate court.

Affirmed.

/s/ Stephen J. Markman
/s/ Alton T. Davis

I concur in result.

/s/ Harold Hood

[1] We also note, however, that the probate court's reliance on *In the Matter of Mudge*, 116 Mich App 159; 321 NW2d 878 (1982) in support of its assertion of jurisdiction is misplaced. In *Mudge*, the parental rights of a father who murdered the mother of the children at issue were terminated. However, the probate court had jurisdiction over the children *prior* to the murder because of a previous petition based on abuse and neglect. *Id.* at 160. Thus, the *Mudge* Court did not base its jurisdiction on the crime itself. The statutes upon which termination may be based are different than those upon which jurisdiction can be based. See MCL 712A.19b; MSA 27.3178(598.19b). Moreover, in *Nelson*, *supra* at 240, this Court rejected the argument that if conduct fits within the termination statute, the conduct automatically allows for jurisdiction. See also *Taurus F., supra* at 546.