STATE OF MICHIGAN

COURT OF APPEALS

In re SMITH, Minors.

UNPUBLISHED
April 30, 2020

No. 351095; 351178
Kalamazoo Circuit Court
Family Division
LC No. 18-000053-NA

Before: RIORDAN, P.J., and FORT HOOD and SWARTZLE, JJ.

Riordan, P.J. (*dissenting*).

I respectfully dissent. Based on the reasoning articulated by the trial court in its orally issued opinion at the adjudication phase of this matter, there is insufficient evidence to support the trial court taking jurisdiction over the children.

At the adjudication phase, significant evidence was presented to the trial court about domestic violence, substance abuse, drug dealing, neglect, eviction, dishevelment, and other issues. However, the trial court looked beyond those behaviors and specifically found it was not against the law for a parent to drink one or two beers, argue with a spouse, be in the middle of an eviction process, or leave a 10-year-old at home alone. Although BS told the trial court that respondent-father had fallen asleep after drinking beer and left food cooking on the stove, the trial court noted that it was not clear whether respondent-mother had taken over the cooking at that point. Thus, the trial court concluded, this evidence was not a basis for the court to assume jurisdiction over BS and BS, Jr. Instead, the trial court based jurisdiction solely upon an allegation of educational neglect, which it characterized as child abuse.

MCL 712A.2 governs jurisdiction in child neglect proceedings, and provides that the trial court may exercise jurisdiction over a juvenile under 18 years of age whose parent "when able to do so, neglects or refuses to provide proper or necessary support, education . . . or other care necessary for his or her health or morals." MCL 712A.2(b)(1). A child's chronic absence from school is a sufficient basis for the trial court to assume jurisdiction on the ground of educational neglect as contemplated by the statute. See *In re Nash*, 165 Mich App 450, 455-456; 419 NW2d 1 (1987).

"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 decision

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). We review de novo the interpretation and application of statutes and court rules. *In re Sanders*, 495 Mich 394, 404; 852 NW2d 524 (2014).

"The question at adjudication is whether the trial court can exercise jurisdiction over the child (and the respondents-parents) under MCL 712A.2(b) . . . ." *In re Ferranti*, 504 Mich 1, 15; 934 NW2d 610 (2019) (parentheses in original). The trial court may exercise jurisdiction if the petitioner has demonstrated that one or more of the statutory grounds for jurisdiction were proven by a preponderance of the evidence based on the allegations in the petition. *Id*. Preponderance of the evidence means "such evidence as, when weighed with that opposed to it, has more convincing force and from which it results that the greater probability is in favor of the party upon whom the burden rests." *Jones v E Mich Motorbuses*, 287 Mich 619, 642; 283 NW 710 (1939) (quotation marks and citation omitted).

The evidence presented at the adjudication phase shows that the children attended school about 75% of their total class time—slightly less than the school's average attendance record of approximately 85%. There is no evidence in the record of harm to the children or poor progress at school. BS, Jr., was achieving at his grade level and was described by a teacher as "doing just fine" in school. The only evidence presented about BS' school work was her absenteeism rate.

Of course, it would be ideal for all children to attend school without appearing disheveled, to always be punctual, and to have their parents take an active interest in homework assignments. However, I disagree with the trial court that the record here supports a finding "well beyond a preponderance of the evidence that the children have not regularly attended school and are often late." The evidence shows that BS, Jr., performs at the appropriate education grade level and there is no documentation or indication in the record that the child is falling behind, only a possibility that it could happen in the future. One teacher testified that BS, Jr. missed some assessments of reading, spelling, and math skills because of absences and did not turn in some homework assignments. However, these things alone do not amount to a preponderance of the evidence of educational neglect rising to the level of child abuse. Instead, it may be more reflective of the educational condition of a great many school-age children. Further, there is no evidence in the record as to the educational progress of BS other than her school attendance rate.

A review of the evidence does not result in the greater probability in favor of the petitioner in this case. *Jones*, 287 Mich at 642. Ideally, every child should have perfect school attendance, but I cannot conclude that a 75% average absenteeism rate is a convincing force of there being educational neglect that is on the level of child abuse. *Id.*

As educational neglect was not proven by a preponderance of the evidence, I am left with a definite and firm conviction that a mistake has been made. *In re HRC*, 286 Mich App at 459. The trial court committed clear error by asserting jurisdiction solely on the basis of educational neglect over the children in these matters. Thus, I would reverse the trial court's order terminating the respondents' parental rights and remand for further proceedings.

/s/ Michael J. Riordan