

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 re CJAC, Minor.

UNPUBLISHED

January 7, 2021

No. 353755
Genesee Circuit Court
Family Division
LC No. 19-136363-NA

Before: REDFORD, P.J., and RIORDAN and TUKEI, JJ.

PER CURIAM.

Petitioner, the Department of Health and Human Services (DHHS), appeals as of right the trial court’s order dismissing without prejudice the petition to terminate respondent’s parental rights to his minor child, CJAC, pursuant to MCL 712A.19b(3)(b)(*iii*) (nonparent caused sexual abuse of a sibling) and MCL 712A.19b(3)(k) (sexual abuse of a sibling) after CJAC’s half-sibling, JS, reported that respondent sexually abused her on three occasions, including one occasion when CJAC was present. We reverse the order and remand this case to the trial court for further proceedings.

I. FACTS & PROCEDURAL HISTORY

CJAC and JS live primarily with their mother. On October 5, 2019, Child Protective Services (CPS) received a referral after JS reported that respondent had sexually abused her three times. The most recent instance took place when JS and CJAC stayed over at their aunt’s home. The children fell asleep on respondent’s bed while watching a movie. JS reported that respondent woke her up and put his fingers in her vagina, licked her vagina, and put his penis inside her vagina. JS reported that respondent asked her to pinky promise not to tell anyone what happened, but JS eventually told her mother.

The petition asserts that jurisdiction was proper pursuant to MCL 712A.2(b)(1) and (2)¹ because respondent, when able to do so, subjected CJAC to a substantial risk of harm to his mental

¹ MCL 712A.2(b) provides, in relevant part:

well-being and the home was unfit for him because of respondent's criminality or depravity and that termination was appropriate pursuant to MCL 712A.12(b)(3)(b)(iii) and (k). On October 24, 2019, the trial court authorized the petition, noting that the children's mother was a non-respondent and that CJAC was safely in her care, and ordered that respondent have no contact with CJAC, JS, or their mother.

On November 19, 2019, the trial court held its first contested pretrial hearing. At the hearing, petitioner noted that a criminal matter was still under investigation for respondent's conduct with JS. Because of the ongoing investigation, the trial court scheduled a second contested pretrial for December 20, 2019, and set a trial date of January 17, 2020. The court continued placement of CJAC with his mother and maintained the no-contact order.

On December 10, 2019, the trial court held a second contested pretrial hearing. Petitioner noted that criminal charges still had not been filed, but indicated that a detective on the case planned to submit a warrant request that same day. The trial court maintained the January 17, 2020 trial date and continued to place CJAC with his mother with no contact from respondent.

On January 17, 2020, the date set for trial, petitioner stated that criminal charges had still not been filed against respondent, but petitioner believed a warrant was forthcoming. Petitioner requested that the court adjourn the trial while the criminal matter still was under investigation. Respondent opposed the motion and requested the case be dismissed. Petitioner noted that it had no control over when the criminal prosecution was to commence and that a termination case had a different burden of proof than a criminal matter and, thus, the termination proceeding would have no impact on a potential criminal proceeding. The court adjourned the trial, noting that it would benefit respondent not to proceed with the termination trial because it would avoid placing respondent in the position of having to testify in a termination proceeding with its lesser burden while possibly implicating himself in a criminal case with its higher burden. However, the trial court warned that it "didn't intend to do this much longer," because the delays were becoming a pattern and it would have to decide what to do "constitutionally, in good conscience, objectively with [the] courtroom." The trial court rescheduled trial for February 14, 2020, and stated, "I'm not promising a dismissal, but the thought has crossed my mind, but we will see as of that date.

Jurisdiction in proceedings concerning a juvenile under 18 years of age found within the county:

- (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.
- (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.

The police have to make some decision as to what they will do.” The trial court granted respondent supervised visits with CJAC.

On February 14, 2020, petitioner reported that criminal charges had still not been filed and the criminal matter was pending further investigation and that charges would be filed once the prosecutor’s office received some items from the detective. Petitioner noted that “in these types of cases, we typically adjourn to allow the criminal matter to run its course,” and that if the court chose to dismiss the petition, DHHS intended to refile it. Respondent requested dismissal of the petition. The trial court adjourned the trial until April 9, 2020, and expanded respondent’s parenting time, but noted that the criminal allegations were still a concern:

I know that you’re well aware of my own concerns with respect to when there are indications of criminal allegations are [sic] the basis of this petition; that I just prefer to defer to the criminal matter; and that is an issue that quite frankly I feel is to the benefit of [respondent]. It may not be convenient, but quite frankly I feel that the criminal matter, if there is to be one, needs to take priority over the outcome.

Because of the COVID-19 pandemic, the trial court was unable to hold the scheduled April 9, 2020 hearing, and the parties met on May 25, 2020, over videoconference. Respondent still had not been charged criminally and petitioner stated that it planned to confer with the prosecutor as to the status of the criminal matter. Respondent requested that the court dismiss the case and argued that DHHS could refile the petition if any criminal charges were brought. Petitioner requested the court to set the case for another contested pretrial because trials were not being scheduled during the pandemic. Petitioner argued that there had been an authorized petition and there was no procedural basis for dismissal of the petition without a trial on the merits.

Concerned with the length of time the case had been pending, the trial court dismissed the case without prejudice. Petitioner asked the court for a specific procedural basis or authority that would authorize the court to dismiss the petition without a hearing on the merits. Respondent noted: “[A]s a general rule, we would let the criminal case play out first because [respondent] couldn’t testify . . . in a hearing. So, as a practical matter, I think—I think one has to come before the other.” The trial court stated:

[A]t this time, with no criminal charges having been brought, the time that’s been involved, the fact that the parties have worked on parenting time at this moment, . . . without further progress regarding criminal charges, I feel that procedurally a dismissal without prejudice is warranted.

Petitioner again asked the court for a procedural basis that justified dismissal and pointed out that child protective proceedings and criminal proceedings had different burdens of proof and that DHHS could choose to proceed on the termination matter with a lower burden of proof. The trial court responded:

I do realize that basis of the petition were [sic] pending criminal charges. The initial petition sought was termination based upon those criminal charges; and, as of today, there have been no criminal charges brought; and the dismissal without prejudice will allow the petition to be either filed for termination or even

jurisdiction if there is some further progress regarding criminal charges. But that issue . . . may be the subject of further legal analysis at a different time; but I simply am not willing to wait on this specific matter.

Petitioner now appeals.

II. ANALYSIS

Petitioner argues that the trial court erred by dismissing the petition without a proper legal or procedural basis for the dismissal. We agree.

We review de novo the interpretation and application of statutes and court rules. *In re Sanders*, 495 Mich 394, 404; 852 NW2d 524 (2014). Child protective proceedings comprise two phases: the adjudicative phase—in which a court determines whether it can take jurisdiction over the child—and the dispositional phase, in which the court determines what course of action will ensure the child’s safety and well-being. *In re Sanders*, 495 Mich at 404. MCR 3.962(B)(2) provides that a trial court has the discretion to dismiss a petition at the preliminary inquiry. However, in this case, the trial court dismissed the petition after authorizing it, holding several contested pretrial hearings, and setting multiple trial dates. Therefore, the case was beyond the stage at which the trial court could dismiss the petition at its discretion. We are unaware of any statute, court rule, or caselaw that would give the trial court authority to dismiss the authorized petition without a decision on the merits. Further, “[o]ur legal system favors disposition of litigation on the merits.” *Vicencio v Ramirez*, 211 Mich App 501, 507; 536 NW2d 280 (1995). Therefore, the trial court erred by dismissing the petition without a decision on the merits.²

² Following oral argument on this matter, we directed petitioner to provide a status update on the child protective proceeding. Specifically, we requested that petitioner notify us as to whether the child protective proceeding had been refiled, and if so, whether the instant appeal is moot as a result. *In re CJA Cornish, Minor*, unpublished order of the Court of Appeals, issued November 16, 2020 (Docket No. 353755). Petitioner responded and informed us that the petition has been re-filed, but has not yet been authorized. As a general rule, an appellate court will not decide moot issues. *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998). A case is moot when it presents only abstract questions of law that do not rest upon existing facts or rights. *Id.* However, “a case is not moot if the issues sought to be litigated are capable of repetition, yet evade review.” *Morales v Mich Parole Bd*, 260 Mich App 29, 32; 676 NW2d 221 (2003). Here, the refiled, unauthorized petition does not ensure that the petition will be reviewed on the merits. Accordingly, the instant case is not moot.

III. CONCLUSION

The trial court committed error requiring reversal when it dismissed the petition without a decision on the merits. Accordingly, we reverse and remand this case to the trial court for further proceedings.

/s/ James Robert Redford
/s/ Michael J. Riordan
/s/ Jonathan Tukel