

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of GABRIEL VERL APPLETON,
Minor.

RANDALL RYAN APPLETON,

Petitioner-Appellee,

UNPUBLISHED
May 23, 2006

v

MARGARET ANNE APPLETON,

Respondent-Appellant.

No. 265402
Marquette Circuit Court
Family Division
LC No. 05-008196 NA

Before: Sawyer, P.J., and Kelly and Davis, JJ.

PER CURIAM.

Respondent appeals as of right from the trial court opinion and order terminating her parental rights to the minor child under MCL 712A.19b(3)(n). We vacate and remand. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Petitioner and respondent were married in the state of Kentucky, and the minor child was a product of that union. The parties were subsequently divorced in Kentucky, and respondent was awarded primary physical custody of the child. Petitioner married his current wife in Michigan. Respondent was then arrested for and pleaded guilty to three counts of complicity to murder, one count of complicity to commit robbery, and one count of complicity to commit burglary. Petitioner obtained a modification of the custody order in Kentucky granting him physical custody. Respondent was sentenced to life in prison with the possibility of parole after twenty-five years. During the time the child lived with Respondent, she was convicted of theft by deception, endangering the welfare of the minor child, and possession of marijuana and drug paraphernalia. The trial court granted the petition.

Respondent first argues that the trial court lacked subject matter jurisdiction over the termination proceedings, which is an issue that we review de novo. *Huron Valley Schools v Secretary of State*, 266 Mich App 638, 645; 702 NW2d 865 (2005). There is no dispute that the allegations of the petition are within the circuit court's general subject matter jurisdiction. However, "jurisdiction," in the context of parental rights, refers to the trial court's statutory authority to enter dispositional orders governing care of a child. *In re AMB*, 248 Mich App 144, 176-177; 640 NW2d 262 (2001). To exercise that jurisdiction, the trial court must first "hold an adjudication, which is a trial on the merits of the allegations in the petition" and "must find that a

preponderance of legally admissible evidence demonstrates that there is factual support for one of the grounds permitting judicial involvement under MCL 712A.2(b).” *Id.* We review findings of fact for clear error. *In re S R*, 229 Mich App 310, 314; 581 NW2d 291 (1998).

Under MCL 712A.2(b)(2), the circuit court has jurisdiction over proceedings involving juveniles “[w]hose 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” (emphasis added). The trial court correctly noted that the statute does not require the unfit environment to be the custodial parent’s. The trial court found the custodial parent’s home was good. Based on respondent’s custodial history and current incarceration, the trial court concluded that her parental environment is unfit by reason of criminality and failure to provide adequate support. Criminality *alone* may not be sufficient without some evidence that it made the environment unfit. *In re Curry*, 113 Mich App 821, 827-830; 318 NW2d 567 (1982). Here the record reflects respondent’s efforts to have an ongoing relationship with the child, including prison visits and telephone calls, would be harmful to the child. We do not find the trial court’s conclusion clearly erroneous.

The next issue in this case is that the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), MCL 722.1101 *et seq.*, imposes additional jurisdictional requirements under the circumstances of this case. *Atchison v Atchison*, 256 Mich App 531, 534-535; 664 NW2d 249 (2003). Specifically, even where the court has general jurisdiction over the child under MCL 712A.2(b), no Michigan court can modify a child-custody determination rendered by the court of another state without first determining that the requirements of MCL 722.1203 have been satisfied. *Id.*, 537-538. This Court explained:

Thus, to modify a child-custody determination from another state, the Michigan court must have jurisdiction to make the initial child-custody determination, MCL 722.1201, and the other state must determine that it no longer has exclusive, continuing jurisdiction or that a Michigan court would be a more convenient forum. MCL 722.1203(a). Alternatively, a Michigan court may modify a child-custody determination when it is determined that the child, parent of the child, or person acting as a parent to the child no longer resides in the other state. MCL 722.1203. [*Id.*, 537-538.]

As discussed, the trial court had jurisdictional authority over the child pursuant to MCL 712A.2(b). We also find that the trial court had jurisdiction to make the initial custody determination because the child has been living with petitioner since March 2003, more than two years before petitioner filed the petition in this matter. Therefore, Michigan had been the child’s “home state,” MCL 722.1102(g), long enough to confer initial jurisdiction under MCL 722.1201(1)(a).

Under MCL 722.1203(a),¹ the lower court record does not contain a determination by a Kentucky court that it no longer has jurisdiction or that Michigan is a more convenient forum.

¹ “The court of the other state determines it no longer has exclusive, continuing jurisdiction
(continued...)”

MCL 722.1203(b)² cannot be satisfied because respondent, a parent of the child, continues to reside in Kentucky, albeit in prison. Petitioner provides for the first time on appeal a document purporting to be an order of a Kentucky court acknowledging Michigan's jurisdiction, but we are not permitted to consider this expansion of the lower court record. MCR 7.201(A); *Amorello v Monsanto Corp*, 186 Mich App 324, 330; 463 NW2d 487 (1990). Instead, we remand the matter for the trial court to supplement the record to reflect a clear waiver of jurisdiction to Michigan by the Kentucky court in satisfaction of MCL 722.1203.³ If not, the case must be dismissed for lack of subject matter jurisdiction. Because the case need not be dismissed on jurisdictional grounds if the trial court determines and the record reflects that MCL 722.1203 has been satisfied, we address the remainder of respondent's issues on appeal in the interests of efficiency.

First, respondent argues that the trial court clearly erred in terminating her parental rights under MCL 712A.19b(3)(n)(i). MCR 3.977(J); *In re Gazella*, 264 Mich App 668, 672; 692 NW2d 708 (2005). We disagree. As previously discussed, respondent's guilty pleas and resultant sentences, as well as her convictions while the minor child was in her custody, persuade us that the trial court did not clearly err in finding MCL 712A.19b(3)(n)(i) satisfied.

Finally, respondent argues that the trial court erroneously assigned to her the burden of proving that termination would not be in the child's best interests. We agree, but the error is harmless. "Once a statutory ground for termination is established by clear and convincing evidence, the trial court must terminate parental rights unless it finds from the whole record that termination clearly is not in the child's best interests." *In re BZ*, 264 Mich App 286, 301; 690 NW2d 505 (2004), citing MCL 712A.19b(5). This does not impose an evidentiary burden on either party. *In re Trejo*, 462 Mich 341, 352-353; 612 NW2d 407 (2000). Instead, it "permits the court to find from evidence on the whole record that termination is clearly not in a child's best interests." *Id.*, 353. The trial court erred when it stated that the burden was on the parent opposing termination. However, the trial court set forth an extensive finding of facts and considered all of the evidence in making its decision. The evidence does not show that the trial court's findings of fact are clearly erroneous. *In re BZ, supra* at 296.

(...continued)

under [MCL 722.1202] or that a court of this state would be a more convenient forum under [MCL 722.1207]."

² "A court of this state or a court of the other state determines that neither the child, nor a parent of the child, nor a person acting as a parent presently resides in the other state."

³ The purported order provided by petitioner is ambiguous on this point. Although it shows that the Kentucky court was aware of the proceedings in Michigan, it also explicitly declines to "mak[e] a determination as to jurisdiction at this time." This issue may have been resolved but simply not explicitly placed in the record. The trial court is permitted to communicate with the Kentucky court "to determine proper jurisdiction if the need arises." *Fisher v Belcher*, 269 Mich App 247, 255; ___ NW2d ___ (2005) citing MCL 722.1110.

Vacated pending remand for a determination of subject matter jurisdiction under MCL 722.1203. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Kirsten Frank Kelly
/s/ Alton T. Davis