

STATE OF MICHIGAN
COURT OF APPEALS

UNPUBLISHED
April 9, 2013

In the Matter of S M M YOUNG, Minor.

No. 307761
Wayne Circuit Court
Family Division
LC No. 11-499355

Before: BORRELLO, P.J., and K. F. KELLY and GLEICHER, JJ.

PER CURIAM.

In this unsuccessful termination-of-parental-rights case, petitioners, the legal guardians of the subject child, challenge the circuit court’s dismissal of their petition for failure to establish a statutory ground to take jurisdiction over the child under MCL 712A.2(b)(1). Petitioners contend that an earlier court’s finding in support of appointing guardians for the child established jurisdiction for their termination petition. The judge in the termination matter incorrectly concluded that it lacked jurisdiction over the child. The court had already taken jurisdiction over the child in the 2007 adoption and 2008 guardianship matters and no one had appealed that jurisdictional decision. As a continuing proceeding in which the guardians filed a petition for termination, the court in the 2011 termination matter was required under MCL 712A.19b(1) to “hold a hearing to determine if the parental rights to [the] child should be terminated.” The court failed to do so. We therefore reverse the dismissal of the petition for child protective proceedings and remand for consideration of the grounds alleged in support of termination of the parents’ rights.

I. BACKGROUND

A. 2007 ADOPTION PROCEEDINGS

In the spring of 2007, while the mother was pregnant with the subject child, the mother pleaded guilty to voluntary manslaughter. In anticipation of her impending birth and her soon-to-follow imprisonment, the mother utilized a private agency to locate potential adoptive parents for her child and she personally selected petitioners. On April 23, 2007, while the mother was waiting to begin her 10 to 20-year prison term, the child was born. Consistent with MCL 710.23d(1) of the Michigan Adoption Code, MCL 710.21 *et seq.*, the mother “ma[de] a temporary placement of the child” with petitioners and allowed petitioners to take the child home from the hospital.

In the following weeks, the mother vacillated between allowing the adoption to proceed as planned and desiring the child to be returned to her care to make an alternate placement during her imprisonment. On May 15, 2007, the mother filed a petition seeking to rescind the child's temporary placement and regain custody of her child as provided in MCL 710.23d(5): "A parent or guardian who wishes to regain custody of a child who has been placed temporarily shall file a petition in the court . . . requesting that the temporary placement be revoked and that the child be returned to the parent or guardian."

Then-Wayne Circuit Court Judge Mary Beth Kelly presided over the 2007 adoption proceedings. Following the mother's motion to revoke the temporary placement, Judge Kelly was required to proceed under MCL 710.23e, which provides, in relevant part:

(2) Upon receiving a petition filed under [MCL 710.23d(5)], the court shall immediately issue an ex parte order directing the prospective adoptive parent to return the child to the parent or guardian with legal custody within 24 hours after receipt of the order, unless the court proceeds under subsection (3).

(3) The court may appoint an attorney to represent the child or refer the matter to the [Department of Human Services (DHS)]. The attorney or the [DHS] may file a petition on the child's behalf requesting the court to take jurisdiction under [MCL 712A.2(b)]. If that petition has not been filed within 14 days after the court appoints an attorney or refers the matter to the [DHS] under this section, the court shall order the return of the child to the parent or guardian with legal custody. During the period before the petition for jurisdiction under [MCL 712A.2(b)] is filed and a preliminary hearing is held or the return of custody is ordered, the court shall remove the child from the home of the prospective adoptive parent and make a temporary disposition appropriate for the welfare of the child as authorized by [MCL 712A.18].^{1]}

(4) Subject to subsection (2), the court may appoint a guardian under the estates and protected individuals code [EPIC] . . . , MCL 700.1101 to 700.8102, in response to a petition filed by the prospective adoptive parent or another individual interested in the child's welfare, and make a temporary disposition appropriate for the child's welfare as authorized by [MCL 712A.18] until an order of guardianship is entered.

Judge Kelly decided not to immediately return the child to her mother's care consistent with MCL 710.23e(2) and was therefore required to proceed under MCL 710.23e(3). Judge Kelly appointed a lawyer guardian ad litem (LGAL) for the child in compliance with subsection (3). MCL 710.23e(3) allows the LGAL 14 days to file a petition under MCL 712A.2(b) for the court to take jurisdiction over the child under the Juvenile Code, MCL 712A.1 *et seq.*, or the

¹ MCL 712A.18(1)(h) permits the court to appoint a guardian for a juvenile under MCL 700.5204 "in response to a petition filed with the court by a person interested in the child's welfare."

court must return the child to the parent. Although the LGAL never filed a petition under the Juvenile Code as required by MCL 710.23e(3), the court proceeded to take jurisdiction over the child at that time.² Judge Kelly then invoked MCL 710.23e(4) and designated petitioners as the child's temporary guardians under EPIC.³ No one appealed Judge Kelly's decision to take jurisdiction over the child and therefore, despite the procedural error committed below, the court retains jurisdiction over the child until the current day.

B. 2008 GUARDIANSHIP PROCEEDINGS

After appointing petitioners as the child's temporary guardians, Judge Kelly continued under EPIC and, in a newly filed 2008 guardianship matter, took full guardianship petitions from petitioners as well as from the mother's two sisters and their husbands. Judge Kelly proceeded under MCL 700.5204(2)(a), which permits the circuit court to appoint a guardian for a minor when the parent's rights have been "suspended . . . by confinement in a place of detention." In relation to this subsection, Judge Kelly determined that the mother "was incarcerated on May 31, 2007, without making any legal provisions for [the child's] care and custody."

Judge Kelly relied upon MCL 700.5212 ("[t]he court may appoint as guardian a person whose appointment serves the minor's welfare"), and MCL 700.5213(2) ("if the court finds that a qualified person seeks appointment . . . and the minor's welfare will be served by the requested appointment, the court shall make the appointment"), in selecting an appropriate guardian for the child. After a lengthy consideration of the best-interest factors outlined in MCL 700.5101 and the applicant evaluations prepared by court staff, Judge Kelly found "that the evidence overwhelmingly reflects that [the child's] best interests will be served by awarding guardianship to" petitioners.

C. 2011 TERMINATION PROCEEDINGS

On March 7, 2011, when the child was nearly four years old, petitioners filed the current petition to terminate the parental rights of the child's mother and any putative father so they

² In her later opinion and order resolving the 2008 guardianship case, Judge Kelly stated that, at a May 23, 2007 hearing, the mother provided testimony that "established that she had not arranged for the custody and care of [the child] during her period of imprisonment nor had any petitions for guardianship for [the child] been filed."

³ Judge Kelly summarized her actions in her 2008 full guardianship opinion and order as follows:

During the course of the [May 29, 2007] hearing, the Court emphasized that, because it had chosen to proceed under MCL 710.23e(3), it did not need to return [the child] to [the mother] forthwith, as would otherwise be required by MCL 710.23e(2). The Court then informed the interested persons that because [the child] could not go into her mother's custody due to the imminence of [the mother's] sentencing date, in accord with MCL 710.23e(4), the Court would consider any proposed guardianship petitions that might be filed with the Court.

could adopt her. As the court already had jurisdiction over the child due to the 2007 and 2008 proceedings, petitioners should have cited MCL 712A.19b(1) in their petition. That statutory provision states, in relevant part:

[I]f a child remains in the custody of a guardian or limited guardian, upon petition. . . of the . . . guardian . . . , *the court shall hold a hearing to determine if the parental rights to a child should be terminated* and, if all parental rights to the child are terminated, the child placed in permanent custody of the court. The court shall state on the record or in writing its findings of fact and conclusions of law with respect to whether or not parental rights should be terminated. [Emphasis added.]

Instead, petitioners generally cited MCL 712A.2 as the grounds for court jurisdiction over the child.

Petitioners claimed that termination of the mother's parental rights was supported by MCL 712A.19b(3)(h) (parent is imprisoned, the child will be deprived of a normal home for more than two years, and the parent has not provided proper care and custody in the past and will not be able to do so within a reasonable time in the future) and the putative father's rights by MCL 712A.19b(3)(a)(ii), (f), and (g) (all based on the unknown father's desertion of the child). In relation to the mother, the petition specifically averred:

1. Full guardianship was granted to petitioners June 27, 2008 by this Court after denial of a request for return of the child filed by the mother under MCL 710.23[d] following the voluntary placement of the child for adoption on April 24, 2007.
2. The mother's earliest possible release date according to the Indiana Department of Correction is June 13, 2017. She is serving a twenty (20) [year] prison term for voluntary manslaughter imposed on May 31, 2007. MCL 712A.19b(3)(h) provides the court may terminate a parent's parental rights to a child if the court finds, by clear and convincing evidence that, "The parent is imprisoned for such a period that the child will be deprived of a normal home for a period exceeding 2 years, and the parent has not provided for the child's proper care and custody, and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age."
3. The mother did not provide proper care and custody for the child prior to her incarceration per finding of this Court in its Opinion dated June 27, 2008 on Page 12.

The termination matter was assigned to Wayne Circuit Court Judge Leslie Kim Smith and a referee presided over the adjudicative trial. The court failed to acknowledge that court jurisdiction over the child already existed based on Judge Kelly's earlier orders. Instead, the court treated the matter as an original petition for termination of parental rights and required petitioners to establish anew the grounds for jurisdiction under MCL 712A.2(b)(1), which

provides for court jurisdiction over a child whose parent has left him or her “without proper custody or guardianship.”

The parties tried to remedy the court’s error by stipulating that the court had jurisdiction over the child based on the 2007 and 2008 proceedings. The court correctly informed the parties that they could not stipulate to court jurisdiction over the child, *In re Hatcher*, 443 Mich 426, 433; 505 NW2d 834 (1993), but went on to erroneously conclude that jurisdiction had to be established under MCL 712A.2(b)(1), ignoring MCL 712A.19b(1). When considering whether the court had jurisdiction under subsection 2(b)(1), the referee who took evidence in the matter and Judge Smith, who reviewed the record and affirmed the referee’s findings, determined that the child was not without proper custody and guardianship because, by the time of the 2011 petition, the child had long been in the care of her guardians.

II. STANDARD OF REVIEW

A circuit court may only proceed to consider whether a petitioner has established grounds for termination of parental rights after first determining that there are grounds to take jurisdiction over a child. *Hatcher*, 443 Mich at 435. We review a trial court’s decision whether to exercise jurisdiction over a child for clear error. *In re BZ*, 264 Mich App 286, 295; 690 NW2d 505 (2004). “A finding is clearly erroneous if although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made.” *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010) (quotation marks, citations, and alterations omitted). To exercise jurisdiction over a child, the court must find that a preponderance of the evidence supports a statutory ground for jurisdiction. *Id.*

We review underlying issues of statutory interpretation de novo. *Id.* When construing a statute, our primary goal is to ascertain the intent of the Legislature from the plain language it used in the statute itself. *In re Schnell*, 214 Mich App 304, 309-310; 543 NW2d 11 (1995). We also review de novo whether a particular legal doctrine, such as collateral estoppel, applies to a case. *People v Trakhtenberg*, 493 Mich 38, 47; 826 NW2d 136 (2012).

III. ANALYSIS

The circuit court clearly erred in dismissing petitioners’ 2011 termination request given that the court already had jurisdiction over the child. Procedural errors did occur in the 2007 adoption proceeding. However, Judge Kelly actually took jurisdiction over the child based on her determination that the mother failed to provide proper care and custody despite her looming imprisonment. “Matters affecting the court’s exercise of its jurisdiction may be challenged only on direct appeal of the jurisdictional decision, not by collateral attack.” *In re Gazella*, 264 Mich App 668, 679-680; 692 NW2d 708 (2005), superseded in part on other grounds as stated in *In re Hansen*, 285 Mich App 158, 163-164; 774 NW2d 698 (2009). Judge Smith therefore lacked the power to reconsider and overturn Judge Kelly’s unappealed jurisdictional decision.

We acknowledge that petitioners’ counsel inartfully argued the jurisdictional point before Judge Smith and on appeal. Even so, Judge Smith proceeded under the wrong statutory provision within the Juvenile Code. The court already had jurisdiction over the child and therefore petitioners were not required to establish a ground for jurisdiction under MCL 712A.2.

Instead MCL 712A.19b(1) governed this proceeding. MCL 712A.19b(1) required the court to conduct “a hearing to determine if the parental rights to a child should be terminated.” Judge Smith erroneously avoided her duty by rejecting jurisdiction. On remand, the court is directed to accept the jurisdiction that has already been established and proceed to consider the grounds for termination alleged by petitioners.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ Kirsten Frank Kelly
/s/ Elizabeth L. Gleicher