

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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In the Matter of C.S., S.S., M.S. and B.S., Minors.

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FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

CANDACE LOBLINER,

Respondent-Appellant,

and

BENJAMIN SCHLENKER,

Respondent-Appellee.

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UNPUBLISHED

September 20, 2002

No. 235778

Jackson Circuit Court

Family Division

LC No. 00-001034-NA

Before: Kelly, P.J., Smolenski and Saad, JJ.

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

I respectfully dissent. A petition requesting that the court assume jurisdiction must set forth the charges against a parent with clarity and specificity. *In re Hatcher*, 443 Mich 426, 434; 505 NW2d 834 (1993); MCR 5.961. Because a review of the petition in the within matter does not contain any factual allegations against the respondent-appellant that would justify the family court's assumption of jurisdiction, I would find that the trial court erred in this regard.

I. Basic Facts and Procedural History

Respondents herein were married and the four children involved in these proceedings were born of that marital union. Unfortunately, the marriage ended in a bitter divorce during which both parents fought for custody of the children with a vengeance. It was against this backdrop that the initial petition against the father was filed in March 2000.

In that initial petition, three of the children alleged that respondent father sexually abused them by touching them inappropriately while he bathed them. Although the March 2000 petition contained allegations of sexual abuse against respondent-father, there were no allegations

brought against respondent-mother. A supplemental petition was filed after Dr. Ruth Worthington, a pediatrician, examined the girls and found that both S.S. and C.S. had abnormal genitalia consistent with inappropriate sexual contact. Once again, the supplemental petition did not contain any allegations against the mother. In January 2001, at the petitioner's request, the court dismissed the supplemental petition and the trial court entered an order finding no probable cause to believe that "one or more allegations in the petition [were] true." Notwithstanding the dismissal, however, to monitor the contact between the children and their father, the trial court altered the custody and parenting time provisions contained in the order of divorce. During this time, the children and family sought and received on-going counseling and therapy.

In February 2001, petitioner filed another petition not only renewing but also supplanting the original sexual abuse allegations contained in the previous petition against respondent-father. The February 2001 petition alleged that following a visitation with her father in January, 2001, S.S. apparently experienced an emotional breakdown after which she expressed a desire to end her life. In response, S.S.'s therapist instructed respondent-mother to remove S.S. from school and supervise her carefully.

After S.S. emotionally collapsed, she was hospitalized at the University of Michigan Hospital. Professionals at the facility surmised that S.S.'s problems stemmed from a visit that she had with her father with certain actions by her mother which compounded her emotional strife. S.S. allegedly indicated that her father masturbated in her presence and rubbed her pubic area. After the trial court found that there was probable cause to support the allegations contained in the petition, it authorized the petition on March 6, 2001 and the children remained in respondent-mother's custody. Significantly, the February 2001 petition did not contain any allegations against the respondent-mother. However, to defend the allegations brought against him in the petition, respondent-father alleged parental alienation.

Following a two-day trial, the trial court rejected the allegations of sexual abuse against the father and further held that the preponderance of the evidence did not support a finding that the children suffered from parental alienation syndrome. Notwithstanding, after finding that neglect permeated the children's home environment thus rendering it unfit, the trial court assumed jurisdiction over the children. In so doing, the trial court did not specify upon which subsection of MCL 712A.2(b) it relied to determine that jurisdiction was appropriate. However, upon review of the trial court's written decision, it appears as though it believed that the evidence adduced at trial sufficiently supported the conditions contained in MCL 712A.2(b)(1) and (2) by a preponderance of the evidence.

Although not one of the petitions filed in this matter specifically contained allegations against respondent-mother, the trial court nevertheless found that respondent-mother's "conduct" contributed to the children's emotional and behavioral instability. The trial court observed that the children's behavior intimated parental neglect thus further indicating an unfit environment. With these findings, the trial court assumed jurisdiction over all four children. In accord with its findings, the trial court placed S.S. in foster care, and then "placed" the two youngest children with the father and the eldest child with the mother. Contemporaneously with the trial court's decision, the order entered in the divorce case reflected this new custodial arrangement.

## II. Standard of Review

Because a probate court's jurisdiction over termination proceedings derives solely by statutory and constitutional command, this court reviews a trial court's decision to assert jurisdiction de novo as a matter of law. *In re Toler*, 193 Mich App 474, 476; 484 NW2d 672 (1992). However, this Court reviews a trial court's factual findings with respect to termination of parental rights for clear error. *In re Ramsey*, 229 Mich App 310, 314-315; 581 NW2d 291 (1998). Commensurate with these standards therefore, upon reviewing the facts and law, incumbent upon this Court is to determine whether there was a sufficient basis for the trial court to assume jurisdiction.

## III. Analysis

### A. The Petition

Respondent-mother is correct to the extent that a petition to allow the juvenile court to assert its jurisdiction must set forth the charges against the parent with clarity and specificity such that it adequately apprise the respondents of the issues under consideration and thus comports with fundamental due process. See *In re Hatcher*, *supra* at 434; MCR 5.961. In fact, MCR 5.961 mandates that the petition contain the "essential facts that constitute an offense against the child under the juvenile code." MCR 5.961(B)(3). In addition, the court must allow a respondent the opportunity to deny or admit the allegations and make a statement of explanation. MCR 5.956 (B)(8).

Certainly, as matter of fundamental due process, a parent must receive notice of the specific allegations brought against him or her. See *In Re CR*, 250 Mich App 185; 606 NW2d 506 (2001). A family court cannot assume jurisdiction over children in the absence of formal allegations contained in the petition to bring them within the provisions of the juvenile chapter of the probate code. *In Re Macomber*, 176 Mich App 131, 133; 439 NW2d 307 (1989) rev'd on other grounds, *In Re Macomber*, 436 Mich 386; 461 NW2d 671 (1990). It is beyond argument that:

parents have a significant interest in the companionship, care, custody and management of their children. This interest has been characterized as an element of 'liberty' to be protected by due process (citations omitted.) Clearly any legal adjustment of their mutual rights and obligations affects a fundamental human relationship. The rights at stake are "protected" and encompassed within the meaning of the term 'liberty' as used in the Due Process Clause." *In Re Brock*, 442 Mich 101, 109; 499 Nw2d 752 (1993).

In this case, additional allegations of inappropriate sexual contact were levied against respondent-father. Petitioner, in the newly filed petition, not only restated the prior allegations of sexual abuse, but also included eleven additional paragraphs almost exclusively detailing the children's accusations against the father including that S.S. suffered an emotional breakdown and also communicated a desire to end her life. Once more, it bears repeating that there were no

factual allegations levied against respondent-mother. In the court's opinion and order, the only references to respondent-mother in the last petition, were that:

3. On January 29, 2001, after the father's visit of January 27 and 28, [S.S.] came home and had an emotional breakdown. She broke out in hives and destroyed and defaced property. The mother claimed that [S.S.] was angry because her mother made her to over [sic] to her father's house. The mother claimed that [S.S.] said she wanted to die and explained how she would kill herself.

4. On January 29, 2001, [S.S.'s] therapist told the mother to take [S.S.] out of school and watch her carefully. ...

\* \* \*

7. On February 6, 2001, [S.S.] informed CPS that she did not like it at her dad's house, that her dad ignored her, and the children were "walking on ice". She stated she fun [sic]. She claimed when she returned to her mother's house that she did not like to visit because her dad was not being fair and punished her for something that was not her fault, It was reported that their stepfather said the "they needed to call people like the copes to stop the visits."

8. [S.S.] reported that when she returned home after her visit that her mother had a hard time getting her to go to bed. When she did go upstairs, she began to take pictures off the walls, took towels from the closet, and wrote swear words on the wall. After an argument with her mother, she stated she wanted to die and explained how she would do it.

An examination of the petition at issue is completely devoid of sufficient allegations against the mother to support a statutory basis for the trial court to assume jurisdiction over the children. In fact, even if respondent- mother admitted to the allegations referencing her, that would be insufficient, as a matter of law, for the trial court to assume jurisdiction over the children. At best, the second petition set forth a parental response to a child's sexual abuse allegations.<sup>1</sup> Finally, although the trial court found that the home environment was rife with neglect and thus an unfit place for the children to live, those specific allegations were not, in any respect, made against respondent-mother in any of the three petitions filed in this case. Accordingly, I would conclude that the trial court erred.

#### B. The Adjudication

At the time the petition was filed, MCL 712A.2(b)(1) and (2) provided, in relevant part:

The court has the following authority and jurisdiction:

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<sup>1</sup> This is not to suggest in any way, that respondent-mother may have engaged in behavior that put her child at risk. However, a supplemental petition must be filed if the FIA becomes aware of additional abuse of neglect and the neglect and/or abuse is substantiated. MCL 712A.19(1).

\* \* \*

(b) 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 process by which jurisdiction is obtained is explained in *In re AMB*, 248 Mich App 144, 176-177; 640 NW2d 262 (2001):

In order for a child to come within a family court's jurisdiction, the family court must hold an adjudication, which is a trial on the merits of the allegations in the petition. Following the adjudicative hearing, the family court 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). Once the family court determines that the child comes within its jurisdiction, it can enter dispositional orders that govern all matters of care for the child. [Footnotes and citations omitted.]

Thus, for purposes of MCL 712A.2(b), the trial court had to find, by a preponderance of the evidence, factual support for the allegations contained in the petition to bring the children within its purview allowing for the trial court to assume jurisdiction over the children. *In re Brock, supra* at 108-109. See also MCR 5.972(C)(1). In the instant case, even assuming, arguendo, that this court could interpret the allegations contained in the petition to include specific instances of misconduct by respondent-mother, the evidence adduced at trial was not sufficient to justify the trial court in asserting its jurisdiction. At most, the testimony established that the children were suffering from the strife generated by the divorce proceedings, the courts and the lawyers. Even when the trial concluded, the FIA took no position on whether the trial court properly assumed jurisdiction.

In essence, the trial court, confronted with a high-conflict divorce proceeding, coupled with a need for the children to continue counseling, employed a legal mechanism contained in the juvenile code to bring some stability to the family structure. While the efforts of the trial court are highly commendable and its overarching goals laudable and while I sympathize with the trial

court's frustration, this maneuver nevertheless constituted error. Although appellee concedes that the evidence supports the ultimate change in custody<sup>2</sup>, and that a change in the custodial arrangement serves the child's best interests that does not and cannot, in and of itself, justify the State intervening and assuming jurisdiction under the juvenile code. As a matter of law, a child's emotional reaction to her parent's acrimonious divorce, without more, does not constitute neglect as that term is understood and applied within the context of MCL 712A.2(b). See *In Re Kurzawa*, 95 Mich App 346 (1980) (finding that jurisdiction under statute must be premised upon evidence of parental neglect and not on behavior of the child. The words "deprived of emotional well-being" cannot be employed as a catch all jurisdictional grant.) Although the record reveals that respondent-mother's conduct at times was somewhat less than desirable, I am not willing to find that a parents' constitutionally protected, fundamental liberty interest in the care, custody and management of their children evaporates simply because at one time or another, the parents have displayed less than model conduct.

Based upon the foregoing, I would find that there were insufficient allegations contained in the petition to support the trial court's assumption of jurisdiction once the trial court determined that the allegations contained therein were not supported by a preponderance of the evidence. I would therefore reverse.

/s/ Kirsten Frank Kelly

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<sup>2</sup> Appellee in his brief states:

In any event, to a large extent, this appeal does not even matter. Respondent-mother has custody of the two oldest daughters, the two from whom the most evidence exists for sexual molestation. Respondent father has custody for only the two youngest children. Respondent-father has custody for only the two youngest children. No allegations have ever arisen that he has in any way inappropriately parented his son . . . . Thus even if the case had been resolved in the divorce file, instead, the result probably would have been the same anyway.

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Exactly what happened may never be known.

This appeal does matter. Custody proceedings are properly brought within a child custody proceeding. It is not appropriate to utilize the juvenile code to resolve custody disputes – rather, the juvenile code is for the protection of child who are subject to unfit homes.