STATE OF MICHIGAN

COURT OF APPEALS

In re A. C. LEACH, Minor.

FOR PUBLICATION
May 18, 2023
9:05 a.m.

No. 362618
Macomb Circuit Court
Family Division
LC No. 2022-000126-NA

In re J. K. SPALLER-LEACH, Minor.

No. 362621
Macomb Circuit Court
Family Division
LC No. 2022-000127-NA

Before: GARRETT, P.J., and K. F. KELLY and HOOD, JJ.

GARRETT, P.J.

After respondent-father was charged with child abuse and jailed on a high bond, the Department of Health and Human Services (DHHS) petitioned the trial court to exercise jurisdiction over his children, JSL and AL, and terminate his parental rights. The trial court declined to authorize the petition because the children lived safely with their mother and because respondent-father posed no risk of foreseeable harm while incarcerated. DHHS appeals as of right, arguing that the trial court erred because respondent-father posed a substantial risk of harm to his children at the time the petition was filed. Because the petition failed to allege facts establishing probable cause that the children came within the trial court's jurisdiction, we affirm.

I. BACKGROUND

These child protective proceedings arose from allegations that respondent-father physically abused JSL in December 2021 by violently shaking him several times. JSL was less than two months old at the time. JSL suffered a bilateral brain bleed, multiple rib fractures, and retinal hemorrhaging, necessitating about two weeks of treatment in the hospital. Respondent-father was arrested and charged with one count of first-degree child abuse. Since January 2022, respondent-

father has been incarcerated at the Macomb County Jail, with bond set at $200,000. The minor children reside with their mother, who has sole legal and physical custody, and it is undisputed that the mother's home is safe.

In February 2022, DHHS filed its first termination petition in this matter. Following a preliminary hearing, the referee denied the petition. The referee emphasized that the children were in a safe and stable environment with their mother, and respondent-father was in jail with a high bond. The referee noted that if DHHS identified some foreseeable risk of harm to the children, respondent-father was released from jail, or respondent-father's criminal case was resolved, DHHS could refile its petition. The trial court affirmed the referee's recommendation, and DHHS did not appeal.

In May 2022, DHHS filed a second petition, again requesting that the trial court take jurisdiction over JSL and AL and terminate respondent-father's parental rights. Because the underlying circumstances had not changed since the denial of the first petition, the referee denied the second petition.[1] The trial court again adopted the referee's recommendation. In an opinion and order, the trial court found that respondent-father's "continued incarceration with no foreseeable release" was significant and explained that his incarceration was "an insurmountable barrier that eliminates any potential risk of harm to the minor children at this time." The court also recognized that the children were living in a safe home with their mother. Finally, the court stated that if respondent-father was released from jail or his criminal case was resolved, DHHS could refile its petition.

DHHS now appeals from the dismissal of the second petition.

II. ANALYSIS

DHHS argues that the trial court erred by declining to authorize the petition because respondent-father poses a substantial risk of harm to the children's well-being.

We review a trial court's factual findings for clear error. *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010). Clear error exists when we are left with a definite and firm conviction that a mistake has been made. *Id*. The trial court's application of its findings of fact to a statute presents a question of law that we review de novo. See *In re Ferranti*, 504 Mich 1, 14; 934 NW2d 610

[1] At the scheduled preliminary hearing, the referee confirmed with counsel for DHHS that the circumstances had not changed since the first petition was denied. The referee adjourned the hearing, however, because respondent-father was not made available from jail. At the next hearing, respondent-father again was not made available. Counsel for DHHS, recognizing that the referee was not inclined to change her mind on authorizing the petition, stated that the referee could "just dismiss the petition" because "that's what's going to happen." To make a record, counsel briefly argued that the referee should accept the petition given the severity of the abuse by respondent-father and the "genuine possibility that he could be released or paroled." The referee then dismissed the petition, reiterating that respondent-father remained in jail without resolution of his criminal case and did not present "any immediate risk of harm" to the children.

(2019). That means we review the issue independently, with no required deference to the lower court. *Id.*

Unlike criminal proceedings, which "focus on the determination of the guilt or innocence of the defendant," child protective proceedings center around "the protection of the child." *In re Brock*, 442 Mich 101, 107-108; 499 NW2d 752 (1993). "The juvenile code is intended to protect children from unfit homes rather than to punish their parents." *Id.* at 108. "Child protective proceedings are initiated when a petition is filed in the trial court that contains facts constituting an offense against a child under MCL 712A.2(b) of the juvenile code, MCL 712A.1 *et seq.*" *In re Long*, 326 Mich App 455, 459; 927 NW2d 724 (2018). See also MCR 3.961(B)(3). After a petition has been filed, "the trial court must hold a preliminary hearing and may authorize the filing of the petition upon a finding of probable cause that one or more of the allegations [in the petition] are true and could support the trial court's exercise of jurisdiction under MCL 712A.2(b)." *Ferranti*, 504 Mich at 15.

In this case, the second petition requested that the trial court take jurisdiction of the proceedings under MCL 712A.2(b)(1).[2] That provision authorizes jurisdiction over proceedings involving a minor

> (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. [MCL 712A.2(b) (emphasis added).]

To determine whether jurisdiction exists, "the trial court must examine the child's situation at the time the petition was filed" because MCL 712A.2(b) "speaks in the present tense." *In re MU*, 264 Mich App 270, 279; 690 NW2d 495 (2004).

DHHS argues that respondent-father poses a substantial risk of harm to the children because he has access to their home when not incarcerated. This Court's decision in *In re Ramsey*, 229 Mich App 310; 581 NW2d 291 (1998), is particularly relevant to applying the "substantial risk of harm" provision in MCL 712A.2(b)(1) in the context of an incarcerated parent. In that case, the father attempted to kill himself and his child, and was ultimately convicted of second-degree child abuse and sentenced to prison. *Id.* at 311-312. After the criminal proceedings, a petition was filed to terminate the father's parental rights to the child. *Id.* at 312. The trial court dismissed

[2] The first petition that the trial court declined to authorize—an order not challenged on appeal—alleged that jurisdiction existed under MCL 712A.2(b)(1) *and* (2). Under the latter provision, jurisdiction exists when the child's "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." MCL 712A.2(b)(2). There are no allegations that, when the second petition was filed, the children's home with their mother was an "unfit place" for them to reside. See *Long*, 326 Mich App at 462.

the petition, finding an absence of probable cause that the child was presently at risk because the child was in her mother's physical custody and the respondent was incarcerated. *Id*. at 312-313. This Court reversed, holding that the trial court erred in declining to assume jurisdiction over the child. *Id*. at 314. In relevant part, this Court explained:

> For this Court to find, as the probate court did, that a father who attempted to kill his 1 ½-year-old daughter does not present a "substantial risk of harm" to the child sufficient to invoke the jurisdiction of the probate court would completely contravene the Legislature's intent in providing for the termination of parental rights. Where, as here, a parent attempted to kill his child, purportedly because he loved her, there most certainly will be some negative effect on the child's mental well-being. The fact that respondent was serving a prison sentence when the petition to terminate his parental rights was filed does not eliminate the mental and emotional effect on the child of his violent conduct. [*Id*. at 315.]

Thus, *Ramsey* recognizes that the fact of incarceration, plus the child's safe placement with another parent, does not eliminate the possibility of mental or emotional harm to a child victimized by the incarcerated parent.[3] *Ramsey* does not, however, set forth a bright-line rule requiring a finding of a substantial risk of harm to the child's mental well-being anytime the respondent is charged with violent conduct against the child.

Respondent-father attempts to distinguish *Ramsey* by arguing that the petition did not allege sufficient facts demonstrating that JSL and AL faced a substantial risk of harm to their mental well-being. While we have no ability to determine the facts alleged in the petition in *Ramsey*, we agree with respondent-father that the petition in this case lacks any allegations of harm to the children's mental well-being. For the trial court to authorize the petition, DHHS had the burden to show probable cause that one or more of the allegations were true and could support establishing jurisdiction under MCL 712A.2b(1). See MCL 712A.13a(2). Certainly, DHHS detailed specific facts about alleged physical abuse by respondent-father against JSL. For instance, the petition stated that respondent-father admitted to shaking JSL several times, discussed JSL's injuries and medical treatment, and referenced multiple physicians' opinions that JSL's injuries were consistent with physical abuse. But the petition lacked any factual allegations that either child—at the time the petition was filed—faced a "substantial risk of harm to his or her *mental* well-being." MCL 712A.2b(1) (emphasis added). Nor was any additional evidence offered at the preliminary hearing to support this finding. The petition noted that respondent-father was in the Macomb County Jail on first-degree child abuse charges. Regarding the well-being of JSL, the petition stated that JSL was "stable and improving with no confirmation of any long term affects [sic]." No allegations of harm to the children's mental well-being were made to the trial court. In

[3] To the extent the trial court concluded that respondent-father's continued incarceration and the children's safe placement with their mother *necessarily* required denial of the petition, that was error. *Ramsey* makes clear that, under certain circumstances, a petition may still be authorized when the respondent is incarcerated without a foreseeable release and the children reside in a safe home. See *Ramsey*, 229 Mich App at 315.

fact, no factual allegations of any kind exist with respect to AL's well-being. The only available information about AL is that she was about 2 ½ years old in May 2022 and, just like JSL, lived with her mother in a safe and stable environment.

This Court has, in several unpublished decisions, highlighted facts demonstrating how a parent's violent conduct poses a substantial risk of harm to the child's mental well-being.[4] For example, in *In re Propp*, unpublished per curiam opinion of the Court of Appeals, issued March 17, 2020 (Docket No. 350089), pp 1, 4, the respondent-father murdered the child's mother. The father's conduct demonstrably impacted the child's well-being, as the child showed several signs of emotional trauma—the child expressed fear of her father, had "temper tantrums and breakdowns," and exhibited low self-esteem. *Id*. at 4. This Court's opinion in *In re Hullihen*, unpublished per curiam opinion of the Court of Appeals, issued September 27, 2016 (Docket No. 332112), p 1, also involved a respondent-father who murdered the child's mother. Affirming the trial court's exercise of jurisdiction under MCL 712A.2(b)(1), this Court noted that "evidence of [the child's] nightmares about the murder of her mother showed that the trauma continued to impact her mental well-being" and was "indicative of the persistent negative effect that the murder has had on [the child's] mental and emotional well-being." *Id*. at 2-3.

Unlike in *Propp* and *Hullihen*, the record here contains no allegations or evidence that the children faced a substantial risk of harm to their mental well-being. While it is certainly possible that respondent-father's charged conduct poses a substantial risk of harm to the children's mental health, it is not our role to speculate. DHHS had the burden to establish probable cause that the allegations in the petition "could support the trial court's exercise of jurisdiction" under MCL 712A.2b(1). *Ferranti*, 504 Mich at 15. Without any allegations about existing mental or emotional harm, or the substantial risk of that harm arising, we cannot conclude that the trial court erred by declining to authorize the petition.[5]

Affirmed.

/s/ Kristina Robinson Garrett
/s/ Kirsten Frank Kelly
/s/ Noah P. Hood

[4] Unpublished decisions are not binding, but we may consider them—as we do here—for their persuasive or instructive value. *In re Kanjia*, 308 Mich App 660, 668 n 6; 866 NW2d 862 (2014).

[5] We emphasize that our decision does not turn solely on respondent-father's incarceration. Again, as *Ramsey* stated, a parent's incarceration from violent conduct towards a child does not necessarily remove the risk of mental harm to that child. See *Ramsey*, 229 Mich App at 315. Thus, DHHS could file a new petition setting forth allegations that respondent-father's conduct presently poses a substantial risk of harm to his children's mental well-being, even if respondent-father remains incarcerated.