

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of PAMELA HALLMAN, Minor.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

DANIEL HALLMAN,

Respondent-Appellant.

UNPUBLISHED
December 9, 2008

No. 285202
Macomb Circuit Court
Family Division
LC No. 2007-000652-NA

Before: Borrello, P.J., and Davis and Gleicher, JJ.

PER CURIAM.

In this child protection proceeding, respondent, the child's father, appeals as of right an order finding that the trial court had jurisdiction under MCL 712A.2. The child's mother is not a party to this appeal. We affirm in part, vacate in part, and remand for further proceedings before a different judge.

Pamela was born on September 30, 2003. The parties filed for divorce at some point in 2005, and they continued to engage in ongoing contentiousness thereafter. The petition at issue in this appeal was filed on December 9, 2007, alleging, in significant part, that Pamela had been interviewed at Care House and had disclosed that respondent was sexually abusing her. The parties agreed that it would be against Pamela's best interests to testify personally at trial; however, the trial court held a tender years hearing to determine the indicia of trustworthiness of Pamela's statements that petitioner sought to introduce into evidence. MCR 3.972(2).

The trial court observed that Pamela's situation had been influenced by the parties' contentiousness, custody disputes, a prior allegation that Pamela had been abused by her mother's son,¹ numerous other interviews or conversations, and "no doubt the parents' conversation, each parent has their version of what happened with this child, either by the stepbrother or by the father." The trial court also noted that the interview protocol at Care House

¹ The record refers to Pamela's mother's son as either Pamela's half-brother or stepbrother.

had not been completely followed, because the interview was not videotaped and “copious” verbatim notes had not been taken. The trial court concluded that Pamela’s statements were inadmissible because they lacked adequate indicia of trustworthiness. The trial court further indicated that although Pamela might have made other statements, they would also not be admissible unless shown to be trustworthy.

Petitioner then moved to dismiss the petition. However, the trial court denied the motion, stating that the “child is getting just totally screwed up by the parents” and that even if sexual misconduct could not be proven, the court perceived “mental abuse associated with the development of this child created by the parents in one form or another” and “I’m not about to let this go.” The trial court therefore denied the motion to dismiss. Instead, it found that it had jurisdiction over the child pursuant to MCL 712A.2(b) because, based on the testimony, respondent and the child’s mother had mentally abused Pamela. Respondent appeals as of right.

Respondent first argues that the trial court abused its discretion by denying petitioner’s request to dismiss the petition. “This Court will not set aside the grant or denial of a voluntary dismissal unless the circuit court’s action was without justification.” *McKelvie v City of Mount Clemens*, 193 Mich App 81, 85-86; 483 NW2d 442 (1992). We are unable to say that the trial court was “without justification” in refusing to dismiss the petition here. Even with Pamela’s actual statement excised, the record shows that Pamela has been interviewed numerous times on the basis of sexual abuse alleged by both parents. The trial court was clearly concerned about Pamela being traumatized, even if actual sexual abuse could not be proven, and the trial court’s concerns were themselves not “without justification” in the record. We therefore decline to set aside the trial court’s denial of petitioner’s motion to dismiss.

The trial court ostensibly had subject matter jurisdiction in this matter, given that the petition facially stated a claim “of a class that the court is authorized to adjudicate,” and it was “not clearly frivolous.” *In re Hatcher*, 443 Mich 426, 437; 505 NW2d 834 (1993). Whether those allegations are later substantiated is irrelevant for jurisdictional purposes. *In re AMB*, 248 Mich App 144, 168; 640 NW2d 262 (2001). However, the trial court did not actually take jurisdiction on the basis of the petition. Rather, the trial court’s order stated that “natural father has placed child in substantial risk of harm by submitting her to consistent mental abuse by multiple medical, emotion [sic] and physical examinations” and that it “amends petition on its own motion to include same.” This was impermissible for several reasons.

Pursuant to MCL 712A.11(6), a “petition or other court record may be amended at any stage of the proceedings as the ends of justice require.” Clearly, the trial court may amend a petition – even on its own initiative – to correct technical defects, at least where no parties are seriously prejudiced. See *Matter of Slis*, 144 Mich App 678, 684; 375 NW2d 788 (1985). However, the trial court’s amendment here was tantamount to filing a wholly new petition, and moreover, it was over the objection of the original petitioner. The trial court is not one of the entities who can file a petition, as enumerated in MCR 3.977(2). Moreover, because the “petition forms the basis of any preliminary action by the court,” *Hatcher, supra* at 433, it is bootstrapping for a court to file its own petition upon which to base jurisdiction. But most

importantly, the trial court effectively assumed the role of “prosecutor, judge and jury,” which constitutes “an unfair and unlawful operation” no matter how noble the trial court’s motivation.² *Genesee Prosecutor v Genesee Circuit Judge*, 386 Mich 672, 683; 194 NW2d 693 (1972).

A trial court may amend a petition on its own initiative to correct technical or administrative defects, and it may permit the parties to amend a petition “as the ends of justice require.” A trial court may *not* file a petition with itself, nor may it amend a petition on its own initiative to the extent that it is tantamount to filing a petition with itself. The trial court exceeded its authority by doing so. We therefore need not reach the other issues raised in this appeal.

The trial court’s denial of petitioner’s motion to dismiss is affirmed. The trial court’s amendment of the petition is vacated, as are the trial court’s orders based on the amended petition. We remand for further proceedings, including renewal of the motion to dismiss or other actions as the parties see fit on the basis of any updated facts, before a different judge. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ Alton T. Davis
/s/ Elizabeth L. Gleicher

² Petitioner is not the “constitutional officer whose duties are as provided by law” discussed in *Genesee Prosecutor*, but even if the trial court’s acts here did not violate the separation of powers, they exceeded its proper role in the proceedings. We note that there would have been no impropriety in the trial court granting a party’s request to make the instant amendment to the petition; the trial court may not to do so itself and against the wishes of all parties involved.