

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of KIERRA NICOLE IVY and
KHYLEEANNA MONE'T IVY, Minors.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellant,

v

TAMARA IVY,

Respondent-Appellee,

and

DANELL WALKER,

Respondent.

UNPUBLISHED

August 19, 2008

No. 282626

Ingham Circuit Court

Family Division

LC No. 06-001003-NA

Before: Markey, P.J., and Whitbeck and Gleicher, JJ.

PER CURIAM.

Petitioner Department of Human Services (the Department) appeals by leave granted the denial of its petition seeking the termination of respondent Tamara Ivy's parental rights to the two minor children for failure to prevent physical injury with the likelihood that they will suffer injury in the foreseeable future if placed in the parent's home,¹ failure to provide proper care or custody with no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time,² and because, based on the conduct or capacity of the parent, there is a reasonable likelihood that the children will be harmed if returned to the home of the parent.³ On appeal, the Department contends that the trial court clearly erred when it found that the Department had not met its burden of proving by clear and convincing evidence that at least one statutory ground for termination for each child had been met. Because we conclude that the trial court did not clearly err in its findings, we affirm.

¹ MCL 712A.19b(3)(b)(ii).

² MCL 712A.19b(3)(g).

³ MCL 712A.19b(3)(j).

I. Basic Facts And Procedural History

A. The Petition

Ivy first became involved with Children's Protective Services (CPS) in April 2006, regarding allegations of domestic violence and criminal activity in Ivy's home. In May 2006, the Department petitioned for termination of Ivy's parental rights to the minor children.

In the petition, the Department alleged that Khyleeanna's father, Danell Walker, had assaulted Ivy on numerous occasions and that Kierra had observed the abuse at least once. She also admitted that she had transported Walker and his cousin from the scene of armed robberies while the children were in the car, but maintained that she did not know about the criminal activity. Ivy later implicated Walker in the robberies. The petition further alleged that, after Ivy reported that members of Walker's family had threatened her, the Department prepared a safety plan for her. The plan provided that Ivy would stay at the home of Kierra's father, would have no contact with any member of Walker's family, would undergo a psychological assessment, and would not be alone with the children without the supervision of another adult. Ivy reported that she would comply with plan.

The petition indicated that, on May 2, 2006, Ivy learned that her daycare license would be revoked. After learning this, Ivy took the children and left Kierra's father's home. While Ivy drove, Kierra sat in the front seat without a seat belt and Khyleeanna sat in a car seat in the back. At some point Khyleeanna got out of her seat and crawled onto Ivy's lap. Ivy attempted to put Khyleeanna back into her seat, but did not stop the car. Ivy lost control of the car while turning left and struck a pole. Khyleeanna, who was still sitting in Ivy's lap at the time of the accident, suffered a ruptured spleen. Ivy did not seek medical attention, but took the children and abandoned the car.

On the next day, Ivy contacted a CPS worker from a hotel. She admitted to running into the pole and leaving the scene of the accident, but refused to seek medical care and refused to disclose her location. By the afternoon, Ivy realized that Khyleeanna was seriously injured and apparently decided that she would kill herself and the children. Ivy spent the afternoon writing farewell letters in which she explained her decision to kill the children and commit suicide. After more calls to the CPS worker, Ivy finally disclosed her location. The CPS worker contacted the police and officers went to the hotel and arrested Ivy. Both children were treated at the scene and, after being transported to the hospital, Khyleeanna's ruptured spleen was surgical corrected. Ivy was later admitted to a psychiatric unit for treatment.

Based on the facts stated in the petition, the Department asked the trial court to terminate Ivy's parental rights to the children under the stated grounds.

B. The Evidence

In June 2007, after Ivy admitted to the allegations in the petition, the children were placed under the jurisdiction of the court. The trial court set a contested dispositional hearing for August on the issue of termination.

The trial court heard evidence over a series of hearings from August 10, 2007 to October 31, 2007. Although there was evidence concerning the events alleged in the petition, a significant amount of testimony concerned Ivy's mental health and her prognosis.

Dr. Leonard VanderJagt testified as an expert psychologist. He stated that he had evaluated Ivy on October 20, 2006. He said that she was resistant to accepting the notion that her conduct with the children might be less than positive and was not able to recognize the degree to which her behavior might impact the children at any given time. VanderJagt diagnosed Ivy with major depression with accompanying anxiety, borderline personality disorder with histrionic elements, and posttraumatic stress disorder. He indicated that these conditions would require all the therapeutic support that could be brought to bear. Because of the intensity, scope, and multiplicity of problems, VanderJagt opined that Ivy's prognosis must be considered very poor. He indicated that he had not had contact with the children and could not give an opinion concerning the best interests of the children.

Dr. Judith St. King testified as an expert in clinical psychology. St. King said she met Ivy in late 2000 and saw her in a professional capacity intermittently until the latter part of 2004. She testified that Ivy was working on self-esteem, depression, relationships, and how to be in relationships in a healthy manner. St. King testified that her working diagnosis for Ivy was major depression and posttraumatic stress disorder. She testified that she saw the children around 40 times over the course of Ivy's therapy and found the relationship to be very warm. St. King felt Ivy was doing a good job with her children and had no concerns about her ability to parent. She also testified that she believed that if Kierra could not see her mother it would be a very difficult and painful adjustment for her as she had a high quality relationship with Ivy.

St. King testified that she believed that the episode that gave rise to this case had been a distinct and separate episode from other problems or issues. St. King opined that it was not likely that Ivy would re-endanger the children in the future as long as she stayed in treatment, was being assessed by a therapist, and stayed on medication. She felt that visitations progressing toward custody, with support and monitoring, would be appropriate. She did not agree with VanderJagt's concern about Ivy's ability to ever parent again.

Nancy James testified that she had been Ivy's therapist for about 13 months, seeing her weekly to biweekly. James testified that it was a complicated case, dealing with anxiety in the beginning and some depression relating to losing her children, and that it had taken some time to get Ivy's trust and to see changes in her. James noted ongoing chronic depression, as well as anxiety, panic attacks, and posttraumatic stress disorder, but stated that Ivy had made tremendous progress. James testified that the incident that gave rise to the case was an isolated incident. She opined that Ivy was not likely to hurt the children if they were returned to her and recommended reunification.

Dr. John Wittekindt, a psychiatrist, also testified on Ivy's behalf. Wittekindt testified that he had seen Ivy through Community Mental Health since November 2006. He noted that her depression was considerably improved and that she had complied with her medication regimen. He stated that he had no qualms about her ability to operate as a mother and as a custodial parent.

Marta Henson testified that she had been Kierra's therapist since May 15, 2006, and had seen her about 50 times. She stated that Kierra missed her sister and worried about her sister's

well being. She also missed her mother and expressed interest in seeing her. Henson said that Kierra hoped to have visits with her mother soon and had a very close relationship with her. Hensen testified that she learned that Kierra had been seeing Ivy since July 2006. Kierra had not felt comfortable revealing this to Hensen, because she knew Henson would have to tell and was afraid she would not be able to see her mother again. At Hensen's request, parenting time for Ivy was arranged at Hensen's office.

Hensen testified that it would be very difficult and harmful for Kierra if Ivy's rights were terminated and Kierra were unable to see her again. However, Hensen stated that she believed that Kierra would continue to see her mother whether or not her rights were terminated. Hensen concluded that it would not be healthy for Kierra to be sneaking around. On cross-examination, Hensen agreed that it could be harmful to Kierra if Ivy's rights were not terminated, because it would reaffirm her thoughts that Ivy did not do anything wrong.

Julie Reynolds testified that she was Ivy's friend and had known her for 17 years. She had seen her weekly or daily, and at times had lived with her. Reynolds testified that Ivy was a really good mother and always did what she could to provide for the children. Reynolds testified that the children were normal happy children, well behaved, and appropriately dressed. Reynolds had no concerns about how Ivy was raising the children before they were removed from her care. Reynolds testified that Ivy had improved in the last year and a half, seemed stable, and was working. She stated that at the time of the incident that gave rise to this case, Ivy was going through a lot in her life and her whole world seemed to be falling apart. Reynolds testified that she saw the events of May 2006 coming in the way Ivy was acting, but before that she had never seen any indication that Ivy would be capable of trying to kill her children.

In closing arguments, the Department argued that the grounds for termination had been met and that termination would be in the children's best interests. The guardian ad litem for the children also indicated that she felt termination would be in the best interests of Khyleeanna, but stated that she would leave the termination of Ivy's parental rights to Kierra to the court's discretion.

Ivy's counsel argued that the statutory criteria for termination were not met and further that termination would be contrary to the best interests of Kierra. But Ivy's counsel conceded that there was no similar evidence concerning the best interests of Khyleeanna.

C. The Court's Opinion And Order

In a written opinion, the trial court noted that there were divergent views regarding whether the children would be safe with Ivy and whether the incident leading to court jurisdiction was an isolated incident. The court stated that it was "not sure whether the children will or will not be safe" with Ivy. However, it found that termination would not be in the best interests of Kierra:

I am sure it would not be in Kierra Ivy's best interest to have her mother's rights terminated because of Kierra's age. She seems to have clearly bonded with her mother and though court ordered termination would legally end Ms. Ivy's relationship with Kierra, the truth may be that Kierra will not disassociate from her mother and will continue to see her mother. The practical problem thus arises

as to whether or not we are serving Kierra's best interest in termination. The Court thinks not, and **THEREFORE, DECLINES TO TERMINATE THE PARENTAL RIGHTS** of Tamara Ivy to the minor child, Kierra Nicole Ivy.

The trial court then turned to whether there was clear and convincing evidence that the children would be harmed if returned to Ivy's care:

The question of "what if" occurs. What if mother puts herself into another bad situation which drives her to the brink and creates the incident that nearly ended with the termination of her children's lives. What if mother does not continue on with therapy and medication, will her mental instability return and would she put the children in jeopardy because of it.

These are very difficult questions. Questions that people trained in psychology seem to be wrestling with The test is clear and convincing evidence. But weighing the various statements made by the experts in this case, the court is not convinced that that threshold has been met. I am not, however, convinced either that the mother is capable of parenting and believe that the court should be given more time to observe how she does and what steps she is going to take in the next 3 to 6 months in bringing a stability to her life that would lead the court to believe that the children are safe. Clearly, therapy is needed and must continue to occur for the mother.

For these reasons, the trial court elected not to terminate Ivy's parental rights to either child. Instead, the trial court ordered the current placement continued with visitation.

After the trial court issued its order, the Department sought leave to appeal, which this Court granted.

II. Statutory Grounds For Termination

A. Standard Of Review

We review the trial court's findings of fact and its decision for clear error.⁴

B. Legal Standards

In order to terminate parental rights, the court must find that at least one of the statutory grounds set forth in MCL 712A.19b(3) has been met by clear and convincing evidence.⁵ Once a

⁴ MCR 3.977(J); *In re Sours*, 459 Mich 624, 633; 593 NW2d 520 (1999).

⁵ *In re Terry*, 240 Mich App 14, 21-22; 610 NW2d 563 (2000).

ground for termination is established, the court must order termination of parental rights unless there is clear evidence, on the whole record, that termination is not in the child's best interests.⁶

C. Applying The Standards

There is no question on this record that Ivy failed to prevent injury to one of the minor children when she had the opportunity to do so,⁷ and that she failed to provide proper care and custody for both children.⁸ Hence, the dispositive inquiry is whether the trial court clearly erred when it found that the record did not supply clear and convincing evidence that there was a reasonable likelihood that the children would be subject to harm if returned to Ivy's care,⁹ or by finding that the record did not clearly and convincingly establish that there was no reasonable likelihood that Ivy would be able to provide proper care and custody for the children within a reasonable time considering their ages.¹⁰

The dispositional hearing, which took place some 18 months after the removal of the children, included testimony from Ivy's therapist and treating psychiatrist, who both felt that she was not a threat to her children. They represented that she had made tremendous progress in therapy, complied well with her medication regimen, and had significantly improved her coping mechanisms since the events that gave rise to this case.

Ivy's therapist characterized the events giving rise to these proceedings as an isolated incident, occurring when Ivy was under extraordinary stress from various sources. In light of Ivy's improved coping mechanisms, she felt that even a recurrence of similar stress would not evoke a similar response. Likewise, Ivy's treating psychiatrist noted that Ivy's depression had considerably improved over the last six to eight months, although she still suffered from anxiety and panic attacks as well as depression.

Countervailing testimony from the clinical psychologist who evaluated Ivy indicated that she is a psychologically complex person with serious and chronic problems that threaten her emotional and behavioral stability, and if confronted with a situation perceived as threatening, she could become agitated, angry, and disorganized. He further noted cause for very serious concern in Ivy's score on the Child Abuse Potential Inventory. VanderJagt opined that Ivy is largely unable to address and respond to the demands of everyday life. He concluded that she suffers from severe chronic depression, chronic anger, probable posttraumatic stress disorder, and personality disorder, and stated that the intensity, scope, and multiplicity of problems indicated a very poor prognosis. He testified that his view as of the date of the evaluation was that Ivy had long-term underlying problems. However, he also testified that the trial court

⁶ MCL 712A.19b(5); *In re Trejo*, 462 Mich 341, 354; 612 NW2d 407 (2000).

⁷ MCL 712A.19b(3)(b)(ii).

⁸ MCL 712A.19b(3)(g).

⁹ MCL 712A.19b(3)(b)(ii), (j).

¹⁰ MCL 712A.19b(3)(g).

should look to treating professionals to understand where a person is in terms of ongoing behavior, and Ivy's ability to cope should be commented on by those currently treating her.

Clearly, the record would permit a factfinder to conclude by clear and convincing evidence that a statutory ground for termination had been established. Ivy's past conduct, including a plan to kill herself and the children, together with VanderJagt's evaluation and prognosis are adequate to support a conclusion that there was a reasonable likelihood that the children would be subject to harm in Ivy's care,¹¹ or that there was no reasonable likelihood that Ivy would be able to provide proper care and custody for the children within a reasonable time considering their ages.¹² However, the record also contains substantial evidence that would allow the trial court to reach the opposite conclusion—in particular the favorable testimony of Ivy's treating psychiatrist and therapist.

We agree with the Department and the guardian ad litem that the recommendations for reunification made by James and Wittekindt were compromised by the fact that they had not seen the children. Further, it appeared that Ivy had not been entirely forthcoming with James. Nonetheless, we are not convinced that the testimony of these witnesses suffers from such defects that it must be entirely discounted. Further, we agree with the Department and the guardian ad litem that St. King's testimony has little or no probative value. St. King saw Ivy *before the incidents in question*, and yet was still willing—in August 2006—to recommend that Ivy be allowed contact with the children and further to opine that this would be in the best interests of the children. Nevertheless, the trial court's judgments of credibility are entitled to substantial deference by this Court.¹³ And we are not prepared to second-guess the judgment of the trial court in this difficult case.

The trial court cautiously concluded that it did not know whether Ivy could be a safe parent and indicated that more time would be necessary before a determination could be made. For that reason, it ordered the children continued as temporary court wards and directed that "further disposition take place and a further program be kept in place to monitor how the mother is doing." Given the divergent views of the witnesses, we cannot characterize the trial court's findings as clearly erroneous. Further, because there was no clear error in the trial court's finding that a statutory ground for termination had not been established by clear and convincing evidence, we need not address the question of the children's best interests.¹⁴

Affirmed.

/s/ Jane E. Markey
/s/ William C. Whitbeck
/s/ Elizabeth Gleicher

¹¹ MCL 712A.19b(3)(b)(ii), (j).

¹² MCL 712A.19b(3)(g).

¹³ *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989); See also MCR 2.613(C).

¹⁴ MCR 712A.19b(5).