

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of ZACHARY POUL HARVEY and
ALEXANDER MICHAEL HARVEY, Minors.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

MICHAEL HARVEY,

Respondent-Appellant.

UNPUBLISHED

November 20, 2008

No. 285179

Antrim Circuit Court

Family Division

LC No. 07-004211-NA

Before: Hoekstra, P.J., and Whitbeck and Talbot, JJ.

PER CURIAM.

Respondent Michael Harvey appeals as of right from the trial court's order terminating his parental rights to the minor children.¹ We affirm.

I. Basic Facts And Procedural History

Harvey, a deputy with the Antrim County Sheriff's Department, and his wife Tricia Harvey had two children, Zachary Harvey and Alexander Harvey. Around March 2005, Harvey began having an affair. In September 2005, Tricia Harvey confronted him about the affair, and Harvey became violent. Afterward, whenever Tricia Harvey confronted him about his whereabouts and his affair, he became violent and abusive. For instance, on several occasions Harvey held a gun to Tricia Harvey's head and said, "I should just f[___]ing kill you," he grabbed her by her throat and "slammed" her head against the couch, he "punched" holes in her bedroom walls and bathroom doors, and, on one occasion, he broke a bedside lamp causing glass to shatter all over Alexander Harvey, who was asleep in her bed. According to Tricia Harvey, Harvey pointed a gun at her in the presence of the children. During this time, Zachary Harvey, then age 13, did not like to be at home and spent a lot of time with his maternal grandmother.

¹ MCL 712A.19b(3)(g) (failure to provide proper care and custody), (h) (the children would be deprived of a normal home for a period exceeding two years due to the parent's imprisonment), and (j) (reasonable likelihood of harm if the children returned to the parent's home).

In April 2006, Harvey and Tricia Harvey had a disagreement about his affair. Harvey was angry, and as Tricia Harvey left the home, she heard a shot fired outside the back door. In May 2006, after Harvey discovered that Tricia Harvey had talked to an attorney about a divorce, Harvey held a gun “pointblank” to Tricia Harvey’s forehead and said “I should just f[___]ing kill you now” while she was in the driveway. At this time, the children were inside the home, and as Harvey pointed the gun at Tricia Harvey, Alexander Harvey said, “Daddy, don’t shoot my mommy.” Following this incident, Tricia Harvey filed a criminal complaint against Harvey, and Harvey was arrested. Following his arrest, the children had no contact with Harvey during the remainder of these proceedings. At some point, a personal protection order was issued preventing Harvey from having contact with Tricia Harvey or the children.

In August 2006, Harvey pleaded guilty to one count of felonious assault, stemming from his assault of Tricia Harvey.² In September 2006, a trial court sentenced Harvey to two to four years’ imprisonment.

In February 2007, approximately nine months following the incident, petitioner filed a petition requesting termination of Harvey’s parental rights at the initial disposition. The petition alleged that (1) in May 2006, Harvey got into an argument with Tricia Harvey, during which he pushed and hit her, pointed a gun at her and threatened to kill her, and also threatened to kill her mother and the children; (2) the children overheard or witnessed the argument; (3) Harvey was arrested, convicted, and sentenced to two to four years’ imprisonment for felonious assault stemming from the incident; (4) at the time of his arrest, the police recovered approximately 22 guns in Harvey’s truck and home, some of which were loaded; (5) Zachary Harvey reported that he was afraid of and angry with his father and did not want further contact with him; (6) Tricia Harvey reported a history of Harvey’s domestic abuse; (7) Harvey physically and verbally assaulted his girlfriend, including pushing her down, choking her, and destroying her property; and (8) a woman with whom Harvey had another child reported that he was physically abusive toward her, including grabbing her by the hair, slamming her head into furniture, pushing her into walls, and threatening to kill her and their child. In September 2007, Harvey entered a no-contest plea, and the trial court assumed jurisdiction over the children. The children were placed in Tricia Harvey’s care, with whom they have been residing since.

In late-September 2007, Harvey underwent a court-ordered psychological evaluation with Dr. Timothy Strauss. The evaluation revealed that Harvey suffered from a personality disorder. Specifically, the “primary concerns were narcissistic personality disorder with histrionic traits” and “intermittent explosive disorder.” According to Dr. Strauss, persons with narcissistic personality disorder “tend to view most relationships as extremely self-centered,” “have a lot of difficulty developing genuine compassion and genuine empathy for other people,” “tend to blame their problems on others,” “tend to view themselves as more the victim,” “tend not to see their part in the relationship [as] a problem,” “have difficulty in intimate relationships [and] family relationships,” “have a lot of difficulty understanding how they impact other people . . . negatively,” “tend to have inflated self-esteem,” and “tend to see others as rather inferior to

² Harvey also pleaded guilty to one count of domestic violence, stemming from an incident with his girlfriend.

them.” Dr. Strauss opined that Harvey would not have the “empathy, compassion or care to ensure safety and understand the impact he has on others,” he would “not be aware of what his children [were] experiencing,” “clearly [felt] that he ha[d] little repair work . . . to do,” and “present[ed] a high risk for physical and verbal abuse primarily towards his romantic partners,” which the children would likely witness.

According to Dr. Strauss, persons diagnosed with intermittent explosive disorder have a “temper problem,” which can be “pretty severe,” involving verbal and physical abuse, and aggressive and “out of control” behavior. The “explosive episodes” associated with the disorder are intermittent and unpredictable. According to Dr. Strauss, Harvey’s dual diagnosis of narcissistic personality disorder and intermittent explosive disorder caused added concern.

According to Dr. Strauss, Harvey’s personality disorder was generally “very difficult to treat” and “tends to be refractory, which means [a person] can make progress and then tend to step backwards.” According to Dr. Strauss, although Harvey reported gaining some anger management tools through his participation in a therapy program while in prison, he “clearly” displayed the “Narcissistic Personality traits” and would require intensive therapy. Specifically, Dr. Strauss opined that, for Harvey to possibly benefit from treatment, it would require two or three means of consistent and intensive therapy for two to three years with a psychologist with specialized training in treating personality disorders. However, the prognosis for change for persons with Harvey’s diagnosis was “very poor” because the disorder was “very difficult to treat” with the “failure rate” of treatment being approximately 70 to 90 percent. Considering the poor prognosis for change associated with Harvey’s personality disorder, Dr. Strauss believed that he had a poor likelihood of improvement, less than 10 percent. Accordingly, Dr. Strauss expected Harvey’s behavior to remain the same. Dr. Strauss also felt that Harvey had only “limited” insight regarding how his behaviors impacted his children.

Dr. Strauss also evaluated Zachary Harvey and Alexander Harvey, who were then 13 years old and almost four years old, respectively. According to Dr. Strauss, Zachary Harvey expressed some positive things about Harvey, such as when he took him fishing and did other activities with him. On the other hand, Zachary Harvey indicated that Harvey was “relatively uninvolved in his life,” he had “significant” or “overwhelming” fear that Harvey would harm him or harm or kill Tricia Harvey, he did not trust that Harvey could control his temper, he did not want to be around Harvey or see him, and he was afraid Harvey would become violent or threatening again. Zachary Harvey also indicated that he heard Tricia Harvey and Harvey arguing and heard Harvey make threats to kill her, he was afraid the threats included him, he was exposed to a lot of fighting and aggressiveness, and he experienced trauma from the experience. Dr. Strauss felt that Zachary Harvey viewed his father as “emotionally absent” from his life both presently and in the past and had only a “weak attachment” to him, at best. In fact, according to Dr. Strauss, Zachary Harvey viewed his father as “gone.” Zachary Harvey also expressed concern for the next woman Harvey became involved with and indicated that he would “feel sorry” for her. Further, although Zachary Harvey received and made progress in counseling, he presented as “hyper sensitive and hyper aroused, and very cautious about discussing the family past,” which “may make him fearful of new situations that would remind him of that situation.” Zachary Harvey also had feelings that he was responsible for his parents’ domestic disputes and divorce.

Dr. Strauss testified that his testing of Alexander Harvey did not demonstrate positive feelings toward Harvey. Instead, testing indicated that Alexander Harvey felt that Harvey was “pretty distant” and that he viewed his father as being absent. In fact, Alexander Harvey viewed Harvey as “gone from his life,” did “not envision him returning to his life in any meaningful way,” and did not have a sense of missing him or of him coming back, which, according to Dr. Strauss, most likely indicated that Alexander Harvey viewed his father as “permanently gone” from his life. During the evaluation, Alexander Harvey indicated that fantasized that he “got it [the gun] and shot him up and killed him.” According to Dr. Strauss, while fantasizing at Alexander Harvey’s age was not unusual, it was “very rare” for a child to have such an “aggressive daydream” of shooting his father, which indicated he was “relatively frightened” of him. Alexander Harvey also indicated a need to protect himself and Tricia Harvey from Harvey. The children’s counseling records also indicated a disconnection from Harvey, a fearfulness of him, a hesitancy to be around him, and a “lack of identification” with him.

Dr. Strauss concluded that it would not be in either Zachary Harvey or Alexander Harvey’s best interests to attempt reunification with Harvey due to his “very poor” prognosis for change because of his personality disorder, the children’s lack of a strong attachment to him, the children’s lack of “faith” that Harvey would protect them, the children’s fears for their own safety, the children’s testing indicating that they were “moving on” with their lives, and the lengthy time that Harvey would need to treat his personality disorder. According to Dr. Strauss, even in the best of situations, if Harvey made improvement, reunification would “re-traumatize” the children and could cause them to suffer posttraumatic stress disorder, their “feelings of fear would start up,” and they would experience “a lot of difficulty and . . . a lot of anxiety.” According to Dr. Strauss, “the likelihood that [the children would] respond favorably to [reunification] and tolerate that much pain and discomfort and anxiety would be very low, so you would see regression in their behavior.” Specifically, if reunification were attempted with Zachary Harvey, Dr. Strauss would expect his grades to decline, depression that could be significant, and withdrawal from friends and activities. If reunification were attempted with Alexander Harvey, Dr. Strauss would expect developmental and intellectual regression, acting out, and aggressive behavior. Further, after the children were re-traumatized and if the reunification was not successful, the children would need to go through counseling again to “get them back to feeling safe” and would likely start to distrust other adult caregivers, such as Tricia Harvey. Dr. Strauss did not believe re-traumatizing the children would be in their best interests especially given the low prognosis that Harvey would successfully address his personality disorder.

In early-December 2007, at Harvey’s request, he underwent a court-ordered psychiatric evaluation with Dr. David McDermid. During the evaluation, Dr. McDermid found Harvey to be “very cautious and distrustful” and not “very reliable.” Dr. McDermid agreed with Dr. Strauss’s evaluation concerning Harvey and the children and also diagnosed him with intermittent explosive disorder and personality disorder “with narcissistic passive-aggressive, antisocial and some paranoid trends.” Dr. McDermid felt that Harvey’s personality disorder was “quite marked.” On a scale of one to ten, with ten being the most severe, Dr. McDermid categorized Harvey as an “eight.” Given the difficulty in treating his disorder, Dr. McDermid was “pessimistic about there being any significant change.” Dr. McDermid also opined that Harvey’s disorder placed him at “high risk” “for verbal and physical abuse towards his romantic partners, which would result in the children continuing to witness them.” Further, Dr. McDermid did not

note any significant change in Harvey's insight into his behavior from the date of his arrest and observed that he continued to place responsibility for his issues and problems on other persons. Dr. McDermid also did not believe that Harvey had made progress with the treatment program he attended while in prison, despite Harvey's opinion to the contrary. Accordingly, Dr. McDermid believed that returning the children to Harvey's care would put them in danger. In fact, Dr. McDermid found it "hard to imagine" the children "coming back into contact" with Harvey, believed that contact with him would be "incredibly stressful" for the children, and believed that the children were highly likely to re-experience the same kind of physical abuse if returned to his custody.

As mentioned, Harvey participated in an "Assaultive Offender Psychotherapy" program while in prison during the proceedings. In late-December 2007, he completed the program, attending all 44 sessions, completing his homework, regularly participating in group discussion, and displaying "excellent" attitude and effort. The program's therapist, Mark Fox, indicated in his termination report that Harvey showed a willingness to learn and made "a great deal of progress" toward achieving a better understanding and more effective management of his criminal behaviors and his feelings connected with criminal behavior. Specifically, Harvey was able to identify his risk factors, including his need to be in control all the time, feeling that he was always right, letting his feelings build up to the point where he became very upset, impulsive thinking and acting, having angry thoughts, getting involved in bad relationships, and job-related stress. He was also able to identify new thinking and coping skills designed to deal with his risk factors and increase his self-control and discipline. Overall, Fox felt that Harvey had a "very good plan" that should be effective in keeping him out of prison, if he followed through.

In January 2008, the time of the termination trial, Zachary Harvey, age 14, and Alexander Harvey, age four, had received counseling and had "done well enough" to end treatment. They continued to reside with Tricia Harvey. According to Tricia Harvey, Alexander Harvey no longer had a recollection of Harvey and Zachary Harvey occasionally discussed Harvey in the context of not wanting to see him. Neither child asked to see Harvey. In fact, Zachary Harvey expressed relief that Harvey was no longer around, in that he indicated he liked being home now and stated, "I'm a lot happier and a lot better to be around." According to Dr. Strauss, Alexander Harvey appeared to be developing well, and his peer and family relationships appeared to be healthy.

By the time of the termination trial, Harvey remained in prison. Harvey's earliest release date was in May 2008, and his maximum discharge date was May 2010. Upon his release, Harvey planned to attend an anger management group and to reside with his brother.

After conducting a termination trial, the trial court found clear and convincing evidence to support grounds for termination of Harvey's parental rights under MCL 712A.19b(3)(g), (h), and (j). Pertinent to the trial court's decision were the opinions of the evaluating experts, whom the court found to be "credible and believable." Specifically, the trial court found that (1) Harvey had a "very poor" prognosis for change given his personality disorder and would not likely benefit from treatment to be able to provide proper care and custody for the children within a reasonable time; (2) attempting reunification with Harvey would re-traumatize and be extremely harmful to the children and not in their best interests; (3) due to Harvey's imprisonment, the children would be deprived of a normal home exceeding two years; and

(4) termination was clearly in the best interests of the children. The trial court then ordered termination of Harvey's parental rights.

II. Motion To Disqualify

A. Preservation Of Issue

“[T]o preserve for appellate review the issue of a denial of a motion for disqualification of a trial court judge, a party must request referral to the chief judge of the trial court after the trial court judge's denial of the party's motion.”³ Although Harvey filed a motion to disqualify the trial judge, which the judge denied, there is no indication that he sought review of the judge's denial of the motion to disqualify.⁴ The trial judge in this case was the only judge and chief judge of the Antrim County Probate Court. MCR 2.003(C)(3)(b), provides, “in a single-judge court, or if the challenged judge is the chief judge, on the request of a party, the challenged judge shall refer the motion to the state court administrator for assignment to another judge, who shall decide the motion de novo.” Accordingly, Harvey failed to preserve this issue for appellate review.⁵ Additionally, as discussed below, Harvey's claim cannot succeed as he failed to demonstrate that the presiding judge was actually biased or prejudiced, and he did not overcome the heavy presumption of impartiality.⁶

B. Standard Of Review

We review for an abuse of discretion the trial court's factual findings on a motion for disqualification, but we review de novo the application of the facts to the law.⁷

C. Analysis

During the motion hearing in the instant case, Harvey identified no conduct by the trial judge that demonstrated actual prejudice or bias, arguing only that the children's maternal grandmother was a court employee and a limited guardian for the children for health insurance purposes. Furthermore, the instant case was not so “extreme” such that due process necessitated judicial disqualification absent proof of actual bias or prejudice.⁸ To the contrary, there was no

³ *Welch v District Court*, 215 Mich App 253, 258; 545 NW2d 15 (1996), citing MCR 2.003(C)(3)(a).

⁴ MCR 2.003(C)(3)(a) and (b).

⁵ *Welch*, *supra* at 258.

⁶ MCR 2.003(B)(1); *Cain v Dep't of Corrections*, 451 Mich 470, 495-497; 548 NW2d 210 (1996); *VanBuren Charter Township v Garter Belt, Inc*, 258 Mich App 594, 598; 673 NW2d 111 (2003).

⁷ *VanBuren Charter Township v Garter Belt, Inc*, 258 Mich App 594, 598; 673 NW2d 111 (2003), citing *Cain*, *supra* at 503 n 38; *Armstrong v Ypsilanti Charter Twp*, 248 Mich App 573, 596; 640 NW2d 321 (2001).

⁸ *VanBuren*, *supra* at 599.

indication that the presiding judge had a financial interest in the outcome of the case; had been the subject of personal abuse or criticism from Harvey; might have prejudged the case because of having previously acted as an accuser, fact-finder, or initial decision maker; or was “enmeshed in other matters involving” Harvey.⁹ Although the trial judge indicated that he and Harvey had coached their sons’ baseball teams in the same league and that the trial judge had extended an offer to Harvey’s son, a child at issue, to join his team, those comments clearly did not display any “deep-seated favoritism or antagonism such that the exercise of fair judgment is impossible.”¹⁰ Likewise, the mere fact that the children’s grandmother and limited guardian for health insurance purposes was a court employee did not establish that the trial judge was biased, or even probably biased, against Harvey. Under these circumstances, we find no abuse of discretion in the trial court’s denial of Harvey’s motion for disqualification.¹¹ Harvey failed to overcome the heavy presumption of judicial impartiality to warrant disqualification of the presiding judge.¹²

III. Termination Of Parental Rights

A. Standard Of Review

To terminate parental rights, the trial court must find that the petitioner has proven at least one of the statutory grounds for termination by clear and convincing evidence.¹³ We review for clear error a trial court’s decision terminating parental rights.¹⁴ A finding is clearly erroneous if, although there is evidence to support it, this Court is left with a definite and firm conviction that a mistake has been made.¹⁵ Regard is to be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it.¹⁶

Once a petitioner has established a statutory ground for termination by clear and convincing evidence, the trial court shall order termination of parental rights, unless the trial court finds from evidence on the whole record that termination is clearly not in the child’s best interests.¹⁷ There is no specific burden on either party to present evidence of the children’s best

⁹ *Id.* at 599-600.

¹⁰ *People v Wells*, 238 Mich App 383, 391-392; 605 NW2d 374 (1999).

¹¹ *VanBuren*, *supra* at 598.

¹² *Id.*

¹³ MCL 712A.19b(3); *In re Sours Minors*, 459 Mich 624, 632-633; 593 NW2d 520 (1999); *In re Jackson*, 199 Mich App 22, 25; 501 NW2d 182 (1993), citing *In re McIntyre*, 192 Mich App 47, 50; 480 NW2d 293 (1991).

¹⁴ MCR 3.977(J); *In re Trejo Minors*, 462 Mich 341, 355-357; 612 NW2d 407 (2000); *Sours*, *supra* at 633.

¹⁵ *In re JK*, 468 Mich 202, 209-210; 661 NW2d 216 (2003).

¹⁶ MCR 2.613(C); *In re Miller*, 433 Mich 331, 337; 455 NW2d 161 (1989).

¹⁷ MCL 712A.19b(5); *Trejo*, *supra* at 350, 354. We note that MCL 712A.19b(5) was recently amended such that the trial court must now find that termination of parental rights is in the

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interests; rather, the trial court should weigh all evidence available.¹⁸ We review the trial court's decision regarding the child's best interests for clear error.¹⁹

B. Statutory Grounds For Termination

1. MCL 712A.19b(3)(j)

Harvey's conduct traumatized and emotionally harmed the children. He physically and verbally abused and threatened to kill Tricia Harvey in their presence. Thereafter, he was absent from the children's lives due to his imprisonment for the felonious assault of Tricia Harvey. Harvey does not contest that his past acts were violent in nature. Instead, he argues that his favorable progress in an "Assaultive Offender Psychotherapy" program completed while in prison showed that he had learned appropriate ways to manage his anger and that the children would no longer be subjected to a risk of harm if returned to his care. We disagree. Although Harvey's prison therapy termination report was positive, the expert opinions clearly contradicted that report and overwhelmingly indicated that the children would likely be subjected to serious emotional harm if returned to his home. It was clear from the trial court's opinion that the court found the expert opinions to be "extremely credible and believable." And we give deference to the special opportunity of the trial court as fact-finder to judge the credibility of the witnesses who appeared before it.²⁰ The evidence clearly and convincingly established a reasonable likelihood, based on Harvey's conduct or capacity, that the children would be emotionally harmed if returned to his home. Thus, termination was proper under § (3)(j).

2. MCL 712A.19b(3)(g)

By the time of the termination trial, Harvey remained unable to provide proper care and custody for the children, as he was still imprisoned. Even under the best case scenario, if Harvey were released from prison on his earliest release date, three months from the time of the termination hearing, he would not be able to provide proper care and custody for the children for, at least, an additional two to three years while he attempted to address his personality disorder. Unfortunately, even with intensive treatment, his prognosis for improvement is extremely poor, and he might not ever be able to successfully address his issues to ensure that his children would be safe and properly cared for while in his care. Under these circumstances, there was no reasonable expectation that Harvey would be able to provide proper care and custody for the children within a reasonable time, if ever, considering their ages. Thus, termination was proper under § (3)(g).

Further, we reject Harvey's argument that termination was improper under §(3)(g) because the children were in the care and custody of Tricia Harvey, a presumably fit parent,

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child's best interests. 2008 PA 199, effective July 11, 2008. However, here, we use the prior standard under which the trial court made its original disposition.

¹⁸ *Trejo, supra* at 354.

¹⁹ *Id.* at 356-357.

²⁰ *Miller, supra* at 337.

during his imprisonment. “[T]he Legislature envisioned and intended that the probate court could terminate the parental rights of just one parent,” and the court need not rely on traditional custody and visitation proceedings to protect a child.²¹

3. MCL 712A.19b(3)(h)

With regard to MCL 712A.19b(3)(h), it was not certain at the termination trial that Harvey’s imprisonment would deprive the children of a normal home for at least two years because his release date was uncertain. Given the close proximity of his earliest release date to the time of the termination hearing, we cannot find that his inability to provide a “normal home” for the children within two years of the termination hearing would be due to his imprisonment. Instead, as stated above, he would not be able to provide an appropriate home for the children because of his need for long-term mental health treatment to address his personality disorder. Regardless, any error in terminating Harvey’s parental rights under section (3)(h) was harmless because the trial court needed clear and convincing evidence of only one statutory ground to support termination.²²

C. Best Interests Determination

Considering the children’s negative feelings toward Harvey, their lack of a strong attachment to him, Harvey’s poor prognosis that he could successfully address his personality disorder even with intensive treatment, and the expert opinions that any attempt at reunification with Harvey would be traumatic and harmful to the children, we conclude that the trial court did not clearly err in finding that termination was in the children’s best interests.²³

Affirmed.

/s/ Joel P. Hoekstra
/s/ William C. Whitbeck
/s/ Michael J. Talbot

²¹ *In re Marin*, 198 Mich App 560, 561, 566-568; 499 NW2d 400 (1993).

²² *In re Powers*, 244 Mich App 111, 118; 624 NW2d 472 (2000).

²³ *In re Gazella*, 264 Mich App 668, 677-678; 692 NW2d 708 (2005) (stating that a trial court’s finding that termination is in a child’s best interests is not required by the court rule, but is permissible if the evidence justifies it).