

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of HARRISON ROSS and MARION
ROSS, Minors.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

AMANDA ROSS,

Respondent-Appellant,

and

DENNIS ROSS,

Respondent.

In the Matter of MATTHEW ALLAN ROSS,
HARRISON NEIL ROSS, and MARION MAY
ROSS, Minors.

FAMILY INDEPENDENCE AGENCY

Petitioner-Appellee,

v

DENNIS N. ROSS,

Respondent-Appellant

and

AMANDA ROSS,

UNPUBLISHED

December 18, 1998

No. 207273

Tuscola Juvenile Court

LC No. 94-006007 NA

No. 208937

Tuscola Juvenile Court

LC No. 94-00607 NA

Respondent.

Before: Gage, P.J., and Kelly and Hoekstra, JJ.

PER CURIAM.

This case arose after respondent Amanda Ross was charged with the death of her stepson and convicted of attempted involuntary manslaughter pursuant to her guilty plea. In Docket No. 207273, respondent Amanda Ross appeals as of right from a juvenile court order terminating her parental rights to the minor children, Harrison and Marion Ross, pursuant to MCL 712A.19b(3)(b)(i), (c)(i), and (g); MSA 27.3178(598.19b)(3)(b)(i), (c)(i) and (g).¹ In Docket No. 208937, respondent Dennis N. Ross appeals by delayed leave granted from a juvenile court order terminating his parental rights to the minor children, Matthew, Harrison, and Marion Ross, pursuant to MCL 712A.19b(3)(c)(i) and (g); MSA 27.3178(598.19b)(3)(c)(i) and (g). We affirm both orders.

We review a lower court's decision to terminate parental rights in its entirety for clear error. *In re Miller*, 433 Mich 331, 345; 445 NW2d 161 (1989); *In re Hall-Smith*, 222 Mich App 470, 472-473; 564 NW2d 156 (1997). First, petitioner was required to prove that the cited statutory grounds for termination were supported by clear and convincing evidence. *Miller, supra* at 345; *Hall-Smith, supra* at 472. We find no clear error in the court's finding that petitioner satisfied this burden. Here, petitioner established that respondent Amanda Ross caused a fatal injury to a half-sibling of her two children and that her children were likely to suffer injury in the foreseeable future if placed in her home. MCL 712A.19b(3)(b)(i); MSA 27.3178(598.19b)(3)(b)(i). Regarding both respondents, petitioner submitted evidence that there was no reasonable expectation that respondents would be able to provide proper care and custody within a reasonable time considering the ages of the children. MCL 712A.19b(3)(g); MSA 27.3178(598.19b)(3)(g). Regarding the last statutory ground for termination, petitioner established that more than 182 days had elapsed since the issuance of the initial dispositional order and that these conditions that led to the adjudication continued to exist and were not reasonably likely to be rectified within a reasonable time given the ages of the children. MCL 712A.19b(3)(c)(i); MSA 27.3178(598.19b)(3)(c)(i).

Second, respondents were required to put forth at least some evidence that termination was clearly not in the children's best interest. *Miller, supra* at 345; *Hall-Smith, supra* at 473. We find no clear error in the court's finding that respondents failed to make this showing. Absent any evidence addressing this issue by the parent, termination of parental rights is mandatory once a statutory ground for termination has been met by clear and convincing evidence. MCL 712A.19b(5); MSA 27.3178(598.19b)(5); *Hall-Smith, supra* at 473. Consequently, we affirm the orders terminating respondents' parental rights to the children.²

Next, respondent Amanda Ross argues that the juvenile court committed error requiring reversal when it denied her motion to dismiss the termination petition. First, the record does not support respondent's assertion that petitioner promised to return the children to respondents to induce

respondents to plead no contest to the jurisdiction of the juvenile court. Second, the record does not support respondent's assertion that dismissal was required because of respondent's plea bargain agreement with the prosecutor. Respondent's argument rests on the portion in the agreement stating that in exchange for respondent's guilty plea in the criminal case, the prosecutor agreed not to terminate her parental rights "based solely upon her conviction." However, the next sentence in the agreement explicitly states that "this does not preclude termination if she should not comply with the requests of the Department as to other matters, like counseling or maintaining a suitable, stable home environment." Here, the court found that the evidence tended to show that respondent had complied with petitioner's requirements of her throughout the review process, but the court also found that factual issues remained concerning whether the conditions that led to the adjudication – her inability to manage or control her anger – continued to exist and whether there was a reasonable likelihood that her children would suffer an injury if returned to her custody. Accordingly, the court denied respondent's motion for dismissal because the petition was not based "solely" upon respondent's conviction. We find no clear error in the court's decision.

Next, respondent Dennis N. Ross argues that the juvenile court violated MCR 5.965(C)(2) in placing his children in foster care after the first preliminary hearing. We disagree. The court rule states the following:

The court may place the child with someone other than the parent pending trial or further court order if the court determines that all of the following conditions exist:

- (a) custody of the child with the parent presents a substantial risk of harm to the life, physical health, or mental well being of the child;
- (b) no provision of service or other arrangement except removal of the child is reasonably available to adequately safeguard the child from the risk as described in subrule (C)(2)(a); and
- (c) conditions of child custody away from the parent are adequate to safeguard the health and welfare of the child. [MCR 5.965(C)(2).]

Here, Protective Services had filed a petition alleging that Amanda Ross had caused the death of her two-year-old stepson and that Dennis Ross had attempted to conceal his wife's role in the death. The petitioner requested that the children be placed in foster care. In compliance with MCR 5.965(C)(3), the court made factual findings regarding the allegations. The court also considered placement with other family members before ordering that the children be placed in foster care where they would not be at risk of physical or mental harm. We find no clear error in the court's decision to place the children with someone other than the parents pending trial.

Next, respondent Dennis Ross argues that his rights to procedural due process were violated by the court's acceptance of hearsay evidence because the supplemental petition alleged new matters. However, respondent presents no authority for the proposition that a violation of the evidentiary requirements of MCR 5.974(E) rises to a deprivation of due process, and this Court will not search for

authority in support of his position. See, e.g., *In re Toler*, 193 Mich App 474, 477; 484 NW2d 672 (1992). In any event, we need not decide whether the court abused its discretion in admitting this evidence because other admissible evidence established the truth of the matter asserted, which was that respondent denied his wife's involvement in his son's death. Therefore, any error that occurred was harmless because the hearsay evidence was merely cumulative. See, e.g., *Sackett v Atyeo*, 217 Mich App 676, 685-686; 552 NW2d 536 (1996).

Last, respondent argues that his equal protection rights were violated because the standard of proof required to terminate his parental rights was lower than the standard of proof required to terminate the parental rights to American Indian children. This issue has already been resolved by this Court in *In re Miller*, 182 Mich App 70; 451 NW2d 576 (1990). The higher standard of proof is federally mandated by 25 USC 1912(f) and mandated by our court rule, MCR 5.980. The evidentiary standard does not violate a respondent's right to equal protection because it is rationally related to the fulfillment of Congress' unique guardianship obligation toward Indians. *Miller, supra* at 76. See also *In re Elliott*, 218 Mich App 196, 201; 554 NW2d 32 (1996) (stating that the standard promotes "the stability and security of Indian tribes and their families").

Affirmed.

/s/ Joel P. Hoekstra

/s/ Michael J. Kelly

¹ The applicable subsections of the statute state the following:

(3) The court may terminate a parent's parental rights to a child if the court finds, by clear and convincing evidence, 1 or more of the following:

...

(b) The child or a sibling of the child has suffered physical injury or physical or sexual abuse under either of the following circumstances:

(i) The parent's act caused the physical injury or physical or sexual abuse and the court finds that there is a reasonable likelihood that the child will suffer from injury or abuse in the foreseeable future if placed in the parent's home.

...

(c) The parent was a respondent in a proceeding brought under this chapter, 182 or more days have elapsed since the issuance of an initial dispositional order, and the court, by clear and convincing evidence, finds either of the following:

(i) The conditions that led to the adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the age of the child.

...

(g) The parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the age of the child. [MCL 712A.19b(3); MSA 27.3178(598.19b)(3).]

² Based upon her review of the record, our dissenting colleague would hold that the lower court clearly erred in terminating the parental rights of respondent Dennis Ross. The court's decision in this regard was predicated upon a determination of respondent's credibility on whether he acknowledged that his wife caused his son's death and whether he was separated from his wife. On both of these points, the court found against respondent.

We note that this Court must accord deference to a probate court's assessment of the credibility of the witnesses before it. See *In re Newman*, 189 Mich App 61, 65; 472 NW2d 38 (1991). Indeed, in *Miller, supra* at 337-338, our Supreme Court stated that fact:

MCR 2.613(C) requires that in applying the principle that findings of fact may not be set aside unless clearly erroneous, regard is to be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it. The deference required by MCR 2.613(C) can make a critical difference in difficult cases such as the one before us. In contrast to the reviewing court, the trier of fact has the advantage of being able to consider the demeanor of the witnesses in determining how much weight and credibility to accord their testimony. It is noteworthy that Probate Judge Donald S. Owens not only observed the demeanor of the witnesses during each of the two formal adjudications concerning Ryan Miller, but he also presided over a number of pretrial conferences and dispositional hearings held during the fifty months of probate court temporary jurisdiction leading up to the termination order.

Like the probate judge in *Miller*, the probate judge here had the unique opportunity to observe the demeanor of the witnesses during the formal adjudication and the many hearings that preceded it. We decline to second-guess the lower court's assessment of the credibility of respondent regarding the critical issues in this case. Rather, from the evidence in this case, it was fair to conclude that respondent Dennis Ross placed his relationship with his wife above the safety interests of his children. Accordingly, the lower court properly found that the statutory grounds for termination were met by clear and convincing evidence.