

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.

UNPUBLISHED

No. 207273

Tuscola Juvenile Court

LC No. 94-006007 NA

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,

No. 208937

Tuscola Juvenile Court

LC No. 94-006007 NA

Respondent.

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

GAGE, P.J. (concurring in part and dissenting in part).

I respectfully dissent from the majority's affirmance of the trial court's termination of respondent Dennis Ross' parental rights. My review of the record has firmly convinced me that the trial court erred in terminating his rights.

A trial court may properly terminate an individual's parental rights when clear and convincing evidence exists establishing at least one of the statutory grounds for termination. MCR 5.974(F)(3). This Court reviews for clear error the trial court's findings in support of its termination order. MCR 5.974(I). Clear error occurs when, although some evidence exists to support a finding, the reviewing court is left with a definite and firm conviction that a mistake has been made. *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989).

The series of events leading to the trial court's ultimate termination of both parents' rights began in December 1994 when respondent Amanda Ross, apparently angry with two-year old Anthony Ross for disobeying her order to lie down for a nap, violently threw him into his bed, fatally injuring his head against a wooden bedpost. Dennis Ross, the father of Anthony and the seven other children who shared his and Amanda's home, was away working at the time of the incident. As soon as he arrived home, he encountered Amanda on the telephone, who told him that something was wrong with Anthony. Dennis went directly to Anthony's room, saw Anthony vomiting, and immediately drove him to a nearby hospital, from which he was airlifted to another facility. Both respondents remained with Anthony until he died several days later.

After Anthony's death, the circumstances surrounding which were investigated by both the police and the Family Independence Agency (FIA), the remaining seven Ross children, five of whom were the offspring of two prior relationships of Dennis, were all removed from the home and placed in several different foster care homes. In 1995, both parents pleaded nolo contendere to the trial court's exercise of jurisdiction over the minors involved in this case. The trial court noted at that time that Dennis had no personal knowledge of what caused Anthony's death. Amanda subsequently pleaded guilty to attempted involuntary manslaughter in causing Anthony's death, and was sentenced to one year in jail and three years on probation. In January 1997, the FIA recommended that the four oldest children, then aged 17, 15, 12 and 10, be returned to the parental home. From the time the FIA initially removed the children until the conclusion of the termination hearings regarding the three minor children, both respondents cooperated in every respect with the orders of the court and diligently attended visitation sessions with the children, for which conduct the trial judge on more than one occasion went out of his way to commend respondents.

Ultimately, however, the trial court terminated both respondents' parental rights. The court terminated Dennis' parental rights pursuant to MCL 712A.19b(3)(c)(i) and (3)(g); MSA

27.3178(598.19b)(3)(c)(i) and (3)(g). Subsection 19b(3)(c)(i) authorizes termination when the conditions leading to the initial dispositional order continue to exist and “there is no reasonable likelihood that the conditions will be rectified within a reasonable time.” Subsection 19b(3)(g) contemplates termination when “[t]he 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.” The trial court found that Amanda remained a danger to young children and that she also remained a presence in Dennis’ home, and concluded that these findings supported its termination of Dennis’ rights.

The trial court terminated Dennis’ parental rights because it believed that he would permit Amanda, whom the court correctly concluded remained a danger to the younger children, to have continued contact with the minors. The court reasoned as follows:

It is a tragedy that Dennis Ross is compelled by circumstances to choose between his wife and his children. However, he has made that choice and it is clear to the Court that he has chosen his wife. Although he claims to be separated from her, he and Amanda still maintain regular social conduct and contact and despite the passage of some eight months since the alleged separation, no divorce has yet been filed and no good reason has been shown why such a divorce has not been filed. Therefore, the Court can only conclude that Dennis and Amanda will continue to maintain a relationship and that from time to time Amanda would be entrusted by Dennis to have care of the children no matter what their age.

Presumably the court also relied on psychologist and FIA workers’ testimony at the termination hearing that prior to 1997, Dennis had not accepted the truth about the extent to which Amanda was responsible for Anthony’s death.

The instant record shows that the worst action committed by Dennis Ross was that, from the time of Anthony’s death until February 1997, he continued to believe Amanda’s allegations that she was not the sole cause of Anthony’s death.¹ Amanda testified that although she had pleaded guilty to involvement in Anthony’s death, she did not believe until she neared the end of her counseling sessions in late 1996 that she had been responsible for killing Anthony. She admitted that she had lied to Dennis about her lack of involvement in the killing, and that Dennis had believed her. The counselors who testified at the termination hearings indicated that because Dennis denied Amanda’s involvement in the incident, they would question his judgment regarding the minor children and, consequently, the minors’ safety.

However, in early February 1997, Amanda finally admitted to Dennis the extent of her responsibility for killing Anthony. Amanda and Dennis both testified that her admission upset Dennis and caused arguments and disagreements. Later that month, Amanda left the home and acquired a new residence. Both Dennis and Amanda testified that they believed the separation was permanent. Dennis stated that, although he still loved Amanda, he had accepted that she caused Anthony’s death and he believed she posed a danger to the younger children, and had therefore asked her to leave. He explained that he would rather have the younger children with him than have Amanda. When questioned why he had not yet filed for divorce, Dennis indicated that according to his Pentecostal

religious beliefs divorce was forbidden. He explained that he had had a difficult time deciding whether to separate from Amanda, but that he intended to save money to hire a lawyer to get the divorce filed.

While the hearing testimony established that Dennis and Amanda saw each other occasionally after their separation, it did not establish that they were attempting to maintain their marital relationship. After the February 1997 separation, Amanda continued to visit the four oldest children in the former marital home. Her visits did not constitute a violation of any court order of FIA recommendation. Amanda stated that she may have thrown in a load of laundry during one of these visits, but that she had not continued to do housework for Dennis and the older children. Although an FIA worker testified that Dennis and Amanda still reacted to each other in the same manner during post-separation visitation periods, Dennis explained that he and Amanda were simply acting close for the children's benefit. The remaining post-separation contact between Dennis and Amanda consisted of meetings at a store or restaurant "once in a while" to discuss the things Amanda wanted to retrieve from the former marital home, Amanda giving Dennis a ride or rides to the grocery store because Dennis' truck's headlights did not function, and a meeting at the local WalMart with Jessica, Dennis' second-oldest daughter (aged sixteen at the time of the termination hearings), so that Amanda could purchase some items Jessica wanted. In response to repeated termination hearing inquiries by the court and the parties' attorneys, both Dennis and Amanda indicated that they had not engaged in sexual intercourse after their separation. Given these facts, I do not believe that the trial court correctly characterized the uncontradicted nature of Dennis and Amanda's occasional, necessary meetings as a normal relationship.

The trial court's finding that Dennis would in the future permit Amanda to supervise minor children was also unsupported by any evidence. Dennis testified that, in light of Amanda's admission of guilt in Anthony's death and despite her attendance of counseling classes, he recognizes that she still poses a risk of harm to young children. He explained that for this reason he ultimately requested that she leave the marital home. Amanda stated that in the event the court granted Dennis custody of the minor children, she would comply with any court restrictions on her visitation. Dennis likewise testified that he would adhere to any provisions the court decided to incorporate in an order granting him custody, even a requirement that he forbid Amanda from visiting the minors. A psychotherapist who had counseled Dennis, Amanda and the four oldest children testified that he knew of no reason to believe that Dennis would disobey a court order. Importantly, uncontradicted testimony established that Dennis, who had been granted at-home visits with minor Matthew on the condition that Amanda not be present, had regularly and successfully complied with this condition. This evidence supports Dennis' and Amanda's testimony that they would accept and obey court-ordered visitation restrictions.

Regarding Dennis' failure to have filed for divorce during the approximately eight months between he and Amanda's separation and the time of the termination hearings, the trial court simply rejected Dennis' explanation for not having done so. Dennis testified that his religious beliefs in the impropriety of divorce made it difficult for him to finally arrive at that decision. The psychotherapist who had counseled Dennis, Amanda and the oldest children believed that Dennis was genuine in his expressions of religious faith, and noted that Dennis had received support from his church and pastor. Dennis further explained that although he had finally decided to seek a divorce, he had not yet saved enough money for legal representation. I would not hold that these allegations constitute bad reasons for having failed to file for divorce, nor do I believe that not filing for divorce within this time period necessarily implies that Dennis and Amanda would resume their relationship.

In summary, my examination of the record reveals that the trial court lacked clear and convincing evidence to terminate Dennis' parental rights, and that the trial court terminated Dennis' parental rights on the basis of its speculation that Dennis would entrust to Amanda the care of his youngest children. The record reveals that Dennis has never harmed any of his children, that he loves his children, that he has always adequately provided for the children, and that he complied in every respect with the trial court's orders and FIA recommendations during the lower court proceedings. Regarding Dennis' belief in Amanda prior to her admission of guilt, I do not believe this period of faith in his wife, whom it is clear he loved, constitutes an adequate basis supporting termination of his parental rights. The FIA psychologist who examined Dennis indicated that most people would go through a period of grief and confusion following a child's death. Ultimately, the psychotherapist who counseled Dennis, an FIA case worker and the trial court all expressed the belief, as voiced by the court, that, "[i]f Amanda were out of the picture ... I don't see anything here that would suggest that [Dennis] would be inappropriate." Because the evidence shows that Amanda is now out of the picture, the trial court clearly erred in terminating Dennis parental rights, *In re Hall-Smith*, 222 Mich App 470, 472; 564 NW2d 156 (1997), and I would reverse this determination.

/s/ Hilda R Gage

¹ I cannot help but note the similarity of the recent events in Washington, D.C., in which the cabinet of the present administration also strongly defended our President under the impression that he had told them the truth. On the cabinet's learning of his admissions of guilt, their explanations that they had simply been misled were accepted. Misguided loyalty has never been considered a justification for imposing severe and permanent sanctions.