STATE OF MICHIGAN

COURT OF APPEALS

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In re BUSHONG/SANTURE Minors.

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DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appelleee,

v

AMANDA SANTURE,

Respondent-Appellant.

UNPUBLISHED
September 18, 2007

No. 276978
Clare Circuit Court
Juvenile Division
LC No. 06-000113-NA

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In re BUSHONG/SANTURE Minors

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DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

JAMES SANTURE, JR.,

Respondent-Appellant.

No. 277010
Clare Circuit Court
Juvenile Division
LC No. 06-000113-NA

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Before: Bandstra, P.J., and Zahra and Owens, JJ.

PER CURIAM.

In these consolidated appeals, respondents appeal as of right the trial court order terminating their parental rights to their respective minor children pursuant to MCL 712A.19b(3)(g) (failure to provide proper care or custody) and MCL 712A.19b(3)(j) (reasonable likelihood of harm if returned). We reverse and remand to the trial court for further proceedings consistent with this opinion.

The permanent termination of parental rights is an extremely serious matter. *In re Sanchez,* 422 Mich 758, 765-766; 375 NW2d 353 (1985). Accordingly, petitioner Department of

Human Services (DHS) bears the burden of establishing, by clear and convincing evidence, at least one statutory ground for termination set forth in MCL 712A.19b(3). MCL 712A.19b(3); *In re CR,* 250 Mich App 185, 194-195; 646 NW2d 506 (2002). As our Supreme Court explained in *In re Martin*, 450 Mich 204, 227; 538 NW2d 399 (1995):

> Evidence is clear and convincing when it "produce[s] in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue." . . . Evidence may be uncontroverted, and yet not be "clear and convincing." . . . Conversely, evidence may be "clear and convincing" despite the fact that it has been contradicted. [Quoting *In re Jobes*, 108 NJ 394, 407-408; 529 A2d 434 (1987).]

Respondents argue that the trial court erred in finding that statutory grounds for termination were established by clear and convincing evidence. We agree. This Court reviews a trial court's finding that a statutory ground for termination has been established for clear error, recognizing the trial court's special opportunity to assess the credibility of witnesses. MCR 3.977(J); *In re Trejo,* 462 Mich 341, 356-357; 612 NW2d 407 (2000); *In re Miller,* 433 Mich 331, 337; 445 NW2d 161 (1989). A finding "is clearly erroneous if, although there is evidence to support it, the reviewing court on the entire evidence is left with a firm conviction that a mistake has been made." *In re JK,* 468 Mich 202, 209-210; 661 NW2d 216 (2003).

In late June 2006, petitioner Department of Human Services (DHS) received information that respondent mother, who was pregnant, was using illegal substances. Respondent mother tested positive for marijuana on July 1, 2006, as well as on July 16, 2006, at the birth of respondents' son, albeit at a decreased level. Respondents' baby's meconium also tested positive for marijuana, benzoylecgonine metabolite and cocaine. DHS filed its initial petition in this matter on July 25, 2006, asking the court to assume jurisdiction over respondents' minor children based on allegations centering on respondent mother's drug use. The petition did not request removal of the children from respondents' home, given that respondent-mother was voluntarily participating in services, submitting to drug screens, and had agreed to begin counseling and the children were in good health and appeared to be doing well. Respondent mother's July 22, 2006 drug screen was negative.

On September 18, 2006, respondent mother admitted the allegations in the initial petition, noted above, and the court assumed jurisdiction over respondents' infant son, while dismissing the other minor children and respondent father from the proceedings. Thereafter respondents each tested positive for marijuana. There was also a reported incidence of domestic violence between respondents. On that basis, on October 4, 2006, DHS requested a "take and place" order for respondents' infant son. The trial court denied this request, noting that it lacked jurisdiction over the two other minor children living in respondents' home and that respondent father had been dismissed from the proceedings. The court expressed concern over the status of the case, which it described as "screwed up" and a "mess," and directed DHS to file an amended petition to "try and straighten out" the case, and the court would then "start from scratch."

DHS filed an amended petition on October 11, 2006, alleging that respondents' home was unfit as a result of respondents' use of illegal substances, which "has affected the children

and resulted in domestic violence." At the preliminary hearing on the amended petition, the trial court concluded that there was a substantial risk of harm to the children because of respondents' substance abuse and domestic violence, and it removed the children from respondents' home. Respondents' October 20, 2006 drug screens were reported to be negative, but dilute, although the trial court would later note that it harbored some skepticism of such reports, because it seemed that a significant percentage of screens it was receiving from this screening facility were reportedly "dilute."

On November 6, 2006, respondent father pled to the amended petition, admitting, as alleged, that on July 22, 2006, he provided a urine specimen for a drug screen that was not of appropriate temperature, that he tested positive for marijuana on September 15 and 29, 2006 and that respondents' son tested positive for the presence of controlled substances at his birth. On that same date, the court held a dispositional review hearing as to respondent mother only, noting that she had scheduled an appointment to begin out-patient treatment and that she was seeking employment.

Thereafter, DHS drafted a parent-agency treatment plan and service agreement, which required (1) that respondents participate in a psychological assessment and complete recommended treatment; (2) that respondents improve their parenting skills; (3) that respondents achieve and maintain a drug and alcohol free lifestyle by participating in random drug screens, developing an understanding of drug dependency, by respondent mother completing an outpatient drug treatment program and by respondent father participating in a drug assessment and successfully completing any recommended treatment; and (4) that respondent father "build and develop his coping skills," by among other things, attending an anger management class. The parties expressed concurrence with this plan at the November 30, 2006 dispositional review hearing. At that hearing, the court observed that "things are going better" than they had been and encouraged respondents to "stay on the straight and narrow."

Respondents were presented with and signed the treatment plan on December 19, 2006, at a meeting with caseworker Joseph Policarpio. At that meeting, Policarpio compartmentalized the services respondents were to begin because of respondents' limited time and resources, suggesting that they focus first on the substance abuse issue, including completing psychological evaluations, and defer tackling the other areas addressed by the treatment plan until some time in the future. Policarpio advised respondents that he would make a referral for the psychological evaluations and that the evaluating office would contact respondents to schedule those evaluations. Policarpio also provided respondents with information on where to obtain a substance abuse assessment.

Prior to their meeting with Policarpio, on December 16, 2006, respondents were arrested, after a routine traffic stop, when cocaine and implements typically used in distributing cocaine, were found in their vehicle. On December 17, 2006, again prior to this meeting, police were called to respond to a domestic situation involving respondents.

Policarpio requested that respondents submit to a drug screen on December 20, 2006; they did not do so. Policarpio also sent two additional drug screen requests to respondents by mail, at least one of which was returned as undeliverable. And he left a drug screen form in respondents' door on January 11, 2007; respondents did not submit that screen. Policarpio also advised that respondents had not returned telephone calls from the evaluating office to schedule

their psychological examinations. Admittedly, Policarpio did not contact respondents by phone to determine whether they received the drug screen requests or to determine whether they had received telephone messages from the evaluating office to schedule, or were otherwise experiencing difficulty in scheduling, their psychological evaluations.

On February 6, 2007, less than two months after respondents first met with Policarpio, the trial court ordered DHS to seek termination of respondents' parental rights, based on respondents' lack of participation in services. At that time, DHS agreed with the trial court that the most recent report on respondents' progress was negative, but advised the court that it "was still holding on to at least a little bit of hope" that respondents would cooperate and participate successfully in services in order to regain custody of their children.

DHS filed its termination petition on February 14, 2007; all services to respondents were suspended at that time. At the termination hearing, on March 16, 2007, testimony indicated that respondents did not receive the two drug screen requests mailed to them by Policarpio, although they did receive and failed to comply with the requests he provided personally and left in their door. Testimony also indicated that respondents had completed their substance abuse assessments and had begun outpatient substance abuse treatment, and that respondent father had provided a negative drug screen. DHS caseworker Kathleen Chimner acknowledged that respondents had a minimum of five months before the case was to be scheduled for a permanency planning hearing and that she would not have sought to terminate respondents' parental rights so quickly had the court not ordered DHS to do so. Chimner also indicated that the two oldest children, both of whom were in the care and custody of their nonrespondent biological parent, would suffer emotional harm as a result of the termination or respondents' parental rights.

Additionally, testimony established that respondents routinely attended scheduled visitation, with the exception of two missed visits with the infant, and that their conduct with their children generally was appropriate. While parenting classes were requested, testimony indicated that respondent mother completed a teen parenting class and that Policarpio felt that parenting classes could be postponed for a time given that visitation was supervised and thus, did not provide respondents with referrals for parenting classes. The record also reflects that children were properly cared for when in respondents' care and custody.

The trial court first concluded that DHS established by clear and convincing evidence that respondents, "without regard to intent, fail[ed] to provide proper care or custody for the child[ren] and there is no *reasonable* expectation that [they] parent will be able to provide proper care and custody *within a reasonable time* considering the child[ren]'s age[s]." MCL 712A.19b(3)(g) (emphasis added). However, considering the short time that the case was pending before the trial court and that the trial court ordered DHS to seek termination less than two months after respondents were presented with their treatment plan, along with evidence that respondents were capable of adequately parenting their children, that the older two children were in good health and appeared appropriately cared for when the family came to the attention of DHS, and that respondents had completed their substance abuse assessments and had begun treatment at the time of the termination hearing, we conclude that the trial court's decision to terminate respondents' parental rights was premature.

It is important to note that this is not a case where the children have been "languishing indefinitely in the temporary custody of the court." *In re Trejo*, *supra* at 351. As the trial court indicated, this case evolved into a procedural "mess," with respondents being afforded no services, other than drug testing, for much of the time the case was pending below.[1] Respondents were not presented with a treatment plan until December 19, 2006. The trial court afforded respondents less than two months thereafter before ordering DHS to seek termination of respondents' parental rights, despite earlier positive indications that respondents would be able to address their substance abuse issues and despite DHS's expression of hope that respondents would participate successfully in services in order to regain custody of their children. Each of the children was doing well in relative placement, with the nonrespondent biological parent of each of the two older children having obtained legal and physical custody of those children. There was thus no apparent urgency to terminate respondents' parental rights.

The trial court also terminated respondents' parental rights pursuant to MCL 712A.19b(3)(j), which provides for termination where "[t]here is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent." We again find the trial court's conclusion that such is the case here to be premature.

Testimony at the termination hearing established that respondents routinely attended scheduled visitation, with the exception of two missed visits with the infant[2], and that their conduct with their children generally was appropriate. While parenting classes were provided for as part of respondents' treatment plan, testimony indicated that respondent mother previously completed a teen parenting class. Further, Policarpio felt that parenting classes could be postponed for a time and thus, he did not provide respondents with referrals for parenting classes until after the termination petition was filed. The record also reflects that the children were observed to be in good health and appeared to be properly cared for when in respondents' care and custody. Further, as mentioned above, the older two children were in the custody of their nonrespondent biological parents at the time of the termination hearing. The trial court acknowledged that there was no question that respondents were capable of adequately parenting their children. Considering the evidence that respondents had completed their substance abuse assessments and had begun treatment at the time of the hearing and that respondents were able to adequately parent the children and acted appropriately during visitations, we conclude that the trial court clearly erred in finding that there was a reasonable likelihood of harm to the children which would warrant termination of respondents' rights.

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[1] Respondents did receive some services in their home in July 2006, including a Families First intervention and counseling services. However, those services apparently ended in mid-August 2006. The lower court record does not evidence any referrals for any additional services, other than drug screens, until after respondents met with Policarpio on December 19, 2006.

[2] These missed visits were attributed to mechanical issues with respondents' vehicle and to respondents needing to stay with respondent father's great grandmother when her state home care worker was unable to be present.

In light of our conclusion that the court clearly erred in finding that a statutory ground for termination was established by clear and convincing evidence, we need not determine whether termination of respondents' parental rights was not clearly against the children's best interests. MCL 712A.19b(5).

We reverse and remand to the trial court for further proceedings consistent with this opinion.[3] We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ Brian K. Zahra
/s/ Donald S. Owens

[3] In so doing, we direct the lower court's attention to the fact that, although neither party mentions this on appeal, our review of the lower court record did not reveal any order of adjudication addressing respondent mother's oldest child.