

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of SANTINO SAGE BERSAMINA
and PAIGE MARGUERITE MARIE
JOSEPHSON, Minors.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

LAURA MCCARTHY,

Respondent-Appellant,

and

SANTINO ANGELO BERSAMINA,

Respondent.

In the Matter of SANTINO SAGE BERSAMINA,
Minor.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

SANTINO ANGELO BERSAMINA,

Respondent-Appellant,

and

LAURA MCCARTHY,

Respondent.

UNPUBLISHED

June 10, 2008

No. 281795

Muskegon Circuit Court

Family Division

LC No. 03-032554-NA

No. 281829

Muskegon Circuit Court

Family Division

LC No. 03-032554-NA

Before: Whitbeck, P.J., and O'Connell and Kelly, JJ.

PER CURIAM.

In these consolidated appeals, respondent-mother Laura McCarthy appeals as of right from the trial court order terminating her parental rights to her two minor children, Santino Sage Bersamina (d/o/b July 30, 2001; "Sage") and Paige Marguerite Marie Josephson (d/o/b August 1, 2004).¹ Respondent-father Santino Bersamina appeals as of right from the trial court order terminating his parental rights to his minor son, Sage.² We affirm.

I. Basic Facts And Procedural History

In October 2005, the Department of Human Services (DHS) filed a petition requesting the trial court to take temporary custody over the minor children after DHS investigated a domestic violence situation between McCarthy and her husband, Michael Josephson, which caused McCarthy to receive approximately 18 stitches to her face and a dresser to be tipped over on Sage. The petition also alleged that the family had moved numerous times and that the most recent residence did not have a working furnace.

A preliminary hearing was held, and the trial court authorized the petition and placed the children in foster care. DHS was unable to locate McCarthy and Josephson but did locate the nine-year-old half-brother of the children (DA), who lived with his father. DA told DHS that he had lived with McCarthy during the summer, that there were numerous fights in the home, and that he had to take the younger children away from the fights and into another room. DA also told DHS that Josephson left bruises that lasted for a day or two on him after hitting and slapping him. The trial court found that McCarthy did not have housing and that domestic violence between McCarthy and Josephson created an unsafe environment for the minor children.

Bersamina was not in attendance at a review hearing in January 2006, and it was reported that he was not a respondent in the petition. DHS stated that Bersamina had indicated that he had little interest in participating.

At the next review hearing, DHS reported that, for the most part, McCarthy was compliant. Bersamina, however, was not present, and it was reported that he never participated in parenting time and that it had been suspended. The trial court took testimony on whether the children should be returned home. Nancy Marotta, a foster care worker, testified that she had concerns that McCarthy and Josephson lacked the skills to supervise the children and to correctly discipline them, and were not on the same page with discipline. She also stated that Josephson controlled McCarthy during the visits. Marotta opined that it was not in the children's best

¹ MCL 712A.19b(3)(c)(i) (conditions of adjudication continue to exist after 182 days) and (g) (failure to provide proper care and custody).

² MCL 712A.19b(3)(a)(ii) (parent deserted child for 91 or more days and did not seek custody during that period) and (g).

interests to be returned home because McCarthy and Josephson needed counseling for their relationship and to build parenting skills. On cross-examination, Marotta explained that McCarthy could not have visitation when Josephson was at work because there were concerns about McCarthy being able to control the children because she needed help with her parenting skills. The trial court found that more services needed to be completed before the children could be returned home but ordered unsupervised visitation.

Bersamina was in attendance at the next review hearing in July 2006. It was reported that there was marginal compliance with the parent agency agreement. McCarthy was working on things slowly and there was a lot of tension. Housing was still an issue. DHS asked that the visits be supervised. It was also reported that Bersamina showed up for the first time and began working on the parent agency agreement and was working on some services. McCarthy testified that she had housing but was behind in rent and that she had made arrangements to catch up on the rent in the next two to three months. She also stated that she was receiving unemployment.

Bersamina's attorney stated that Bersamina lived with his girlfriend and their two daughters, who were one year old and four months old, in a three-bedroom home. He was employed and wanted custody of Sage. He had not had parenting time with Sage and was requesting time. The trial court continued the children in their placement, granted Bersamina supervised parenting time, and granted McCarthy and Josephson unsupervised parenting time.

All parties were present at the next hearing. McCarthy stated that she was current on her back-rent and utilities. Bersamina testified that he had approximately eight supervised visits with Sage. Bersamina stated that he did not have a problem with the services DHS wanted him to participate in and that he would comply. The trial court ordered complete compliance with the parent agency agreement, including parenting classes. If McCarthy and Josephson enrolled in and completed every parenting class, the children would be returned home. Bersamina's parenting time was suspended until he had consistently clean drug screens. The trial court further ordered that Bersamina participate in counseling with Sage.

In December 2006, the trial court heard a motion to review placement and a request to remove the children from the home of McCarthy and Josephson. Josephson tested positive on his drug test, McCarthy had been terminated from her counseling because she missed four appointments in a row, the couple owed \$3,000 in back rent, and they had not paid rent or utilities since September. In addition, since the children had been returned home, DHS had difficulty getting in touch with McCarthy to see how the children were doing. However, the trial court did not remove the children from the home. Instead, the trial court clarified what McCarthy and Josephson were supposed to do and stated that, if any visits were cancelled, DHS should get a pickup order from the court and the children would then be removed.

At the next review hearing, it was reported that McCarthy and Josephson had been compliant and that the only concern was that they were behind in their rent in the amount of \$3,500. They had something worked out with the landlord, and once they complied, DHS recommended that the case be closed. Bersamina was in court at that time, but it was reported that he had not been involved. The trial court continued the children in the care of McCarthy and Josephson and continued suspension of Bersamina's parenting time.

An emergency removal hearing was held in early June 2007. Protective services received a complaint that the children were not being properly cared for. Bersamina was not notified of the hearing. It was reported that McCarthy and Josephson did not pay the back rent even after DHS paid \$1,700. It was also reported that DHS received a complaint that the children were being left home alone without adult supervision for extended periods of time and that Paige was seen crossing the road unsupervised. The children confirmed that they were left home alone several times. McCarthy testified that she remembered Paige running across the street when McCarthy was trying to get something out of the shed in the backyard. She stated that sometimes Sage may be home alone for five minutes before she arrives home.

Another hearing was held in mid-June 2007. The prosecutor stated that he had discovered that there were numerous police contacts and other issues involving McCarthy and Josephson going back to January 2007. They continued to provide an unstable home. DHS asked the trial court to maintain the children in temporary custody until a permanency planning hearing could be held.

Jim Colby testified that he was a psychologist and that he had counseled McCarthy and her family for approximately a year and a half. He believed that progress had been made since he first met with them. McCarthy and her husband had a better relationship, and the children had been returned to their care and appeared to be loved and cared for. He stated that, after DHS could no longer pay for his services, McCarthy and her husband approached Colby to continue counseling paid for by their insurance. He did not believe that the children should be temporarily removed from McCarthy and her husband. On cross-examination, Colby stated that Sage told him that his parents left him alone on eight occasions. He did not think Sage was lying. He had good eye contact and was not led in any way. Colby also stated that, when focused and talking to someone that he trusts, Sage would tell the truth. The trial court found that there was significant evidence presented that Sage came home alone on more than one occasion. The children were continued in out-of-home placement with supervised parenting time. The trial court added that it was a difficult decision because there appeared to be a bond between McCarthy and Josephson and the children.

The permanency planning hearing was held in August 2007. Bersamina testified that he had a job making \$8 an hour and had housing. He complied with drug testing, which came back clean, and he had enrolled in anger management classes. But on cross-examination, Bersamina stated that he had just enrolled in the classes and was offered parenting classes in July that he did not complete. The trial court found that DHS was authorized to file the petition to terminate.

McCarthy did not appear for the termination trial; however, it was determined that she had actual notice of the hearing. Jennifer Lopez, foster care worker for the children, testified that McCarthy had not rectified the conditions that caused the children to be placed in foster care, and Lopez did not believe that she would be able to do so within a reasonable time. Lopez also stated that she was not aware of any services or provision of services that could be utilized to accomplish unification in the near future. McCarthy was offered a budgeting class just before the pretrial and had been offered case management services, parenting time, drug testing, parenting classes, domestic violence counseling, individual counseling, the family reunification program, the parent mentor program, psychological evaluations, housing assistance, financial assistance, and CASA services. Lopez also testified that she believed that termination of

McCarthy's parental rights was in the best interests of the children because the case had been going on for so long. The original issues that led to the children being removed from the home were still present. McCarthy did not have stable housing and left Sage unattended.

The trial court gave its opinion from the bench and found there was a statutory basis to terminate McCarthy's parental rights. The primary problem was that McCarthy was unable to provide stable housing for the children. During many of the hearings, McCarthy was just about to get another house and then did not pay rent, causing the housing to fall through. In addition, there was the constant issue of utilities being shut off or McCarthy being evicted. This had gone on for well over a year. The trial court also pointed out that there was domestic violence in the home. The trial court stated that, given the multitude of services that had been provided to McCarthy, it was not likely that she would be able to provide appropriate care and custody within a reasonable time. The trial court also stated that McCarthy failed to alleviate the conditions that brought the children under the jurisdiction of the court and that there was no reasonable likelihood that she would be able to do so in the future based on her performance throughout the case. The trial court also found that there was no evidence showing that termination of McCarthy's parental rights was not in the best interests of the children. The trial court concluded that it would enter an order terminating the parental rights of McCarthy. Orders were filed terminating McCarthy's parental rights to the children.

Lopez testified again with respect to Bersamina. She stated that she met with Bersamina and his attorney in January 2007 and went over the things that Bersamina needed to do in order to gain custody and visitation of Sage, including random screens, a substance abuse assessment, anger management, domestic violence, and a psychological evaluation. Bersamina did the psychological evaluation. He completed the substance abuse assessment in August 2007. Bersamina had told Lopez on several occasions, the most recent time being two days earlier, that he felt that he did not need to do the services, and it was unfair that he had to do them, because it was not his fault that Sage was removed from McCarthy's care. Bersamina did not take the parenting classes, did not complete domestic violence or anger management classes, and had only completed two random drugs screens since January. One drug screen in July was negative, and the other drug screen taken on the date of the pretrial was positive for marijuana. Bersamina was informed of the positive drug screen, and his position was that he did not see it as a problem if he was not smoking in the home. Bersamina did not have any parenting time with Sage since September 2006. Lopez stated that Bersamina's bond with Sage was minimal to none. She also stated that, because Bersamina had not made an effort, she did not believe that additional time would help.

Lopez testified that Bersamina did not have employment but told Lopez that he had some job interviews. Bersamina had three visits with the child. One of the visits was cut short and one was cancelled. In September 2006, Bersamina's parenting time was suspended.

Nancy Marotta testified that she was the foster care worker before Lopez. She stated that Bersamina signed a treatment plan in May 2006, but in July 2006, he tested positive for cocaine and marijuana. On several occasions, Marotta discussed with Bersamina the need to get a substance abuse assessment, and she gave him the phone number and directions to a facility where he could get the assessment. Bersamina did not comply with the assessment. Respondent took another drug test in September 2006, and tested positive for marijuana.

Bersamina testified that he felt it was unfair that he had to comply with the parent agency agreement because it was not his fault that Sage was taken from McCarthy and that it never would have happened if he had Sage in his custody. Bersamina admitted that he did not pay child support. He also admitted that he failed to do some things over the past year that would have made it easier to see the bond he had with his son.

The trial court issued a written opinion terminating Bersamina's parental rights pursuant to MCL 712A.19b(3)(a)(ii) and (g). With respect to the issue of abandonment, the trial court found that Bersamina deserted Sage from January to August 2007. The trial court stated that Bersamina was provided weekly parenting time in November 2005. He went to the first visit and failed to show for the next three visits, and DHS cancelled the fifth visit after learning that Bersamina had an outstanding warrant for his arrest. His parenting rights were suspended by the trial court in December 2005 because Bersamina refused to comply with the parent agency agreement, including getting a substance abuse assessment, complying with random drug testing, and enrolling in parenting classes. Bersamina signed a service agreement in May 2006 after a five-month period of doing nothing to facilitate parenting time. The trial court found that Bersamina deserted his son during that five-month period. Between July 2006 and July 2007, Bersamina did not contact DHS about seeing Sage and the trial court found Bersamina abandoned Sage during this period as well. The trial court also found that Bersamina failed to provide proper care for Sage, which would include, at the very least, regular contact with him. The trial court found that it was not against Sage's best interests to terminate Bersamina's parental rights. Bersamina admitted that he continued to use marijuana, he had not taken any parenting classes even after acknowledging that he did not know how to deal with some of Sage's behaviors, and there was no bond between Bersamina and Sage. The last visit Bersamina had with Sage was over a year ago, and Bersamina terminated that visit because of Sage's hostility towards him. Accordingly, the trial court entered an order terminating Bersamina's parental rights to Sage.

II. Statutory Grounds For Termination

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.³ We review for clear error a trial court's decision terminating parental rights.⁴ A finding is clearly erroneous if, although there is evidence to support it, this Court is left with a definite and firm conviction

³ MCL 712A.19b(3); *In re Sours*, 459 Mich 624, 632-633; 593 NW2d 520 (1999).

⁴ MCR 3.977(J); *In re Trejo*, 462 Mich 341, 355-357; 612 NW2d 407 (2000); *In re Sours*, *supra* at 633.

that a mistake has been made.⁵ We give regard to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it.⁶

B. Analysis

(1) McCarthy

The trial court did not clearly err when it terminated McCarthy's parental rights pursuant to MCL 712A.19b(3)(c)(i). The conditions that brought the children into care were domestic violence and unstable housing. Throughout the proceedings, housing remained an issue. McCarthy was behind in her rent, by as much as \$3,500. She also did not pay her utilities in a timely fashion, causing the threat of utilities being shut off. DHS assisted McCarthy by paying approximately half of her back rent, but she still did not get the rent paid up to date. In addition, there continued to be domestic violence in the home between McCarthy and her husband, and the police were called on several occasions. McCarthy was offered many services, including budgeting classes, parenting time, drug testing, parenting classes, domestic violence counseling, individual counseling, the family reunification program, the parent mentor program, psychological evaluations, housing assistance, financial assistance, and CASA services. Given all of these services, and the amount of time that had lapsed after the children were taken into the court's custody, there was no reasonable likelihood that the conditions would be rectified within a reasonable time.

It was also determined that McCarthy left her five-year-old son home alone after school for extended periods of time. This was after the children had been removed from her care and then placed back with her. The child consistently reported to DHS and to the family counselor that this occurred. Based on these events, as well as the facts that McCarthy was unable to provide a stable home, that domestic violence continued to be an issue, and that McCarthy had been provided all available services, it was not likely that McCarthy would be able to provide appropriate care and custody within a reasonable time. Thus, the trial court did not clearly err when it found the evidence clear and convincing to terminate McCarthy's parental rights to the children pursuant to MCL 712A.19b(3)(g).

(2) Bersamina

The trial court also did not clearly err in finding statutory grounds established to terminate Bersamina's parental rights to Sage. The trial court very carefully outlined the events and times during which Bersamina deserted his child for 91 days or more without seeking custody of him, facts that justified termination of his parental rights pursuant to MCL 712A.19b(3)(a)(ii). Bersamina takes the position that it was not his fault that the child was taken into temporary care, and he was under the impression that McCarthy was doing what was necessary to have the children returned to her care and custody. However, DHS and the trial

⁵ *In re JK*, 468 Mich 202, 209-210; 661 NW2d 216 (2003).

⁶ MCR 2.613(c); *In re Miller*, 433 Mich 331, 337; 455 NW2d 161 (1989).

court both explained clearly to Bersamina what he needed to do to have parenting time with the child before he could even be considered as a possible custodial parent.

Bersamina was required to comply with the parent agency agreement, which included obtaining a drug assessment, submitting to drug testing, and taking parenting classes, and his parenting time was suspended in December 2005 when he refused to comply. He signed a parent agency agreement in May 2006 after a five-month period in which he did nothing to facilitate parenting time. In July and September 2006, Bersamina had positive drug tests, and the trial court again suspended visitation. Once again, Bersamina did nothing to facilitate parenting time. In January 2007, Bersamina and his attorney met with DHS and the steps he needed to take to have his parenting time reinstated were addressed. The termination petition was filed in August 2007, and Bersamina continued to refuse to be drug tested, assessed for substance abuse, or take parenting classes. The evidence was clear and convincing to find that Bersamina deserted his child from December 2005 to May 2006, from September 2006 to January 2007, and again from January 2007 to August 2007.

With respect to MCL 712A.19b(3)(g), Bersamina did not do what was necessary to have parenting time with the child. At the very least, providing proper care and custody includes regular contact with the child. While Bersamina stated that he wanted to provide for the child, he did not seem to understand that his use of marijuana was an impediment to him being able to do so, and he tested positive for marijuana on the date of the pretrial for the termination petition. Based on the facts that Bersamina was unwilling to comply with the service agreement, and the proceeding was pending for almost two years, the evidence was clear and convincing: Bersamina did not provide proper care and custody and there was no reasonable likelihood that he would be able to do so within a reasonable time. A parent's failure to comply with the parent/agency agreement is evidence of a parent's failure to provide proper care and custody for the child and can be a valid indication of neglect.⁷

Further, even though McCarthy had been the child's custodial parent, Bersamina had an obligation to provide for the child as well and did not have the option of sitting back and hoping that McCarthy would do what was necessary to keep the child in her care. The record does not support his arguments that DHS did not follow through with services.

III. Best Interests Determination

A. Standard Of Review

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.⁸ There is no specific burden on either party to present evidence of the children's best

⁷ *In re JK*, *supra* at 214; *In re Trejo*, *supra* at 360-363, 361, n 16.

⁸ MCL 712A.19b(5); *In re Trejo*, *supra* at 350.

interests; rather, the trial court should weigh all evidence available.⁹ We review the trial court's decision regarding the child's best interests for clear error.¹⁰

B. Analysis

(1) McCarthy

Based on the evidence presented to the trial court, it was clear that McCarthy and the children shared a bond. However, McCarthy was given many opportunities to obtain stable housing, provide a safe home for the children free of domestic violence, and provide proper care and custody. After almost two years, McCarthy was unable to provide these things for her children. The trial court did not clearly err when it determined that the children's best interests did not preclude termination of McCarthy's parental rights.

(2) Bersamina

The trial court did not clearly err in determining that termination of Bersamina's parental rights was not contrary to the child's best interests. Based on the evidence presented at trial, Bersamina and the child did not share a bond. Bersamina did not do what was necessary to visit with the child, including being free of drugs and taking parenting classes to learn how to better deal with the child's hostility towards him.

In sum, we conclude that respondents' parental rights were properly terminated.

Affirmed.

/s/ William C. Whitbeck
/s/ Peter D. O'Connell
/s/ Kirsten Frank Kelly

⁹ *In re Trejo, supra* at 354.

¹⁰ *Id.* at 356-357.