

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of FRANK SICURELLO, JR.,
KENNETH PENLEY, II, and
COLE TRISTAN PENLEY, Minors.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

DANA M. PENLEY,

Respondent-Appellant.

UNPUBLISHED
February 23, 2006

No. 264566
Berrien Circuit Court
Family Division
LC No. 04-000096-NA

In the Matter of KENNETH WADE PENLEY, II,
and COLE TRISTAN PENLEY, Minors.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

KENNETH WADE PENLEY,

Respondent-Appellant.

No. 264782
Berrien Circuit Court
Family Division
LC No. 04-000096-NA

In the Matter of FRANK SAMUEL SICURELLO,
JR., Minor.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

FRANK SAMUEL SICURELLO, SR.,

Respondent-Appellant.

No. 264783
Berrien Circuit Court
Family Division
LC No. 04-000096-NA

Before: Borrello, P.J., and Sawyer and Fitzgerald, JJ.

PER CURIAM.

In these consolidated cases, respondents claim appeals from an order terminating their parental rights. In Docket No. 264566, respondent Dana Penley challenges the termination of her parental rights to Frank Sicurello, Jr., Kenneth Penley, II, and Cole Tristan Penley pursuant to MCL 712A.19b(3)(a)(ii), (g), and (j). In Docket No. 264782, respondent Kenneth Penley, Sr., challenges the termination of his parental rights to Kenneth Penley, II, and Cole Penley pursuant to MCL 712A.19b(3)(a)(ii), (g), and (j). In Docket No. 264783, respondent Frank Sicurello, Sr., challenges the termination of his parental rights to Frank Sicurello, Jr., pursuant to MCL 712A.19b(3)(a)(ii), (g), and (j). We affirm.

We review a trial court's decision to terminate parental rights for clear error. MCR 3.977(J); *In re Sours*, 459 Mich 624, 633; 593 NW2d 520 (1999). A finding is clearly erroneous when we are left with the firm and definite conviction that a mistake was made. *In re JK*, 468 Mich 202, 209-210; 661 NW2d 216 (2003). To be clearly erroneous, a decision must be more than maybe or probably wrong. *Sours, supra*. If the trial court determines that the petitioner has proven by clear and convincing evidence the existence of one or more statutory grounds for termination, the court must terminate parental rights unless it finds from evidence on the whole record that termination is clearly not in the child's best interests. MCL 712A.19b(5); *In re Trejo Minors*, 462 Mich 341, 353-354; 612 NW2d 407 (2000). We review the trial court's decision regarding the child's best interests for clear error. *Id.* at 356-357.

We hold that the trial court did not clearly err in finding that petitioner presented clear and convincing evidence of the existence of one or more grounds for the termination of respondent Sicurello's parental rights. The trial court did not clearly err when it found that respondent had deserted Frank, Jr., for a period of more than ninety-one days. We acknowledge that respondent's ability to contact his son was limited by his incarceration. However, Sicurello chose not to take advantage of this availability and sent Frank, Jr., only one card and letter over a

period of a year. In addition, we conclude that the trial court did not err in finding that Sicurello could not provide proper care and custody to Frank, Jr., within a reasonable time. Respondent remains incarcerated. Moreover, Sicurello has a long-term drug dependency problem for which he has never been treated. This problem has led to his inability to maintain employment. The trial court did not clearly err in finding that Sicurello would be unable to properly care for Frank, Jr., without treatment, and that this would not occur within a reasonable time. Grounds for termination were established under MCL 712A.19b(3) (a)(ii) and (g). We agree with Sicurello that the court's finding that Frank, Jr., would likely be harmed if returned to respondent was not as clearly proven. However, error, if any, concerning this factor is harmless because other grounds for termination existed. *In re Powers*, 244 Mich App 111, 118; 624 NW2d 472 (2000).

We hold that the trial court did not clearly err in finding that petitioner established by clear and convincing evidence the existence of one or more grounds for the termination of respondent Kenneth Penley's parental rights. The evidence presented at the termination hearing supports the trial court's decision that grounds for termination of parental rights were established pursuant to MCL 712A.19b(3)(g) and (j). Kenneth Penley failed to comply with the parent-agency agreement. He lacked housing and employment. He acknowledged his drug dependency problem, but failed to deal with it even during the time he was not incarcerated. When faced with a choice between substance abuse and visitation with his children, he chose substance abuse. From the evidence presented, petitioner showed that Kenneth Penley was unable to provide proper care and custody for the children. In addition, the failure to comply with a parent-agency agreement constitutes evidence that a child could face substantial risk of harm if returned to the parent's custody. MCR 3.976(E)(1). The evidence further supports that, from February 2005 until August 2005, Kenneth Penley deserted the children and did not seek custody. The failure to visit or contact a child constitutes evidence of an intent to desert the child. *In re Sterling*, 162 Mich App 328, 336; 412 NW2d 284 (1987).¹

We hold that the trial court did not clearly err by finding that petitioner established by clear and convincing evidence the existence of one or more grounds for the termination of Dana Penley's parental rights. Dana Penley failed to finish counseling, did not benefit from her parenting programs, and did not obtain stable housing or employment. In addition, like Kenneth Penley, she chose continued drug use over visitation. She failed to provide any support for her assertion that a treating physician authorized her use of prescription medications. The trial court did not clearly err in finding that Dana Penley could not become a suitable parent within a reasonable time. In addition, Dana Penley's failure to comply with the parent-agency agreement supports the trial court's finding under MCL 712A.19b(3)(j). MCR 3.976(E)(1). The evidence also supports the finding that she deserted the children for a lengthy period of time and did not seek custody during that time. *In re Sterling, supra*. Grounds for termination were clearly established pursuant to MCL 712A.19b(3)(a)(ii), (g) and (j).

¹ We note that Kenneth Penley was sentenced on September 14, 2005, to concurrent sentences of five to fifteen years in prison for second-degree home invasion and three to fifteen years in prison for forgery. His earliest release date is July 5, 2010. This factor alone justifies the court's findings under MCL 712A.19b(3)(g) and (j).

The trial court impliedly found that no evidence showed that termination of respondents' parental rights was clearly not in the children's best interests. Respondents do not provide any actual argument to the contrary, but state only that it was within the trial court's discretion to consider the best interests of the children. Respondents' arguments that the children would not be harmed if they were forced to remain in temporary custody for the foreseeable future are contradicted by their caseworker's testimony that the children were in need of stability. The evidence did not show that termination of respondents' parental rights was clearly not in the children's best interests. See MCL 712A.19b(5); *Trejo, supra* at 356-357.

Affirmed.

/s/ Stephen L. Borrello
/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald