STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of TYLER ANN HALL, Minor

TAMMY ANN KUMMER and THOMAS WILLIAM KUMMER,

Petitioners-Appellees,

v

TONY JOSEPH HALL,

Respondent-Appellant.

UNPUBLISHED
October 10, 1997

No. 200395
Oakland Juvenile Court
LC No. 96-027155-AD

Before: Markey, P.J., and Neff and Smolenski, JJ.

PER CURIAM.

Respondent appeals as of right from the juvenile court order terminating his parental rights to the minor child under § 51(6) of the Adoption Code, MCL 710.51(6); MSA 27.3178 (555.51)(6). We affirm.

Respondent argues that the juvenile court erred in finding that the requirements of § 51(6)(a) and (b) were both met. This Court reviews the juvenile court's findings of fact under the clearly erroneous standard. *In re Hill*, 221 Mich App 683, 692;562 NW2d 254 (1997).

Although respondent concedes that he did not pay any child support directly to petitioner Tammy Kummer during the two-year period preceding the filing of the petition, he claims that the court erred in finding that the requirements of § 51(6)(a) had been established because the evidence showed that funds were regularly withheld from his wages and paid to the Friend of the Court in accordance with several income withholding orders. However, the record indicates that the funds in question were used to satisfy past arrearages to ADC and Medicaid, not as child support for the two-year period preceding the filing of the petition.

Alternatively, respondent argues that the requirements of § 51(6)(a) were not established because, according to the Friend of the Court paternity records, petitioner Tammy Kummer entered into a stipulation dated February 22, 1994, "which completely abated [his] obligation to pay support"

Respondent contends that, because he was no longer under an obligation to pay support, his failure to do so cannot be deemed a violation of the statute. Respondent also argues that petitioner Tammy Kummer should be estopped from challenging his failure to provide support where she stipulated to the abatement of child support. We disagree.

First, respondent did not raise the estoppel argument below. Therefore, this issue has not been preserved for appeal. *Burgess v Clark*, 215 Mich App 542, 548; 547 NW2d 59 (1996). Second, respondent's arguments are predicated on an assumption that § 51(6)(a) may be satisfied only upon a showing of noncompliance with a support order. However, as this Court observed in *In re Hill*, *supra* at 692, subsection 6(a) addresses two different situations: (1) where a parent, when able to do so, fails or neglects to provide regular and substantial support, and (2) where a support order has been issued and the parent fails to substantially comply with it. See also *In re Colon*, 144 Mich App 805, 809-812; 377 NW2d 321 (1985). Although respondent was not required to pay child support pursuant to a support order, termination under § 51(6)(a) was still warranted upon a showing that respondent failed or neglected to provide regular and substantial support when able to do so. As noted above, the evidence demonstrated that respondent did not provide any child support during the two-year period before the filing of the petition. Additionally, respondent admitted that he had been employed since 1994, except for "a lull," and had worked consistently since 1995, thereby establishing an ability to pay support. Therefore, the juvenile court did not clearly err in finding that the requirements of § 51(6)(a) were proven by clear and convincing evidence.

Respondent next argues that the juvenile court erred in finding that the requirements of § 51(6)(b) were proven by clear and convincing evidence. Respondent does not contend that he regularly and substantially visited, contacted, or communicated with the child for a period of two years before the filing of the petition. Rather, he argues that the evidence failed to show that he had the "ability to" do these things, as required by subsection 6(b). We disagree.

Although respondent did write two letters to the Friend of the Court inquiring about visitation, he was told that he would have to obtain an attorney because there was no court order governing visitation. The record indicates that respondent never followed through in obtaining an attorney to pursue visitation, nor did he file a petition on his own requesting visitation. Additionally, while respondent claims that he was unable to visit, contact or communicate with the child because he did not know her address, the record indicates that he knew her aunt and also had mutual friends who knew where the child lived, yet never made an effort to learn of her location through these people or to obtain the child's address from the Friend of the Court. Moreover, respondent spoke to petitioner Tammy Kummer on several occasions and, according to her, he talked about their relationship but did not ask to see the child. In view of this evidence, the juvenile court did not clearly err in finding that respondent had the ability to visit, contact, or communicate with the child but failed or neglected to do so for two years or more before the filing of the petition. Cf. *In re Simon*, 171 Mich App 443, 449; 431 NW2d 71 (1988); *In re Colon*, *supra* at 813-814.

Affirmed.

/s/ Jane E. Markey
/s/ Janet T. Neff
/s/ Michael R. Smolenski