STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of ELIJAH MARCUS JURDEN,
Minor.

ELIZABETH ANN JURDEN,

Petitioner-Appellee,

v

AARON STEVENS,

Respondent-Appellant.

UNPUBLISHED
January 30, 1998

Kent Juvenile Court
No. 200751
LC No. 96-017003-AD

ELIZABETH ANN JURDEN,

Petitioner-Appellee,

v

AARON STEVENS,

Respondent-Appellant.

Kent Juvenile Court
No. 204196
LC No. 96-017003-AD

ELIJAH MARCUS JURDEN,

Appellant,

v

ELIZABETH ANN JURDEN,

Petitioner-Appellee,

v

AARON STEVENS,

Kent Juvenile Court
No. 204601
LC No. 96-017003-AD

Respondent-Appellee.

Before: Neff, P.J., and Sawyer and Murphy, JJ.

PER CURIAM.

These cases were consolidated for purposes of appeal. In Docket No. 200751, respondent appeals from the January 13, 1997, order of the juvenile court, which found that he did not fall under MCL 710.39(2); MSA 27.3178(555.39)(2), and, thus, was subject to MCL 710.39(1); MSA 27.3178(555.39)(1). We affirm.

In Docket No. 204196, respondent appeals from the May 28, 1997, opinion and order of the juvenile court, which provided that custody of the minor child would be awarded to him, subject to certain conditions. Respondent claims the conditions imposed have denied him his constitutional rights to equal protection and due process. In Docket No. 204601, the minor child claims his own appeal from the May 28, 1997, opinion and order. We affirm the award of custody but remand this matter to the juvenile court for the entry of an order consistent with this opinion.

Addressing the issues raised in Docket No. 200751, we reject respondent's claim that the filing of the notice of intent to claim paternity provided for in MCL 710.33; MSA 27.3178(555.33) of the adoption act is sufficient to satisfy the requirements set forth in MCL 710.39(2); MSA 27.3178(555.39)(2). The notice of intent merely serves as a rebuttable presumption of paternity and cannot logically satisfy the requirements of § 39(2). There is no evidence to support respondent's claim that the Legislature intended the filing of the notice of intent to be sufficient to establish the requirements of § 39(2). *Wortelboer v Benzie Co*, 212 Mich App 208, 215; 537 NW2d 603 (1995). The language of both statutes is clear and unambiguous and not susceptible to more than one interpretation. Thus, judicial construction is neither necessary nor permitted. *Lorencz v Ford Motor Co*, 439 Mich 370, 376; 483 NW2d 844 (1992).

Reasonable minds would not differ with respect to the interpretations of §§ 33 and 39. Had the Legislature intended the filing of the notice of intent to claim paternity would fulfill the obligation to establish a custodial relationship or constitute support for the child or the mother, it would have so stated in § 39(2). *Institute of Basic Life Principles, Inc v Watersmeet Twp (After Remand)*, 217 Mich App 7, 12; 551 NW2d 199 (1996). It is not a reasonable construction of either statute to find that the filing of the intent form is sufficient to constitute support for the mother or child. *Marquis v Hartford Accident & Indemnity*, 444 Mich 638, 644; 513 NW2d 799 (1994).

Next, respondent claims the facts of the case do not support the juvenile court's finding that he failed to provide reasonable support under the holding of *In re Gaipa*, 219 Mich App 80, 86; 555 NW2d 867 (1996). We disagree. There was no evidence to dispute the finding that respondent failed to provide support or care for the mother during her pregnancy or for the mother or child after the child's birth during the 90 days before notice of the hearing was served upon him. MCL 710.39(2); MSA 27.3178(555.39)(2). The findings of fact by the juvenile court were not clearly erroneous. MCR 2.613(C).

The factors set forth in *Gaipa* address whether the "quantum" of support provided by the putative father was "reasonable under the circumstances." *Id*., 84, 86. An analysis of reasonableness is required only if there has been "some contribution." The juvenile court did not clearly err when it found respondent did not satisfy the requirements of § 39(2).

Next, respondent claims that the adoption act's provision that a putative father's parental rights could be terminated pursuant to § 39(1), even after he has filed the notice of intent to claim paternity pursuant to § 33 of the act, amounts to a denial of his constitutional rights to equal protection and due process. We disagree. Respondent's constitutional rights are protected under the adoption act. *In re Blankenship*, 165 Mich App 706, 711-712; 418 NW2d 919 (1988); *In re Kozak*, 92 Mich App 579, 581-582; 285 NW2d 378 (1979); MCL 710.29(5); MSA 27.3178(555.29)(5).

In Docket No. 204601, the minor child raises several issues. First, he claims that he was denied the effective assistance of counsel because his counsel failed to list or call as witnesses the prospective adoptive parents. We disagree. Our review is limited to the existing record because the minor child did not raise this issue by a motion for a new trial or an evidentiary hearing. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995). The record shows that the prospective adoptive parents exercised their right to remain anonymous. It would have been a futile act to list them as witnesses. *People v Rodriguez*, 212 Mich App 351, 356; 538 NW2d 42 (1995). The record reveals that the minor child was not denied the effective assistance of counsel. *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994); *People v Bass*, 223 Mich App 241, 252; 565 NW2d 897 (1997).

Next, the juvenile court did not abuse its discretion in refusing to admit the preplacement assessment into evidence pursuant to MRE 803(24). *People v Sawyer*, 222 Mich App 1, 5; 564 NW2d 62 (1997); *People v McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994). The case upon which the minor child relies, *Schmitz v Schmitz*, 351 NW2d 143, 145 (SD 1984), is factually distinguishable.

Further, the juvenile court did not abuse its discretion in not qualifying Sandra Recker as an expert witness. *Bahr v Harper-Grace Hospitals*, 448 Mich 135, 141; 528 NW2d 170 (1995); *Phillips v Deihm*, 213 Mich App 389, 401; 541 NW2d 566 (1995).

Finally, the minor child contends the juvenile court clearly erred in finding it was in his best interests that his father be awarded custody rather than the prospective adoptive parents. We disagree. There was sufficient evidence to support the findings of the juvenile court. This Court is not left with a definite and firm conviction that a mistake has been committed. *Townsend v Brown Corp*, 206 Mich App 257, 263; 521 NW2d 16 (1994).

Accordingly, we find no clear error or abuse of discretion which requires reversal of the juvenile court's decision to award custody to respondent. However, we find it necessary to remand this matter to the juvenile court for issuance of an order requiring custody of the minor child be transferred to respondent immediately.

In Docket No. 204196, respondent claims the juvenile court erred in failing to order immediate placement once the court determined it would be in the minor child's best interests to be placed in respondent's custody. The juvenile court placed two conditions on placement with respondent. First, the court conditioned placement with respondent "upon the release of the parental rights of the mother." According to respondent and the representations in the mother's brief to this Court, she has refused to execute the release of her parental rights. Second, the court conditioned placement with respondent on the formulation of a transition plan, following an assessment which included all parties. The assessment and the plan were to be prepared by the Infant and Toddler Development Services Department of Arbor Circle.

Respondent claims the minor child was removed from the home of the prospective adoptive parents and placed with Catholic Social Services following the issuance of the order. Respondent further claims that (1) he has been denied any visitation with the minor child while the agency has permitted the mother to have liberal visitation, and (2) the assessment and the transition plan have not been completed.

This Court finds that the juvenile court did not err in placing the conditions in its order when it awarded custody of the minor child to respondent. Clearly, the juvenile court placed the conditions in its order with the best intentions so as to effectuate a smooth transfer of the minor child from the prospective adoptive parents to respondent and his family.

First, the juvenile court could certainly assume from the mother's prior actions in placing the minor child in a prospective adoptive home immediately after his birth and in filing her intent to give up her parental rights, that she would release her parental rights to the minor child upon the entry of the court's order. In fact, it is likely the court considered the release to be a mere formality. The record reflects that the mother did not sign the release.

The juvenile court found it was in the best interests of the minor child that custody be given to his father. It was certainly not the intent of the juvenile court that the minor child be placed with a third party for months, simply because the mother has not signed a release.

Accordingly, this Court remands this matter to the juvenile court. The juvenile court is instructed to enter an order which will place the child with the father. This is to be accomplished within thirty days unless the court finds good cause to do otherwise.

In Docket No. 200751, we affirm the juvenile court's order of January 13, 1997. In Docket Nos. 204196 and 204601, we affirm the order of May 28, 1997, but remand this matter to the juvenile court for proceedings consistent with this opinion.

/s/ Janet T. Neff
/s/ David H. Sawyer
/s/ William B. Murphy