STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of ADRIENNE POHL, Minor

LINDA WHEATON, f/k/a LINDA POHL,

Petitioner-Appellee,

v

DAVID POHL,

Respondent-Appellant.

UNPUBLISHED
October 9, 1998

No. 203595
Washtenaw Juvenile Court
LC No. 94-022100 NA

Before: Gage, P.J., and Kelly and Hoekstra, JJ.

PER CURIAM.

Petitioner, Linda Wheaton, filed a petition to terminate the parental rights of respondent, her former husband, to their minor child under § 51(6) of the Adoption Code, MCL 710.51(6); MSA 27.3178(555.51)(6). While that petition was pending, the attorney for the minor child filed a separate petition to terminate respondent's parental rights under §§ 19b(f) and (h) of the Juvenile Code, MCL 712A.19b(3)(f) and (h); MSA 27.3178(598.19b)(3)(f) and (h). Following a hearing, the juvenile court terminated respondent's parental rights under both § 51(6) of the Adoption Code and § 19b(3)(h) of the Juvenile Code. Respondent now appeals as of right. We affirm.

Respondent first challenges the juvenile court's decision to terminate his parental rights under the Adoption Code. The petitioner in an adoption proceeding is required to prove by clear and convincing evidence that termination of parental rights is warranted. This Court reviews the trial court's findings of fact under the clearly erroneous standard. A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made. *In re Hill*, 221 Mich App 683, 691-692; 562 NW2d 254 (1997).

Relying on *In re Halbert*, 217 Mich App 607; 552 NW2d 528 (1996), respondent first contends that termination of his parental rights was precluded under § 51(6) as a matter of law because he was incarcerated for the two years preceding the filing of the petition. We disagree.

The decision in *Halbert* was overruled by a special panel convened under MCR 7.215(H)(3) in *In re Caldwell*, 228 Mich App 116; ___ NW2d ___ (1998). The special panel in *Caldwell* rejected *Halbert's* conclusion that § 51(6) is inapplicable to an incarcerated parent, holding instead that "no incarcerated parent exception exists" under § 51(6). *Caldwell*, *supra* at 120-121. Thus, the juvenile court could properly terminate respondent's rights under § 51(6), notwithstanding his incarceration.

Next, respondent argues that the juvenile court erred in finding that he failed to provide regular and substantial support for a period of two years or more before the filing of the petition while having the ability to do so. MCL 710.51(6)(a); MSA 27.3178(555.51)(6)(a). We conclude that the juvenile court's findings on this issue are not clearly erroneous. *In re Hill, supra*. Evidence was presented that respondent was able to work and earn money while in prison. In addition, he regularly received money from his own family. Although he was not required to support his child by court order while incarcerated, he had the financial ability to provide some type of financial support for his child, but made no effort to assist petitioner with the financial responsibilities for the child's care. Moreover, even before he was incarcerated, respondent failed to provide regular support for the child. Although respondent did occasionally send gifts, the gifts did not amount to "regular and substantial support" under § 51(6)(a).

Respondent also challenges the juvenile court's findings regarding his failure to regularly and substantially visit, contact, or communicate with his child for two years or more before the filing of the petition. MCL 710.51(6)(b); MSA 27.3178(555.51)(6)(b). Respondent claims that he was prevented from maintaining contact with his child under the terms of the parties' 1991 divorce judgment, which barred him from visiting the child until further order of the court. Respondent contends that reversal of the juvenile court's decision on this issue is required by this Court's decision in *In re Kaiser*, 222 Mich App 619; 564 NW2d 174 (1997). We disagree.

In *Kaiser*, following allegations of sexual abuse, the circuit court entered an order barring respondent from visiting with her children until the court received a report from a therapist or counselor favoring reinstatement of visitation. This Court reversed the juvenile court's termination of parental rights under § 51(6), concluding that there was no evidentiary support for that court's determination that the respondent was able to contact her children if she simply submitted to a psychological evaluation. *Kaiser*, *supra* at 624. This Court further noted that the respondent was being cooperative in attending and participating in visitation counseling, and it was unclear whether the circuit court ever received a favorable report indicating that the respondent could resume visiting the children. *Id.*

This case is factually distinguishable from *Kaiser*. Here, respondent was convicted of various criminal offenses directed at his family, which called into question his ability to place his child's interests above his own interests and provide a safe environment for his child. It was respondent's own voluntary criminal behavior that necessitated the ban on visitation. Unlike *Kaiser*, where reinstatement of visitation was in part dependent on a favorable opinion from a third-party therapist, here respondent had the power himself to seek restoration of visitation rights upon conforming his conduct to the requirements of the law, but neglected to do so. Furthermore, respondent had other options within his control to obtain visitation, but he did not pursue them. Although he maintained that the circuit court

was biased against him and unfairly denied him visitation, he never sought an appeal of any of the circuit court orders. Respondent also delayed in requesting that the visitation ban be changed. In sum, respondent did not do everything reasonable within his powers to maintain regular and substantial contact with his child. We believe that this case is more analogous to *In re Simon*, 171 Mich App 443, 449; 431 NW2d 71 (1988), a case in which this Court similarly held that termination was not improper under § 51(6), notwithstanding a court order barring visitation, where the respondent did not take reasonable steps to request visitation.

Finally, respondent's limited contact with his daughter through cards, letters and gifts, mostly on special occasions, did not amount to "regular and substantial" contact under § 51(6)(b). *In re Kaiser, supra* at 624.

Accordingly, on the facts of this case, we conclude that the juvenile court did not clearly err in finding that termination of respondent's parental rights was warranted under § 51(6) of the Adoption Code.

Finally, respondent challenges the juvenile court's decision to terminate parental rights under § 19b(3)(h) of the Juvenile Code, MCL 712A.19b(3)(h); MSA 27.3178(598.19b)(3)(h). Parental rights may be terminated under § 19b(3)(h) when: (1) the parent's incarceration will deprive a child of a normal home for a period of two years or more; (2) the parent has not provided for the child's care and custody; and (3) there is no reasonable expectation that the parent will be able to provide proper care and custody of the child within a reasonable time considering the child's age.

The petitioner bears the burden of proving a statutory ground for termination by clear and convincing evidence. Once that burden is met, the respondent has the burden of coming forward with evidence that termination is clearly not in the child's best interests. MCL 712A.19b(5); MSA 27.3178(598.19b)(5); *In re Hall-Smith*, 222 Mich App 470, 471-473; 564 NW2d 156 (1997). Absent any evidence that termination is clearly not in the child's best interests, termination of parental rights is mandatory. *Id.* The trial court's decision regarding termination is reviewed in its entirety for clear error. *In re Hamlet (After Remand)*, 225 Mich App 505, 515; 571 NW2d 750 (1997).

Respondent contends that the juvenile court erred by considering his past incarceration, rather than determining whether incarceration would deprive his child of a normal home for two years into the future. See *In re Perry*, 193 Mich App 648, 650; 484 NW2d 768 (1992); *In re Neal*, 163 Mich App 522, 527; 414 NW2d 916 (1987). We find no merit to this claim.

The record indicates that, for purposes of determining the requisite two-year period, the juvenile court did not count respondent's past incarceration, but only counted from the time the petition was filed. The evidence indicated that respondent's earliest release date from prison was sixteen days short of two years from the date that the petition was filed. Even if respondent were released on that date, the juvenile court found that there was no reasonable expectation that he would be able to establish a normal life for his child within the requisite two-year period, given his past inability to care for the child and the numerous problems that were still present. The juvenile court's determination is not clearly erroneous.

Affirmed.

/s/ Hilda R. Gage
/s/ Michael J. Kelly
/s/ Joel P. Hoekstra