STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of ALEXANDER FRANCIS MAYA, Minor.

JENNIFER IRENE PILGRIM,

Petitioner-Appellee,

v

MARCOS ALVIN MAYA,

Respondent-Appellant.

UNPUBLISHED
February 4, 2000

No. 219093
Lapeer Circuit Court
Family Division
LC No. 00-002577

Before: Cavanagh, P.J., and White and Talbot, JJ.

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PER CURIAM.

Respondent appeals as of right from the family 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).[1] We affirm.

Respondent contends that the evidence was insufficient to terminate his parental rights. A petitioner in an adoption proceeding must prove by clear and convincing evidence that termination of parental rights is warranted. *In re Hill*, 221 Mich App 683, 691; 562 NW2d 254 (1997). This Court reviews the family court's findings of fact under the clearly erroneous standard. *Id.* at 691-692. A finding is clearly erroneous if, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake was made. *Id.* at 692.

With regard to the issue of support, respondent argues that the family court erred in finding that he failed to comply with the child support order because it had been held in abeyance. Although child support was held in abeyance, the order of filiation entered in September 1996 required respondent to contact the Friend of the Court after his release from incarceration so that child support could be determined and to pay court costs and fees. Because defendant failed to do so, the family court

correctly found that respondent failed to substantially comply with the support order. See *In re Kaiser*, 222 Mich App 619, 621; 564 NW2d 174 (1997).

Respondent also argues that petitioner failed to prove by clear and convincing evidence that he had the ability to support or assist in supporting the child and failed or neglected to provide regular and substantial support for the child. With regard to the interpretation of § 51(6), this Court observed:

> In [*In re*] *Colon* [, 144 Mich App 805, 809-812; 377 NW2d 321 (1985)], this Court held that subsection 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. A parent who seeks to terminate the parental rights of the other parent, against whom there is already a support order, need prove only a substantial failure to comply with the support order for two years before the filing of the petition. The petitioning parent is not additionally required to prove the other parent's ability to comply with the support order because the ability to pay has already been factored into the order. [*In re Hill*, *supra* at 692.]

Because a support order was issued and respondent failed to substantially comply with it, petitioner was not additionally required to prove respondent's ability to comply with the support order. Nevertheless, a review of the record persuades us that there was clear and convincing evidence that respondent had the ability to support or assist in supporting the child and failed or neglected to provide regular and substantial support for the child.

At the hearing, respondent testified that he gave gifts to the child and gave money to petitioner when he was working and that his incarceration for most of the relevant time period hindered his ability to support the child. Even assuming the veracity of respondent's testimony, such support would not satisfy the statute because it was not regular and substantial. The family court found that respondent was employed when he was not incarcerated in early 1997 and mid-1998 and that respondent's payment of $100 to petitioner and purchase of clothing for the child on one occasion did not constitute regular and substantial support under § 51(6). The court further found that the child had been supported by petitioner and her family during the relevant time period. With respect to the issue of respondent's incarceration, this Court has held that there is no incarcerated parent exception under the statute and that an incarcerated parent may still retain the ability to comply with the support and contact requirements of § 51(6). *In re Caldwell*, 228 Mich App 116, 121; 576 NW2d 724 (1998). Therefore, we hold that § 51(6)(a) was satisfied under the circumstances of this case.

Respondent next argues that petitioner failed to prove by clear and convincing evidence that he regularly and substantially failed or neglected to visit, contact, or communicate with the child. We disagree.

While the evidence did establish that respondent had contact with the child from January to March 1997 at petitioner's mother's house while he lived there and that there was some limited contact thereafter, there was conflicting testimony regarding the extent of respondent's contact with the child

during other relevant periods. Respondent testified that, while he was in the Oakland County Jail and boot camp from May 1996 to January 1997, he wrote about fifteen letters to the child, that petitioner brought the child to visit at the jail every two to three weeks, and that he called petitioner every other day and spoke with the child until the calls became too expensive. The trial court, however, did not give credence to respondent's testimony and, instead, chose to believe petitioner and her mother, who testified that petitioner did not bring the child to the Oakland County Jail, that respondent did not ask to see the child while he was in jail, that respondent did not call petitioner or write any letters to the child from jail, and that petitioner's mother received one letter from respondent while he was in jail. In considering the family court's findings, due regard must be given to the special opportunity of the family court to judge the credibility of the witnesses who appeared before it. MCR 2.613(C); *In re Martyn*, 161 Mich App 474, 481-482; 441 NW2d 743 (1987). Based on the record before us, we cannot conclude that the trial court erred in its credibility finding or in its determination that § 51(6)(b) had been satisfied.

Respondent next argues that the family court erred in excluding evidence regarding what he did for, and with, the child prior to the statutory period. This Court reviews the family court's evidentiary decisions for an abuse of discretion. *In re Caldwell*, *supra* at 123. However, we will not reverse on the basis of an evidentiary error unless the court's ruling affected a party's substantial rights. *Id.*, citing MCR 2.613(A) and MRE 103(a). Any error here did not affect respondent's substantial rights because he was able to present evidence that he and petitioner lived together as boyfriend and girlfriend, that he was at the hospital when the child was born in May 1994, and that he helped raise the child during the first years of the child's life.

Respondent next contends that the family court erred in ruling that the applicable two-year statutory period ended with the filing of the petition for stepparent adoption on October 6, 1998, rather that with the filing of the supplemental petition and affidavit to terminate parental rights on January 4, 1999. Had the family court measured the statutory period from the filing of the supplemental petition, it would not have considered four months which it did consider and would have considered four months which it did not consider. See *In re Halbert*, *supra* at 612 (the applicable two-year statutory period "commence[s] on the filing date of the petition and extend[s] backwards from the date for a period of two years or more"). However, defendant neither objected to the alleged error nor made an offer of proof concerning the period which the family court did not consider. MRE 103(a)(2). Accordingly, even if we were to assume that the family court erred, we are left without a record to determine whether the claimed error affected respondent's substantial rights. *In re Caldwell*, *supra* at 123.

Finally, respondent argues that termination of his parental rights was not mandatory under § 51(6). He contends that termination was inappropriate because he loved the child, he was a loving and caring father, he was the best father he could have been in light of his circumstances, his contact with and support of the child were as much as he could offer, and it is in the best interests of the child to continue the relationship.

Section 51(6) states that the family court *may* issue an order terminating the rights of the parent if the requirements of subsections (a) and (b) are both met. Thus, the statute is permissive and not mandatory, *Jordan v Jarvis*, 200 Mich App 445, 451; 505 NW2d 279 (1993), and the family court

may consider the best interests of the child in deciding whether to grant a petition to terminate the noncustodial parent's rights. *In re Hill*, *supra* at 696.

Here, the record reveals that the family court was aware of its discretion to terminate respondent's parental rights and appropriately exercised its discretion in doing so. Indeed, respondent acknowledged that the amount of time and support he had given the child in the two years before the hearing was not appropriate. While petitioner did admit that respondent was a loving and caring father, she did not trust respondent to be a stable and good influence on the child because he had been in and out of jail. Moreover, the family court noted that the child could not know respondent considering the lack of contact they had during the past two years, that it was respondent's choice to limit his contact with the child, and that he had forfeited his rights. Under the circumstances, family court did not abuse its discretion in terminating respondent's parental rights under § 51(6).

Affirmed.

/s/ Mark J. Cavanagh
/s/ Helene N. White
/s/ Michael J. Talbot

[1] MCL 710.51(6); MSA 27.3178(555.51)(6) provides:

> (6) If the parents of a child are divorced, or if the parents are unmarried but the father has acknowledged paternity or is a putative father who meets the conditions in [MCL 710.39(2); MSA 27.3178(555.39)(2)], and if the parent having legal custody of the child subsequently marries and that parent's spouse petitions to adopt the child, the court upon notice and hearing may issue an order terminating the rights of the other parent if both of the following occur:
>
> (a) The other parent, having the ability to support, or assist in supporting, the child, has failed or neglected to provide regular and substantial support for the child or if a support order has been entered, has failed to substantially comply with the order, for a period of 2 years or more before the filing of the petition.
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> (b) The other parent, having the ability to visit, contact, or communicate with the child, has regularly and substantially failed or neglected to do so for a period of 2 years or more before the filing of the petition.