

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of FBP, Minor.

ANGELA SUE JEROME and NEWTON
WILBUR JEROME, JR.,

UNPUBLISHED
June 12, 2001

Petitioners-Appellees,

v

JOHN JOSEPH POOLE, SR.,

Respondent-Appellant.

No. 230008
Midland Circuit Court
Family Division
LC No. 00-007650-AD

Before: Hood, P.J., and Whitbeck and Meter, JJ.

PER CURIAM.

Respondent John Poole, Sr., appeals as of right the family court's order terminating his parental rights pursuant to the adoption code.¹ We affirm.

I. Basic Facts And Procedural History

Petitioner Angela Jerome and Poole divorced in 1994, at which time Jerome retained physical custody of their minor daughter, FBP. There is no debate that Poole was a good father to FBP during the next several years, visiting her every weekend and paying child support. However, Poole stopped paying child support in February 1998 and, in May of that year, he was incarcerated for committing criminal sexual conduct against a minor.

During the next two years Poole had no actual contact with his daughter at all.² Nor did he contribute to her financial support. However, the efforts he made to maintain contact during this time and Jerome's attempts to thwart that contact are in dispute. For instance, Poole said that he relied on other members of his family to call Jerome and FBP, but because Jerome, her

¹ MCL 710.51(6).

² Whether this distance was pursuant to a court order in his criminal case is not clear from the record submitted in this appeal.

new husband, and FBP had moved at least three times without notifying him of their new addresses, neither he nor his relatives could contact FBP and Jerome.

When Poole was released briefly in September 1998, he went to last place he knew FBP and Jerome were living for a scheduled visit, only to find the house empty. Upset, he called the police and asked for assistance in locating Jerome. According to Poole, Jerome refused to allow him to visit FBP that day, indicating that he would never see FBP again. A police report concerning the incident corroborated his claim that Jerome refused to give Poole any information regarding her whereabouts. Though Poole consulted an attorney regarding his visitation rights, he did not seek assistance in locating FBP and Jerome from the Friend of the Court, though he made a preliminary inquiry over the telephone. Nor did he ask the family court to enforce the visitation order in place.

Poole called Jerome's parents twice in October 1998, but they refused to speak with him. Grace Thrasher, Poole's mother, had similarly cool interactions with Jerome's parents, who not only refused to talk to her when she called, but told her it was none of her "damn business" when she inquired about FBP in August 1999 when they saw each other at a grocery market.

Poole was reincarcerated in November 1998. Poole said that, with his mother's assistance, he sent FBP a birthday gift around that time by registered mail. Though he did not know whether she received the gift, it was not returned to him. He said that he wrote to FBP's godmother in an attempt to contact FBP, but he never received a response.

Jerome and her new husband, Newton Wilbur Jerome, Jr., filed the petition to terminate Poole's parental rights in August 2000, approximately thirty months after Poole made his last child support payment. At the hearing conducted in this case, Poole acknowledged that he did not pay any support for FBP during this time. He noted that he had no income or assets while in prison and had to rely on his family for money. Suggesting that he would have sent her some of this money, he commented that he did not have a valid address for his daughter until he was served with notice of the termination proceedings. Poole made clear that he had not intended to stop visiting or communicating with FBP and that he had every intention of supporting her as soon as he got a job.³ He also emphasized that there have never been any allegations that he was a bad father. Nevertheless, he conceded that he had "no excuse" for failing to pay support from September through November 1998, while he was working.

From the family court's perspective, Poole was a "nice" man and deserved some measure of sympathy. However, the most significant factor to the family court was Poole's failure to support FBP, even when he was able to do so. The family court thought it clear that Jerome did not want Poole to see FBP, but it was common knowledge that the Friend of the Court was available to give assistance in visitation matters and Poole had failed to follow through with the Friend of the Court. Consequently, having found the requisite lack of support and contact for the

³ Poole was scheduled to be released from prison in April 2001. We are unable to determine whether that actually occurred.

statutory two-year period and relying on *In re Caldwell*,⁴ the family court terminated Poole's parental rights to FBP, thereby allowing Jerome's new husband to adopt FBP.

On appeal, Poole challenges the family court's factual findings as well as its decision to apply MCL 710.51(6) and related case law.

II. Stepparent Adoption

A. Standard Of Review

Whether certain published opinions and MCL 710.51(6) apply to Poole involves questions of law, meriting review de novo.⁵

B. *Halbert and Caldwell*

MCL 710.51(6) provides:

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 section 39(2) of this chapter, 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.

(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.

Poole argues, however, that the family court improperly applied this statute to this case when it does not apply to him because he was incarcerated for the two years in which he neither supported nor communicated with FBP and Jerome opposed his contact with FBP. This is, essentially, an impossibility argument in which Poole claims that he had no capacity to support FBP because he was in prison and he had no ability to keep in contact with FBP because Jerome moved numerous times and was uncooperative.

⁴ *In re Caldwell*, 228 Mich App 116; 576 NW2d 724 (1998).

⁵ See *In re RFF*, 242 Mich App 188, 195; 617 NW2d 745 (2000).

In large part, Poole's argument stems from *In re Halbert*,⁶ an opinion in which this Court interpreted the statute at issue in this case, holding:

The primary purpose of MCL 710.51(6); MSA 27.3178(555.51)(6) is to allow a stepparent who provides the material and emotional support to a child that would be expected of the child's legal parent to adopt the child of a noncustodial parent who has essentially abandoned the child and who has refused to, or is unavailable to, consent to the adoption. This purpose may be effectuated only where the noncustodial parent is situated in circumstances whereby that parent can earn a living and acquire the wherewithal to support a child, where the noncustodial parent has ignored or abandoned the natural obligations owed a child by a parent, and where the noncustodial parent has refused, or intentionally has become unavailable, to consent to the adoption. *Respondent's lengthy incarceration before the filing of the petitions for termination of his parental rights and for adoption – and, hence, his inability to earn a living and acquire the wherewithal to provide support for [his child] – take respondent outside the intended scope of MCL 710.51(6); MSA 27.3178(555.51)(6).*^[7]

If *Halbert* applies to this case, then the family court clearly erred in terminating Poole's parental rights. However, as Jerome and the family court both acknowledged, this Court's special opinion in *Caldwell*⁸ "rejected *Halbert*'s conclusion regarding the application of MCL 710.51(6); MSA 27.3178(555.51)(6) because the statute does not contain an 'incarcerated parent' exception." Thus, not only is *Halbert*, the legal basis for Poole's primary argument, no longer good law, the family court also correctly applied the plain language of MCL 710.51(6) to this case.

III. Findings

A. Standard Of Review

We review for clear error the family court's findings on the statutory basis for terminating Poole's parental rights to FBP.⁹

B. Support And Communication

The plain language of MCL 710.51(6) requires a petitioner seeking termination of a noncustodial parent's parental rights to prove that the noncustodial parent: (a) either failed to provide "regular and substantial support" for the child or failed to comply "substantially" with a child support order,¹⁰ and (b) "regularly and substantially failed or neglected" to "to visit,

⁶ *In re Halbert*, 217 Mich App 607; 552 NW2d 528 (1996).

⁷ *Id.* at 615-616 (emphasis added and citation omitted).

⁸ *Caldwell*, *supra* at 120-121.

⁹ *In re Simon*, 171 Mich App 443, 448; 431 NW2d 71 (1988).

¹⁰ See *In re Hill*, 221 Mich App 683, 693; 562 NW2d 254 (1997).

contact, or communicate with the child”¹¹ for the statutory two-year period, or longer, when the parent had the ability to comply with both requirements.

Poole first contends that there was no clear and convincing evidence that he had the ability to pay support while incarcerated and, therefore, the family court erred in finding clear and convincing evidence of the first requirement. However, Poole was not incarcerated between February and May 1998 and he worked for almost three months, starting in September 1998, all of which suggests that he had the ability to support FBP, at least for part of the two years preceding when Jerome filed the petition. Furthermore, “[o]nly in cases in which there is no support order in place is an inquiry into ability to pay necessary or even allowed.”¹² There is no dispute that Poole was under court order to pay child support for FBP. Consequently, the family court did not err in concluding that there was clear and convincing evidence that Jerome had met her burden of proof under MCL 710.51(6)(a).

With respect to the family court’s conclusion that there was clear and convincing evidence that Poole had not visited, contacted, or communicated with FBP, Poole contends that he was unable to do so because of Jerome’s efforts to keep him away from FBP. In resolving this issue, we must defer to the family court’s assessment of witness credibility,¹³ which ultimately favors affirming in this case. Jerome and Poole provided conflicting testimony on whether she attempted to keep Poole away from FBP. The family court acknowledged Jerome’s attempts to keep Poole from FBP. Nevertheless, the family noted the evidence that indicated that Poole had not exhausted every reasonable avenue he had to visit, contact, or communicate with FBP. For instance, Poole’s testimony indicated that he was aware that the Friend of the Court might be able to help him with visitation, but he never followed through with requesting assistance because he was working.¹⁴ Nor did he seek enforcement of the visitation order even though he had contacted an attorney. As a result, though this may have been a particularly difficult factual matter to resolve, we cannot conclude that the family court clearly erred when it found that there was clear and convincing evidence that Jerome had met her burden of proof under MCL 710.51(6)(b).

Poole argues that equitable principles bar Jerome from relying on MCL 710.51(6) to petition the family court to terminate his parental rights because of her efforts to keep FBP away from him. We disagree. The plain language of the statute does not impose prerequisite standards of conduct for a custodial parent who petitions for termination of the noncustodial parent’s parental rights. In other words, though a child support or visitation order may require a custodial parent to cooperate with the noncustodial parent in matters affecting the child, nothing in MCL 710.51 requires custodial parents to facilitate the noncustodial parent’s support and visitation efforts or to abstain from conduct that may affect support and visitation. Nor has Poole provided

¹¹ See *In re Meredith*, 162 Mich App 19, 23; 412 NW2d 229 (1987).

¹² *In re Newton*, 238 Mich App 486, 492; 606 NW2d 34 (1999).

¹³ MCR 5.974(I).

¹⁴ See *Simon*, *supra* at 449 (respondent-father could have contacted the Friend of the Court, but did not do so, was factor supporting termination of parental rights).

any authority for the proposition that equitable considerations, including the clean hands doctrine¹⁵ to which he refers, can modify the language or meaning of an unambiguous statute. We are bound to apply this statute as written, which is a point this Court made abundantly clear in *Caldwell*.¹⁶

Affirmed.

/s/ Harold Hood
/s/ William C. Whitbeck
/s/ Patrick M. Meter

¹⁵ See *Stachnik v Winkel*, 394 Mich 375, 382-383; 230 NW2d 529 (1975).

¹⁶ See *Caldwell*, *supra* at 120-121 (criticizing *Halbert*, *supra* for reading an exception for incarcerated parents into MCL 710.51[6] when the plain language of the statute did not provide such an exception).