STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of TRA, Minor.

ANGELA JO GODELL,

Petitioner-Appellee,

v

RONALD PAUL AXLINE,

Respondent-Appellant.

UNPUBLISHED
September 13, 2002

No. 240958
Missaukee Circuit Court
Family Division
LC No. 01-005189-AY

In the Matter of TKA, Minor.

ANGELA JO GODELL,

Petitioner-Appellee,

v

RONALD PAUL AXLINE,

Respondent-Appellant.

No. 240959
Missaukee Circuit Court
Family Division
LC No. 01-005190-AY

Before: Whitbeck, C.J., and Sawyer and Kelly, JJ.

PER CURIAM.

In these consolidated cases, respondent Ronald Axline appeals as of right from family court orders terminating his parental rights to the minor children pursuant to MCL 710.51(6). We affirm.

I. Basic Facts And Procedural History

Axline and Angela Godell were married and had two children, TKA and TRA. When the couple divorced in November 1999, Godell was awarded legal and physical custody of the children. Axline was ordered to pay $56 per week in support beginning November 10, 1999.

Godell remarried in July 2000. The following year, Godell and her new husband filed petitions to terminate Axline's parental rights so Godell could adopt the children.

At a hearing in March 2002, Darla Dennis, an employee of the Wexford County friend of the court (FOC) office, testified that Axline owed $11,845.97 in unpaid child support, court costs, and fees. Dennis stated that the family court had issued a temporary support order on January 13, 1999, requiring Axline to pay $85 a week in support. Child support was reduced to $56 a week in the final judgment. Axline made his first support payment on July 5, 2000, in the amount of $56. Axline did not make another payment until October 24, 2000, and that was pursuant to an order withholding his income. Thereafter, Godell received three support payments in November 2000, four payments in February 2001, and one in March 2001. Those payments were between $68 and $74 each. In May 2001, Godell received $31 "by tax offset." That was the last payment. Dennis did not know if Axline had ever contacted the FOC regarding his support payments.

James Carmody, a custody and parenting time review investigator for the Wexford County FOC office, testified that Axline had written five letters "regarding the issue of contact with his children." In the first, dated October 23, 2000, Axline said "he's not been able or allowed to see the children" and asked for the FOC's assistance. Carmody then wrote to Godell reminding her that she was to comply with the judgment of divorce, which granted Axline reasonable parenting time. That was the end of the matter.

In the second letter, dated June 20, 2001, Axline admitted that he was not in a position to see the children, but complained that he was not being allowed to talk to the children by telephone. Because the FOC could only enforce court orders, it responded "that since phone contact was not part of the court order, there was very little" it could do.

In the third letter, dated October 31, 2001, Axline informed the FOC that he was in jail. He made a proposal regarding his support payments once he was released. He again complained that he had not been able to talk to the children by telephone. Before the FOC could reply, Axline sent another letter, dated November 7, 2001, complaining "that letters and phone calls to the children are not allowed." The FOC wrote back on November 8, 2001. The FOC again advised him that it could not do much about the lack of telephone contact because the court had not ordered it. If, when released from jail, Axline still had trouble arranging parenting time, the FOC said he could request mediation.

In the last letter, dated November 20, 2001, Axline complained that Godell was not giving the children the letters he sent them. Carmody responded that, because the judgment did not expressly provide that he could write to the children, there was little the FOC could do. Again, he stated that if Axline had difficulty obtaining parenting time after he was released from jail, he should contact the FOC. Carmody said that was the last contact from Axline. To his knowledge, Axline had never filed a motion regarding parenting time.

Godell testified that after she and Axline divorced, Axline visited the children every other weekend. After a couple months, he stopped visiting regularly because "[h]e was in jail and out of jail . . . or in rehab or wherever so many times . . . ." Godell said Axline had last seen the children a couple years earlier. She did not recall the exact date, but guessed it was in June 2000. At that time, Axline was driving somewhere with the children and was arrested for driving with a

suspended license. He and the children were taken to jail; the children "stayed with him until somebody came to bail him out of jail one more time, obviously, and were very scared." Since that time, Axline had never visited the children. "He has called and sent letters once every five or six months, maybe six times in the last year they've received a letter or a call from him." At most, Axline had called or written eight times "in the last two years, probably." Godell said that half the calls were collect calls "from whichever county jail or wherever." Axline could not always talk to the children because "they weren't home. They don't sit around and wait for him to call." He had talked to them "approximately two times." Godell said she had never denied Axline the opportunity to talk to the children when the call was not made collect.

Godell stated that Axline had sent approximately eight letters to the children in the last two years; two were sent since she filed the termination petition in November 2001. She had given the letters to the children and allowed them to decide whether to respond. According to Godell, the children "have chosen not to write back to him." She guessed that was why Axline complained to the FOC that there was a problem with contact. Godell stated that all the letters had come from a jail; Axline never wrote when he was free. He had never sent the children presents or cards for their birthdays or Christmas since the judgment of divorce was entered. Godell added that she had not received any child support payments from Axline apart from those Dennis described. Nor had she received any clothes or other items for the children.

Axline conceded that he had been in jail several times. Apparently he was arrested for breaking and entering and was in jail two days in January 1999. He was convicted of attempted receiving and concealing stolen property and sentenced to probation. He violated probation and spent sixty-one days in jail, from April 26, 1999, to June 25, 1999. He spent one day in jail on August 21, 1999, for driving on a suspended license. He denied that he was in jail on May 17, 2000, and again on October 8-10, 2000. He admitted serving forty-six days in jail and ninety in rehab sometime in 2001, but denied that the jail time was served April 6 to May 21, 2001. He also denied being jailed from October 27 to November 21, 2001.

According to Axline, sometime in 1999, he was sentenced to six months in jail and ordered to pay $13,700 in restitution. He served three months, "went to the T-house" for a month, and then was home on tether for a month. Sometime in 2000, he was sentenced to six months in jail in Traverse City. He was released after five months. In April 2001, he served approximately forty-five days in jail and then spent ninety days in Project Rehab. He got out of Project Rehab in August or September and was jailed in October 2001 for a probation violation. He was then sent to prison in November 2001 and had been there ever since. He had an early release date of September 2002.

Axline agreed that he was behind in his child support payments. He apparently lacked regular work when he was not in jail. He had a job for a while, which allowed him to make the few support payments. He said, "I believe I'm wrong for being behind on the support, yeah. But I'm willing to make it up." He admitted that he never sent the children presents or other items "because I didn't think they were receiving anything from me. My letters or nothing." Despite Godell's testimony, he was convinced that his letters were not getting to the children because "I don't believe that a five year old and seven year old can just make up their minds they don't want to write."

Axline testified that, despite the FOC intervention in response to his first letter, Godell still would not let him see the children. Axline said he did not know that he could file a motion asking the court to authorize calls or letters, and claimed the FOC should have told him what to do. He said he called more than eight times; he guessed that it was more like twenty-five or thirty times. "And when I call they're never home, but I can hear 'em in the background playing." Axline said he never called from jail. When he was incarcerated, he wrote letters instead. He estimated that he sent the children one letter a month from jail. He said he only saw the children two times after the divorce was finalized, once at a holiday function in December 1999 and "once at McDonald's after that and that's it." When he was not in jail, he said he called Godell to try to arrange a time to see the children and she would only say, "We'll see." Then he said he did not try to see the children when he was not in jail because "I'm not going to go there when they're like that. She's not going to let me see 'em anyways. She says I don't come to her house. I'm not going to come there 'cause I know what she told me on the phone."

Given that the judgment of divorce ordered Axline to pay child support and that he only made ten payments since November 1999, the court found it "beyond clear and convincing that he has substantially failed to pay on his child support." Regarding Axline's attempts to contact the children, the court ruled[1] that

> while he is in prison, we do not hold against him that he does not visit. He cannot visit. His obligation and duty at that point while he is in jail or prison is to communicate by letter or telephone call and I'm not holding him to a burden to say that he had to be able to visit. [¶]
>
> I want to notice several things in findings of fact. He did write five letters to the [FOC] requesting assistance enable [sic] to have contact with his kids. Three of the letters, though, are within an approximate one month period – 10/31/2001; 11/7/2001; 11/20/2001. They all occur while he's in jail. . . . And while in jail, he [was] writing them asking for communication. The one before that is 6/20/2001 and I believe the evidence shows that that too was while he was in jail and the testimony was that he was in jail for 45 days around that period. I can't say absolutely sure he was in jail, but it seems like he may have been in jail at that point. We go back to 10/23/00. The only thing I have is he's serving six months in Traverse City at that time. No one was quite specific, although there was a suggestion that it started in April. But . . . I don't know if he was in jail or not during that time. What is significant to me is that when he's out of jail, he never seems to go to the [FOC]. He does get a contempt of court for nonpayment of child support and interacts with them, but he does not go to them to have his visits somehow put into effect. He does seem to write when he's in jail, but he doesn't seem to act when he's not in jail. [¶]
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> The testimony is in 1999, he probably served, what, five out of twelve months in either jail or Rehab House or a tether and in the year 2000, he probably

[1] The court's ruling was transcribed as one very lengthy paragraph. We have broken it into separate paragraphs for ease of reading. The breaks are noted by [¶].

served five momths [sic]. He had one six months sentence with one month out for good time and then in 2001 . . . I guess there's two periods. One he served around April and then I think in late fall he got picked up and finally served a significant period of time. The rest of the time he does not appear to have been in jail, so in 2001 he was in jail from October to the end of the year and then maybe 45 days in April. The rest of the time he was not in jail – he was in rehab, though. Let's give him a month and a half, let's say – two months at least – in that period of time. [¶]

When out of jail, he does not seem to go get reasonable visiting time. He does not take advantage of it. His own testimony was that in actual visits, there may have been a couple after the divorce finally occurred and from that time on, they cease. He did not visit with his children. All the time out of jail, he doesn't go and see them. If . . . you had half a year in '99 out of jail and a half a year in 2000 out of jail and let's say half a year in 2001 out of jail, all those periods of time he did not go and visit his child [sic]. That says to me that he did substantially fail and in the credibility question – because if I were to believe him – I think we are to say he did try. He made the calls – twenty-five or thirty, I think, is his testimony – and so if I give him the credibility, then I believe the mother blocked his efforts to communicate with the child [sic]. If I believe her, his efforts were sporadic at best. Once every couple of months, at best and simply do not meet the necessary requirements for sustaining the fact that he did visit, contact and communicate. In this credibility issue, I give the nod to her and I do so because when I look at when he did contact, he appears to be in jail. When he's not in jail, he didn't pursue it – he didn't do anything. All the times out of jail, he seems to have been out of the child's [sic] life and because of that, I do not find his testimony as credible as hers. [¶]

Accepting hers as credible, I do find then clear and convincing evidence that the non-custodial parent – meaning Mr. Axline – had the ability to visit, contact and communicate and regularly and substantially failed or neglected to do so for a period of two years or more. He had almost no visits whatsoever and you say half the time he could have, he didn't. When he was out of jail he never went to the [FOC] to petition and again, if we put it in relationship [to *In re ALZ*, 247 Mich App 264; 636 NW2d 284 (2001)], the man did file a petition, he did go to court and it was reaction to that by the mother afterwards that went for the adoption. But he took the steps to try to see the child and when Mr. Axline was not in jail, he did not take the steps. It appears to me that his actions were limited, his communication was not enough to overcome the finding that he has regularly and substantially failed to interact with his child [sic] and that when he did so, it seemed to be it was when he was in jail, had time on his hands and thought of his children. He didn't think of them when he was not in jail. Therefore, I do terminate the parental rights of Ronald Axline and I will sign that order. . . .

On appeal, Axline argues that the family court erred in finding that he met the statutory criteria for termination and that termination was in the best interests of the children.

II. Standard Of Review

"A petitioner in an adoption proceeding must prove by clear and convincing evidence that termination of parental rights is warranted."[2] Consequently, we review the family court's findings of fact for clear error.[3]

III. Termination

The family court applied the stepparent adoption statute, MCL 710.51(6), which 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.

"In order to terminate parental rights under the statute, the court must determine that the requirements of subsections (a) and (b) are both satisfied."[4]

Axline admitted that he substantially failed to comply with an order of support, MCL 710.51(6)(a), but contended that he did maintain or attempt to maintain regular contact with the children. The evidence, however, shows that his contact with the children was never regular, even considering his incarceration. Axline sent only six letters to the children in the two years preceding the petition. Axline only wrote those letters while in jail. Axline called the children sporadically, and often at a time when the children were not at home. Consequently, he actually spoke to them only twice. Though Axline contends that he called at least twice as often as Godell said he did, and that she lied about the children's availability, credibility is a matter for the fact finder, not this Court, to decide.[5] Therefore, we have no basis on which to conclude that the family court clearly erred in finding that Axline evinced little interest in maintaining any contact with his children other than when he was incarcerated and had nothing better to do and

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[2] *In re Hill*, 221 Mich App 683, 691; 562 NW2d 254 (1997).

[3] *Id*. at 691-692.

[4] *In re ALZ*, 247 Mich App 264, 272; 636 NW2d 284 (2001).

[5] See *H J Tucker & Associates, Inc v Allied Chucker & Eng'g Co*, 234 Mich App 550, 563; 595 NW2d 176 (1999); MCR 2.613(C).

thus that Axline "regularly and substantially failed or neglected" to visit, contact, or communicate with them for the preceding two years.[6]

Axline also argues that, even if the family court did not err in finding that the statutory bases for termination were proved, it nonetheless erred in ordering termination without considering whether doing so was in the children's best interests. Termination under subsection 51(6) is "permissive rather than mandatory."[7] As a result, even if the petitioner proves that termination is warranted, the family court may consider evidence relating to the best interests of the children,[8] and need not terminate parental rights if it finds that termination would be contrary to the children's best interests.[9] In this case, Godell established that Axline had essentially abandoned his children, failing to support them or maintain regular contact with them. The parties offered no evidence to show that, despite the abandonment, terminating Axline's parental rights was contrary to the children's best interests. Therefore, the court did not clearly err in ordering termination.

Affirmed.

/s/ William C. Whitbeck
/s/ David H. Sawyer
/s/ Kirsten Frank Kelly

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[6] MCL 710.51(6)(b).

[7] *ALZ*, *supra* at 272.

[8] See *Hill*, *supra* at 696.

[9] See *In re Newton*, 238 Mich App 486, 494; 606 NW2d 34 (1999).