STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of BETHANY VICTORIA DAVIS, Minor.

MARY HEATON and JOHN HEATON,

Petitioners-Appellees,

v

VINCENT ALLEN DAVIS,

Respondent-Appellant.

UNPUBLISHED
April 13, 2004

No. 249643
Oakland Circuit Court
Family Division
LC No. 03-676579

Before: Cavanagh, P.J., and Murphy and Smolenski, JJ.

PER CURIAM.

Respondent appeals as of right from the trial court order terminating his parental rights to the minor child under MCL 710.51(6), the stepparent adoption provision of the adoption code. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

The trial court did not clearly err in finding that the enumerated statutory circumstances for termination were established by clear and convincing evidence. *In re Hill*, 221 Mich App 683, 691; 562 NW2d 254 (1997). The evidence showed that respondent's child support order had gone into effect in 1992, and that in the relevant two-year period prior to the filing of the termination petition, and indeed in the past seven years, he had made two payments, one of $1,000 and one of $90. Therefore, the trial court correctly determined that respondent had failed to substantially comply with the support order.

The trial court also correctly determined that respondent had failed or neglected to visit or communicate with the minor child for the relevant two-year period, and also for the past seven years. Although respondent made efforts to find the minor child after petitioners married, and genuinely seemed to want to reestablish a relationship, his efforts were minimal. The child had stayed in the same community and home for several years, and there was no indication that petitioners attempted to conceal the child's whereabouts. While the evidence showed that petitioners failed to register their change of address with the Friend of the Court seven years previously, respondent did not seek assistance from the courts or Friend of the Court in reestablishing his parenting time or locating the minor child during the three years he was

incarcerated or until thirty-two months after his release. Petitioners' failure to file a change of address does not excuse respondent's failure to contact the Friend of the Court for six years.

Respondent argues that he was denied the effective assistance of counsel. We disagree. Respondent did not move for a new trial or an evidentiary hearing on this ground, and therefore our review is limited to matters apparent from the record. *In re Schmeltzer*, 175 Mich App 666, 673; 438 NW2d 866 (1989). Respondent was required to show that his attorney's performance was prejudicially deficient and that, under an objective standard of reasonableness, the attorney made an error so serious that counsel was not functioning as an attorney as guaranteed under the Sixth Amendment. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). None of respondent's assignments of error has merit, but we will discuss one here. His attorney's strategy of raising the issue of respondent's incarceration as a reason for his failure to visit the minor child was unnecessary because incarceration is not an excuse for failure to maintain contact. *In re Caldwell*, 228 Mich App 116, 120-121; 576 NW2d 724, 726-727 (1998). Introduction of that evidence led to testimony undermining respondent's credibility. However, respondent's voluntary revelation of the relatively unbelievable events causing the charges against him, not counsel's strategy, undermined respondent's credibility.

Finally, the trial court did not abuse its discretion in denying respondent's request for a best interests hearing. In a termination proceeding under the adoption code, the trial court may consider the child's best interests and choose not to terminate parental rights even if the enumerated statutory circumstances are established. *Hill, supra* at 696. In this case, the evidence was clear that respondent and the child had not had any contact or communication in at least seven and most likely ten years. The thirteen-year-old minor child expressed a desire to be adopted by petitioner John Heaton and was ambivalent about what kind of contact or relationship she wanted with respondent. A best interests hearing would not have shown that respondent and the child had a relationship that would justify foregoing termination.

Affirmed.

/s/ Mark J. Cavanagh
/s/ William B. Murphy
/s/ Michael R. Smolenski