STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of MADISON RHAE SNYDAL,
Minor.

AMBER LAUREEN PARKER and JEREMY LEE PARKER,

Petitioners-Appellees,

v

MATTHEW ABPLANALP,

Respondent-Appellant.

UNPUBLISHED
November 25, 2008

No. 285747
Jackson Circuit Court
Family Division
LC No. 07-006849-AY

Before: Fitzgerald, P.J., and Bandstra and O'Connell, JJ.

PER CURIAM.

Respondent appeals as of right the circuit court order terminating his parental rights to the minor child under MCL 710.51(6). We affirm.

If the parents of a child are unmarried but the father has acknowledged paternity, and if "the parent having legal custody of the child subsequently marries and that parent's spouse petitions to adopt the child," the court may terminate the parental rights of the noncustodial parent if both of the following conditions are met:

> (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. [MCL 710.51(6).]

"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). "In order to terminate parental rights under the statute, the court must determine that the requirements of subsections (a) and (b) are both satisfied." *In re ALZ*, 247 Mich App 264, 272; 636 NW2d 284 (2001). We review the trial court's findings of fact for clear error. *Hill*,

supra at 691-692. "A finding of fact is clearly erroneous if the reviewing court has a definite and firm conviction that a mistake has been committed, giving due regard to the trial court's special opportunity to observe the witnesses." *In re BZ*, 264 Mich App 286, 296-297; 690 NW2d 505 (2004).

Section 51(6)(a)

Respondent argues that the trial court erred in determining[1] that he, "having the ability to support, or assist in supporting, the child, has failed or neglected to provide regular and substantial support for the child . . . for a period of 2 years or more before the filing of the petition." MCL 710.51(6)(a). We disagree.

According to the stipulated facts, respondent was incarcerated when the child was born and thus presumably had little to no income. Whether he had any income which would enable him to assist in supporting the child has not been disclosed. At the time the paternity action was initiated, respondent was in a rehabilitation facility operated by the Delancey Street Foundation. Debra Evans, a member of the foundation's legal department, wrote a letter to the Superior Court of San Bernardino County in January 2002 advising that respondent had been a resident of the treatment center "since July 7, 2000. As a resident of Delancey Street he receives no income. He works at one of our business training schools." Respondent testified that when he was expelled from the treatment center in June or July 2002, "he was employed." He also testified "that he had the ability to support the child but chose not to do so" for two years.

Respondent, citing *In re ALZ, supra,* now argues he did not have the ability to support the child because petitioner wanted nothing to do with him and did not want his money. However, respondent waived this issue by admitting below that he had the ability to pay and did not do so for two years. According to the stipulated facts, respondent did not contest the support issue and relied on *In re ALZ* below only in support of his claim that he lacked the ability to visit, contact, or communicate with the child. See discussion *infra*. "Error requiring reversal cannot be error to which the aggrieved party contributed by plan or negligence," *Phinney v Perlmutter,* 222 Mich App 513, 558; 564 NW2d 532 (1997), and a party cannot seek relief on appeal on the basis of a position contrary to that taken below. *Flint City Council v State of Michigan,* 253 Mich App 378, 395; 655 NW2d 604 (2002).

[1] We note that respondent does not claim that this determination was irrelevant under the statute because an order had been entered stating, consistent with petitioner's request, that respondent had no obligation to pay child support. See *In re Van Rijn*, unpublished opinion per curiam of the Court of Appeals, issued January 15, 2008 (Docket No. 279660). Because petitioner thus had no opportunity to respond to that argument and the trial court had no reason to develop the factual record surrounding entry of the order to determine its effect upon the argument, we do not consider and offer no opinion with respect to it. *Michigan Ed Ass'n v Secretary of State*, ___ Mich App ____; ___ NW2d ___; 2008 WL 3183881 (2008), slip op at p 6-7. (We are not obligated to consider issues not properly raised on appeal even if they may "have substantive merit" [citations omitted].)

Further, *In re ALZ* is not apposite. In that case, the respondent father contested his ability to visit or otherwise contact the child, under MCL 710.51(6)(b), because the mother asked that he refrain from having contact with the child and, when the respondent initiated a paternity action, the mother opposed his request for parenting time. *In re ALZ, supra* at 267-268. The trial court agreed, finding that "the mother cannot refuse contact and then rely on the lack of contact to meet the statutory basis." *Id.* at 270. This Court affirmed. It specifically noted that although the respondent could have refused to honor the mother's request and made an attempt to see the child, his paternity was not established until March 2000, only three months before the termination petition was filed, and until his paternity was established, "he had no legal right to visitation or communication with the child." His only recourse was to file the paternity action, which he did "well within the two-year statutory period under" § 51(6)(b). *Id.* at 268, 273-274.

In re ALZ does not apply here. In that case, the respondent father was found not to have the ability to contact the child because he was not legally entitled to do so, his paternity not having been established. In this case, although petitioner advised the California court in April 2002 that she did "not want current child support enforced" and thereafter made no attempt to obtain support from respondent, respondent was not legally precluded from paying support. The issue is not whether petitioner wanted respondent to exercise his parental rights and obligations but whether respondent had an existing legal right to do so. Here, respondent's paternity was established in 2002 and, while respondent may not have known that paternity was established, that was because he voluntarily absented himself from further participation in the paternity action after he violated probation. Thus, he had a legal right to pay support and could not rely on petitioner's earlier refusal of support to excuse his failure to pay. The trial court did not err in concluding that Section 51(6)(a) was satisfied.

Section 51(6)(b)

Petitioner also had to prove that respondent, "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." MCL 710.51(6)(b). Because the terms "visit, contact, or communicate" are phrased in the disjunctive, the petitioner is "not required to prove that respondent had the ability to perform all three acts. Rather, petitioner merely ha[s] to prove that respondent had the ability to perform any one of the acts and substantially failed or neglected to do so for two or more years preceding the filing of the petition." *In re Hill* at 694.

Regarding substantial failure to visit, this Court has stated:

> We acknowledge that the phrase "substantially failed" has not been previously construed. We also express some doubt that the phrase can be reduced to a specific number of visits within two years. We would, for instance, be less likely to consider a specific number of visits late in the two-year period to be "substantial failure." We would also be less likely to consider a specific number of visits "substantial failure" if they required the respondent to overcome significant legal, physical or geographic obstacles. [*In re Martyn,* 161 Mich App 474, 482; 411 NW2d 743 (1987).]

Apart from that, case law defines "substantially failed" by illustration: three letters from the respondent and visits and gifts from the respondent's parents on birthdays and holidays, *In re Caldwell*, 228 Mich App 116, 121-122; 576 NW2d 724 (1998); one item sent, *In re Hill, supra* at 695; one card, *In re Simon*, 171 Mich App 443, 446; 431 NW2d 71 (1988); four visits and one letter in three years, *In re Meredith*, 162 Mich App 19, 22-23; 412 NW2d 229 (1987); two visits and one phone call, *In re Martyn, supra*; and 8 to 11 visits in 2-1/2 years, *In re Colon*, 144 Mich App 805, 814; 377 NW2d 321 (1985).

In this case, the evidence showed that respondent had absolutely no contact with the child at any time during her life, which would certainly constitute substantial failure. Thus, the only question is whether respondent had the ability to visit, contact, or communicate with the child. It appears that petitioner terminated her relationship with respondent right around the time the child was born, when she told respondent and his relatives that he was not the child's father and asked respondent to "stay away." Pursuant to *In re ALZ*, that may have excused respondent's failure to establish a relationship with the child initially because his paternity had not yet been established. However, once respondent's paternity was established in 2002, he had a legal right to contact his daughter and to seek relief from the court if petitioner refused such contact, and thus petitioner's prior attempt to discourage respondent did not prevent him from having regular and substantial contact with the child. *In re SMNE*, 264 Mich App 49, 51; 689 NW2d 235 (2004). There was no evidence that respondent sought to contact his daughter at any time after his paternity was established. To the contrary, respondent testified that he did not attempt to contact petitioner or the child after participating in the paternity action and he specifically "admitted that he had the ability but chose not to do so." Therefore, the trial court did not clearly err in finding that respondent, "having the ability, has failed to contact the child."

Best Interests

Once the petitioner meets her burden of proof, the court is not required to terminate respondent's parental rights and may decline to do so if it finds that termination would not be in the child's best interests. *In re ALZ, supra* at 272-273. Considering that the child had never met respondent and did not have any type of father-daughter relationship with him, the trial court did not clearly err in finding "that it was not clearly shown that it was not in the best interests of the minor child to terminate Mr. Abplanalp's parental rights."

We affirm.

/s/ E. Thomas Fitzgerald
/s/ Richard A. Bandstra
/s/ Peter D. O'Connell