STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of DESARAE LYNN WHEETLEY, Minor.

SARA LYNN BLOOM and MICHAEL GEORGE BLOOM,

Petitioners-Appellees,

v

DAVID ANTHONY WHEETLEY,

Respondent-Appellant.

UNPUBLISHED
November 25, 2008

No. 285994
Lake Circuit Court
Family Division
LC No. 08-000001-AY

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

PER CURIAM.

Respondent appeals as of right from a circuit court order terminating his parental rights to the minor child under § 51(6) of the Adoption Code, MCL 710.51(6). We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Respondent argues that the trial court erred in finding that the requirements of § 51(6) were established by clear and convincing evidence. We disagree.

We review the trial court's findings of fact for clear error. *In re Hill*, 221 Mich App 683, 691-692; 562 NW2d 254 (1997). "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).

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. [MCL 710.51(6).]

A petitioner in an adoption proceeding must prove both subsections (a) and (b) by clear and convincing evidence before termination can be ordered. *In re ALZ*, 247 Mich App 264, 272; 636 NW2d 284 (2001); *In re Hill, supra* at 691.

The parties agreed that a support order was not in place, and thus to meet § 51(6)(a), petitioners were required to prove that (1) respondent had the ability to pay support, and (2) did not provide regular and substantial support for at least two years preceding the filing of the petition. Respondent is serving a life sentence for murder. However, the statute does not provide an exception for incarcerated parents who, despite their incarceration, "may still retain the ability to comply with the support and contact requirements of the statute." *In re Caldwell*, 228 Mich App 116, 121; 576 NW2d 724 (1998). The evidence showed that respondent had funds in a commissary account and, although the evidence did not show how much he earned or had in his account, respondent claimed that he had sent money from that account to his relatives for the child. Such evidence was sufficient to prove that respondent had the ability, albeit limited, to provide support.

The second element of § 51(6)(a) is whether respondent provided "regular and substantial support for the child . . . for a period of 2 years or more before the filing of the petition." Petitioner Sara Bloom, the child's mother, testified that she had not received any money from respondent during the past two years. Respondent testified that he had sent money to his relatives for the child, but did not say when or how often he sent it or even if it had been delivered or spent on the child's behalf. There was other evidence that respondent bought a purse for the child in November 2005, sent some unspecified gifts in the summer of 2007, and two more gifts at the end of 2007. Even if this evidence is credited, it does not show that respondent provided "regular and substantial support" during the past two years. Therefore, the trial court did not clearly err in finding that § 51(6)(a) had been proven by clear and convincing evidence.

Section 51(6)(b) considers whether the respondent maintained a relationship with the child by visiting, contacting, or otherwise communicating if he had the ability to do so. Respondent was unable to visit the child due to his incarceration. But because the terms "visit, contact, or communicate" are phrased in the disjunctive, a 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, supra* at 694. Respondent's contention that he lacked the ability to contact Desarae because of Sara Bloom's interference must be rejected. Respondent had a legal right to contact with his daughter as established by the 1999 judgment of filiation and could have enforced that right through the assistance of the court if such contact was denied by the mother. That he apparently elected not

to do so does not mean that he lacked the ability to maintain a father-daughter relationship. *In re SMNE*, 264 Mich App 49, 51; 689 NW2d 235 (2004).

Sara Bloom testified that she had not received any correspondence or calls from respondent during the previous two years. Respondent testified that he made an unspecified number of calls at unspecified times and that the calls were not answered. He testified that he sent letters to Sara Bloom's address once a month for an unspecified time, but at least one letter was sent in early 2006. Because his letters went unanswered, respondent sent letters and gifts to the child through his mother. The evidence did not clearly indicate when respondent gave up writing to the child or her mother directly and began communicating through his own mother. Further, the evidence was unclear whether respondent resumed writing to the child or her mother directly after his mother allegedly was denied contact in June 2006. Considering Sara Bloom's testimony that she had not received any mail from respondent during the previous two years, it is clear that the trial court resolved this factual dispute in petitioners' favor and this Court defers to the trial court's assessment of witness credibility. *In re Newman*, 189 Mich App 61, 65; 472 NW2d 38 (1991). Because respondent had no contact with the child by phone or mail during the previous two years and had sent only a handful of gifts, some of which were not delivered, the evidence showed that respondent failed to maintain regular and substantial contact or communication with the child during the relevant time period. Therefore, the trial court did not clearly err in finding that § 51(6)(b) had been proven by clear and convincing evidence.

Respondent also argues that the trial court erred in denying his request for the appointment of counsel. Unlike the rules governing involuntary termination under the Juvenile Code, see MCR 3.901(A)(1) and (B)(1); MCR 3.915(1), the rules governing involuntary termination under the Adoption Code do not provide for the appointment of counsel for an indigent respondent. See MCR 3.800 *et seq.* Nevertheless, the court has "discretionary authority to appoint counsel for an indigent noncustodial" parent in proceedings brought under § 51(6) of the Adoption Code, "guided by the principle of assuring the nonconsenting parent the ability to present a case properly, measured in the particular case by factors such as the relative strength of the adversaries and the presence or absence of legal, factual, procedural, or evidentiary complexity." *In re Sanchez*, 422 Mich 758, 761, 770-771; 375 NW2d 353 (1985). Appointment of counsel is a matter within the trial court's discretion. *Id.* at 770.

The trial court did not abuse its discretion in denying respondent's request for appointment of counsel. Although respondent was in prison, he never indicated that he was in fact indigent and unable to afford counsel. Even under the Juvenile Code, there must be some evidence to support a finding that a respondent is indigent before counsel can be appointed. MCR 3.915(B)(1)(b)(ii). In addition, this was not a complex case and because the issues were simple and fact-specific, petitioners did not have an unfair advantage over respondent even though they were represented by counsel. It is clear from the record that respondent was aware of the requirements of the statute and relevant case law. In addition to his own testimony, respondent called and questioned witnesses on his behalf and the court allowed respondent considerable leeway in the manner in which evidence was presented. Respondent presented evidence to show that he had regularly tried to contact his daughter and that the child's mother had interfered with such contact and argued to the court that petitioners had failed to meet their burden of proof with respect to § 51(6)(b). Resolution of the case thus came down to a

determination of credibility and, as noted, this Court defers to the trial court's assessment of witness credibility. *In re Newman, supra*.

Affirmed.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Michael R. Smolenski