STATE OF MICHIGAN

COURT OF APPEALS

UNPUBLISHED
October 12, 2010

In the Matter of JJH, Minor.

No. 298041
Genesee Circuit Court
Family Division
LC No. 09-016755-AY

Before: OWENS, P.J., and WHITBECK and FORT HOOD, JJ.

PER CURIAM.

Respondent appeals as of right from a circuit court order terminating his parental rights to the minor child pursuant to § 51(6) of the Adoption Code, MCL 710.51(6). We remand to the trial court for findings of fact and conclusions of law.

For purposes of a stepparent adoption, MCL 710.51(6) requires proof of both of the following elements before a court can terminate the parental rights of a child's noncustodial parent:

> (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.

The petitioners 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*, 221 Mich App 683, 691; 562 NW2d 254 (1997). The trial court's findings of fact are reviewed for clear error. *In re Hill*, 221 Mich App 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).

It is not disputed that a support order was entered against respondent in December 2005 and that he did not substantially comply with that order at any time. Therefore, the only issue is

whether respondent had the ability to maintain contact with the child, and regularly and substantially failed to do so for two years or more before the filing of the petition.

The child was born in April 2005. Respondent and the child's mother were unmarried and have never been married to each other. In December 2005, a default judgment of filiation was entered against respondent in the Arenac Circuit Court. The mother married her co-petitioner husband on September 20, 2008. They filed a petition for step-parent adoption on September 11, 2009. A hearing was held on that petition in December 2009. At that hearing, the mother testified that during the relevant two-year period preceding the filing of the petition, respondent had no contact of any kind with the child. With respect to the relevant two-year period, respondent testified that he did not see the child at all between September 2007 and August 2008 and that he only saw the child one time between August 2008 and August 2009. He testified that he sent the child cards or letters on his birthday and at Christmas and also sent him "random gifts." Based on those proofs, the trial court found that while respondent had the ability to visit, contact, or communicate with the child, he regularly and substantially failed or neglected to do so for the statutory two-year period. The trial court then terminated respondent's parental rights in an order dated December 9, 2009. Respondent appealed to this Court and that appeal was dismissed for want of prosecution.

Respondent also filed a motion for rehearing, which motion was granted by the court. At the rehearing held April 21, 2010, the court only took testimony from the respondent. The respondent testified that between September 2007 and July 2008, he had regular telephone or web cam contact with the child, that he sent the child an Easter basket and presents, a Christmas card and presents, and a birthday card and presents. Between August 2008 and August 2009, he testified that he had visited the child one time. Following his testimony, the trial court ruled as follows:

> I understand that the parties lived together since 2006 and even taking Mr. Jennings' testimony at face value and even noting the fact that his legal problems began in late 2008, I cannot find that he has regularly and substantially . . . had contact with his child. And I will find that he has regularly and substantially failed, or neglected, to do so for a period of two years.

As a result, the court refused to change its prior order terminating his parental rights.

In this appeal, respondent argues that the evidence does not support the trial court's finding that when able to do so, he regularly and substantially failed or neglected to visit, contact, or communicate with the child for a period of two years before the filing of the petition. Respondent also argues that during the period of December 2, 2008 until September 11, 2009, his lack of contact with the child was excused due to his incarceration and due to a no contact order that prohibited contact by him with the child's mother.

With regard to the period of imprisonment, respondent relies on *In re Halbert*, 217 Mich App 607; 552 NW2d 528 (1996). Unfortunately for respondent, that case's holding was overruled by a conflict panel of this Court in *In re Caldwell*, 228 Mich App 116, 120-121; 576 NW2d 724 (1998). With regard to the no contact order, we note that it only prohibited contact with the child's mother and not the child. Respondent's parents did have contact with the child, and he could have had contact through them.

Finally, respondent appears to argue that the court found his testimony to be true and the mother's testimony to be untrue when the court said that it was "taking Mr. Jennings' testimony at face value." We do not agree that that statement by the court necessarily stands for the proposition asserted by respondent. We believe that it is equally possible that when the court stated, "even taking Mr. Jennings' testimony at face value and even noting the fact that . . . his legal problems began . . . in late 2008, I cannot find that he has regularly and substantially . . . had contact with his child," it meant that, even assuming that his testimony were true, it would still be insufficient to show that he had had the necessary contact with his child to defeat the petition. Unfortunately, the court made no findings of fact as to which testimony by the mother and respondent it believed and which it did not believe.

Therefore, because the record does not disclose what testimony the court believed to be true (or not true), we are unable to decide whether the court erred in its ruling. It is necessary, therefore, to remand this matter to the trial court for findings of fact and conclusions of law. If the trial court finds the mother to be more credible than the father, the trial court's ruling is affirmed. If the trial court finds the respondent more credible then the child's mother, then the trial court must determine whether the amount of contact during the relevant two-year period was sufficient to constitute regular and substantial visits, contact, or communication with the child.

Remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ William C. Whitbeck
/s/ Karen M. Fort Hood