

STATE OF MICHIGAN
COURT OF APPEALS

UNPUBLISHED

October 19, 2010

In the Matter of IC, a/k/a JIT, Minor.

No. 296324

Kent Circuit Court

Family Division

LC No. 09-023430-AY

Before: HOEKSTRA, P.J., and FITZGERALD and STEPHENS, JJ.

PER CURIAM.

Respondent appeals as of right the trial court order terminating his parental rights to the minor child pursuant to § 51(6) of the Adoption Code, MCL 710.51(6). We affirm.

Petitioner D. Totten and respondent are the parents of IC. Petitioner and her husband filed a petition in May 2009 to terminate respondent's parental rights to IC for purposes of stepparent adoption. Termination requires proof of both of the following elements:

(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).]

Petitioner bears the burden of proving both elements by clear and convincing evidence. *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 found that petitioner met her burden of proof. We review the trial court's findings of fact for clear error. *In re Hill*, 221 Mich App at 691-692.

Respondent contends that the trial court erred in finding that § 51(6)(a) was proven because he lacked the ability to pay support due to the lack of employment. However, it was undisputed that a support order had been entered against respondent. If an order of support requiring payment of a sum of money has been entered, the respondent's ability to pay is irrelevant because the ability to pay has been factored into the order and the only issue to be determined is substantial compliance with the support order for the two-year period in accordance with the second clause of § 51(6)(a). *In re SMNE*, 264 Mich App 49, 54-55; 689

NW2d 235 (2004); *In re Newton*, 238 Mich App 486, 492-493; 606 NW2d 34 (1999). The documentary evidence indicated that respondent made only sporadic payments over the two-year period. He failed to make any payments at all in 12 of the 25 months and accumulated a substantial arrearage. Therefore, the trial court did not clearly err in finding that respondent failed to substantially comply with the support order.

Further, the trial court did not clearly err in finding that respondent regularly and substantially failed or neglected to visit, contact, or communicate with IC during the relevant time period. The evidence showed that petitioner took responsibility for facilitating a relationship between respondent and IC by transporting IC to and from Pontiac to visit with respondent. When petitioner ended that practice in August 2006, respondent never again saw the child. Respondent tried calling to either speak to the child or arrange a visit and, when that did not work out, he filed a motion for parenting time. The Friend of the Court issued a recommendation for parenting time that included a provision regarding drug testing. Orders for drug testing were entered, but respondent failed to follow through. When petitioner objected to the recommendation for parenting time because respondent had not complied with the drug-test provision, an order denying the motion was entered in January 2008. Respondent took no further action to obtain parenting time or to contact the child after that order was entered.

Respondent contends that contrary to the trial court's finding, he lacked the ability to visit, contact, or communicate with IC due to petitioner's interference. A father whose paternity has not been established does not have the ability to visit, contact, or communicate with a child if the mother refuses to allow it because he does not have a legal right to visitation or communication, and thus has no recourse to the courts, until paternity is established. *In re ALZ*, 247 Mich App at 273-274. In this case, by contrast, respondent's paternity was not at issue and the support judgment specifically granted him parenting time, thus vesting him with the legal right to a relationship with the child. Because respondent had a legally enforceable right to maintain a relationship with IC and could have sought relief from the court if petitioner interfered with that right, petitioner's attempts to discourage respondent did not prevent him from having regular and substantial contact with the child. *In re SMNE*, 264 Mich App at 51.

Here, respondent attempted to enforce his right through the court. That resulted in orders directing the parties to submit to drug testing at respondent's expense, but respondent failed to pay for or submit to drug testing. Although petitioner objected to the recommended visitation schedule because respondent had not complied with the order for drug testing, that cannot be deemed interference with respondent's parental rights because petitioner was only insisting that respondent follow the court orders as he was required to do. See *Kirby v Mich High Sch Athletic Ass'n*, 459 Mich 23, 40; 585 NW2d 290 (1998) (even an order that is clearly incorrect must be followed if issued by a court with proper jurisdiction). Further, after his motion for parenting time was denied, respondent could have sought relief from the court as specified in the order itself. Respondent failed to do so, claiming that he had been told that he "needed to get an attorney next time I come in here" and he could not afford to hire an attorney. The trial court disbelieved that explanation and, giving "special deference to the trial court's findings when they are based on its assessment of the witnesses' credibility," *H J Tucker & Assoc, Inc v Allied Chucker & Engineering Co*, 234 Mich App 550, 563; 595 NW2d 176 (1999), that finding is not clearly erroneous. Respondent took no further action to facilitate a relationship with IC before the petition was filed. Therefore, the trial court did not clearly err in finding that respondent had

the ability to visit, contact, or communicate with the child, but regularly and substantially failed or neglected to do so for the two-year period before the filing of the petition.

Affirmed.

/s/ Joel P. Hoekstra

/s/ E. Thomas Fitzgerald

/s/ Cynthia Diane Stephens