STATE OF MICHIGAN

COURT OF APPEALS

In re SBQ, Minor.

UNPUBLISHED
January 14, 2016

No. 329219
Clinton Circuit Court
Family Division
LC No. 15-025867-AY

Before: RONAYNE KRAUSE, P.J., and GADOLA and O'BRIEN, JJ.

PER CURIAM.

Petitioner-mother and petitioner-stepfather appeal as of right from the trial court's August 31, 2015 order setting aside its prior order terminating respondent's parental rights to the minor child, SBQ, and placing SBQ for adoption pursuant to MCL 710.51(6) of the Michigan Adoption Code, MCL 710.21, *et seq*. We affirm.

I. BACKGROUND

SBQ is the biological child of petitioner-mother and respondent and was born in 2003. Respondent currently resides in California and, until 2012, did not have any contact with SBQ or know that SBQ was his child. It appears undisputed that respondent thereafter visited SBQ in Michigan, purchased a plane ticket for the child to visit him in California, and maintained at least some communication with SBQ since that time. According to respondent, all communications with SBQ ceased once petitioners married in July 2013. In 2015, petitioners filed a petition to terminate respondent's parental rights to SBQ and to allow petitioner-stepfather to adopt SBQ.

A hearing on the petitioners' petition was held in June 2015. Petitioner-mother testified that respondent was SBQ's biological father but had failed to maintain consistent contact with or financially support SBQ. Respondent was not present at the hearing. As a result, the trial court entered an order terminating respondent's parental rights to SBQ and placing SBQ for adoption. Later that month, however, the trial court received a letter from respondent. According to the letter, respondent did not receive any notice of the June 2015 hearing. Had he, the letter explained, he would have attended and objected to the termination of his parental rights to SBQ. The letter also indicated that respondent had been working with the Clinton County Prosecutor's Office to establish paternity despite the fact that petitioner-mother refused to sign an affidavit of parentage identifying him as SBQ's father as well as highlighted his contact with the child over the previous several years. The trial court considered respondent's letter as a petition to set aside its prior orders, and a hearing on that petition was held in August 2015. See MCL 710.64.

At the hearing, respondent's attorney argued that respondent did not receive notice of the June 2015 hearing and that terminating respondent's parental rights was inappropriate in light of the fact that respondent had made efforts to visit, communicate with, and establish paternity to SBQ. Petitioners' attorney argued that the trial court properly terminated respondent's parental rights to SBQ because respondent had no contact with her for the first ten years of her life and because he had only visited and communicated with her minimally since then. While petitioners' attorney did acknowledge that petitioner-mother refused to sign an affidavit of parentage, he indicated that respondent was not prevented from pursuing that matter further. Neither party sought to submit any evidence; however, respondent's attorney did indicate that Randy Jones, an individual from the prosecuting attorney's office, was present and willing to testify regarding respondent's efforts to establish paternity.

While the trial court recognized that respondent had not financially supported SBQ, it remained concerned about respondent's ability to maintain contact with SBQ. Specifically, the trial court acknowledged the fact that respondent had made approximately 15 contacts with the Clinton County Prosecuting Attorney's Office in 2014 regarding a paternity action that was pursued by the office, completed deoxyribonucleic acid (DNA) testing twice, and had signed an affidavit of parentage. The trial court also pointed to the fact that petitioner-mother admitted that the prepaid phone that respondent and SBQ used to communicate no longer had any minutes. Consequently, the trial court concluded that there was an insufficient basis to terminate respondent's parental rights pursuant to MCL 710.51(6)(b) at the time. It therefore entered an order setting aside its prior orders terminating respondent's parental rights and placing SBQ for adoption. This appeal followed.

II. ANALYSIS

A. STANDARDS OF REVIEW

A trial court's decision on a petition for rehearing to set aside an order terminating parental rights is reviewed for an abuse of discretion. *In re Koroly*, 145 Mich App 79, 87; 377 NW2d 346 (1985). A trial court abuses its discretion when its decision falls beyond the range of principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). A trial court's factual findings underlying its decision are reviewed for clear error. *In re Martyn*, 161 Mich App 474, 478; 411 NW2d 743 (1987). "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court, after examining all of the evidence, is left with a definite and firm conviction that a mistake has been made." *Id*. The interpretation and application of a statute is a question of law that is reviewed de novo. *Hunter v Hunter*, 484 Mich 247, 257; 771 NW2d 694 (2009). "As always, the objective of statutory interpretation 'is to give effect to the Legislature's intent,' and '[t]o ascertain that intent, this Court begins with the statute's language.' " *In re AJR*, 496 Mich 346, 352; 852 NW2d 760 (2014), quoting *People v Stone*, 463 Mich 558, 562; 621 NW2d 702 (2001) (alterations by *AJR* Court). Unambiguous language is interpreted according to its plain and ordinary meaning, and judicial construction is not permitted. *Id*. at 352-353. "We interpret court rules using the same principles that govern statutory interpretation." *In re Sanders*, 495 Mich 394, 404; 852 NW2d 524 (2014).

B. PETITIONERS' ARGUMENTS

On appeal, petitioners challenge the trial court's decision to set aside its previous orders in three distinct ways.

1. REHEARING PROCEDURE

First, they argue that reversal is appropriate because the trial court erred in making findings during the rehearing without receiving any sworn testimony. At the outset, we are compelled to point out that petitioners failed to raise this argument before the trial court. While we choose to address it, see, e.g., *In re AJR*, 300 Mich App 597, 600-601; 834 NW2d 904 (2014), we are not required to do so. Petitioners did not object to the trial court reaching a decision based only on the record, the pleadings, and the oral arguments, see MCR 3.806(B), and now, for the first time, they claim the trial court erred in doing so. We have long held that a party may not harbor error as an appellate parachute. See, e.g., *In re Hudson*, 294 Mich App 261, 264; 817 NW2d 115 (2011). In any event, we conclude that their argument is meritless.

"The statute at issue is MCL 710.51(6), which allows for the termination of the rights of a noncustodial parenting during a stepparent adoption." *AJR*, 300 Mich App at 601. The primary purpose of MCL 710.51(6) is "to foster stepparent adoptions in families where the natural parent had regularly and substantially failed to support or communicate and visit with the child," *In re Colon*, 144 Mich App 805, 810; 377 NW2d 321 (1985), "not to break up an existing parent-child relationship." *In re Newton*, 238 Mich App 486, 493; 606 NW2d 34 (1999). Petitioners have the burden to prove, by clear and convincing evidence, that MCL 710.51(6) is satisfied. *In re Hill*, 221 Mich App 683, 691; 562 NW2d 254 (1997). Even if petitioners do so, however, the trial court's authority to terminate parental rights under the statute is permissive, not mandatory. *Newton*, 238 Mich App at 493-494. After a parent's rights are terminated pursuant to MCL 710.51(6), however, the Adoption Code expressly permits trial courts to grant a party's petition for rehearing so long as it is filed within 21 days of the order terminating parental rights. MCL 710.64(1). The decision whether to grant the petition is to be based on the record, the pleading filed, or a hearing on the petition. MCR 3.806(B). Courts are permitted to grant a rehearing only for good cause. MCR 3.806(B).

In this case, the trial court granted petitioners' petition to terminate parental rights and place SBQ for adoption after respondent failed to appear at the hearing on that petition. It is clear that, in light of respondent's letter, the trial court found good cause to grant a rehearing pursuant to MCR 3.806(B), and it does not appear that petitioners challenge that decision, i.e., they do not argue that there was not good cause. Instead, they argue that, after granting rehearing, the trial court erroneously made new findings without taking sworn testimony in deciding to vacate its previous orders. While it is true that unsworn statements by the parties' attorneys do not constitute evidence, see, e.g., *Guerrero v Smith*, 280 Mich App 647, 658; 761 NW2d 723 (2008), it is also true that the trial court was not required to hold an evidentiary hearing or take new evidence. MCR 3.806(C) states that an evidentiary hearing *may* be held and that the court *may* take new evidence. See, e.g., *Veltman v Detroit Edison Co*, 261 Mich App 685, 713; 683 NW2d 707 (2004) ("The use of the word "may" in the court rule is permissive."). Thus, as stated above, a trial court is not required to hold an evidentiary hearing or take new evidence to affirm, modify, or vacate its previous decisions.

Accordingly, because the trial court was not required to hold an evidentiary hearing or take new evidence, we conclude that the trial court did not err in reaching its decision without doing so.

2. INTERPRETATION OF MCL 710.51(6)

Next, they argue that reversal is appropriate because the trial court erroneously applied the two-year time period set forth in MCL 710.51(6). We disagree.

Similarly to subsection (a), subsection (b) of MCL 710.51(6) requires that a 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." (Emphasis added.) This two-year time period " 'commence[s] on the filing date of the petition and extend[s] backwards from that date for a period of two years or more.' " *Hill*, 221 Mich App at 689, quoting *In re Halbert*, 217 Mich App 607, 612; 552 NW2d 528 (1996) (alterations by *Hill* Court). That is, the "clear and unambiguous statutory language provides that the court must determine whether statutory grounds for termination exist by looking at the two years immediately preceding the filing of the petition." *In re Caldwell*, 228 Mich App 116, 120; 576 NW2d 724 (1997).

In this case, the trial court did not erroneously apply the two-year time period set forth in MCL 710.51(6)(b) as petitioners suggest. Consistent with the unambiguous language of MCL 710.51(6)(b) and caselaw interpreting the same, the trial court recognized that it was required to look at the two-year time period immediately preceding the filing of petitioners' petition. This is completely accurate. While the trial court *may* consider circumstances beyond that two-year period, MCL 710.51(6)(b); *Hill*, 221 Mich App at 689, it is not required to. Further, the record does not indicate that the trial court refused to consider circumstances beyond that two-year period. Conversely, the trial court expressly acknowledged respondent's lack of involvement with and financial support for SBQ for the first decade of her life; however, it was persuaded by his recent efforts in light of the mandatory language in MCL 710.51(6)(b).

Accordingly, we conclude that the trial court did not erroneously apply the two-year time period set forth in MCL 710.51(6)(b).

3. ESTABLISHING MCL 710.51(6)(B)

Lastly, they argue that reversal is appropriate because the trial court erred in concluding that they could not establish that MCL 710.51(6)(B) was satisfied by clear and convincing evidence. Again, we disagree.

MCL 710.51(6)(b) requires that "[t]he 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." While the phrase "regularly and substantially" cannot be "reduced to a specific number of visits within two years," *Martyn*, 161 Mich App at 482, we have generally concluded that infrequent or sporadic contact between a parent and child in insufficient to avoid the termination of parental rights pursuant to MCL 710.51(6). *Caldwell*, 228 Mich App at 122. However, we have also recognized that, despite infrequent or sporadic contact, the termination of parental rights pursuant to MCL 710.51(6)(b)

can be inappropriate when the parent has no legal right to contact the child because paternity has not been established. *In re ALZ*, 247 Mich App 264, 274-275; 636 NW2d 284 (2001).

In this case, the trial court set aside its order, in part, based on respondent's efforts to become the legal father to SBQ. The record, pleadings, and arguments submitted by the parties demonstrate that, especially within the past several years, respondent had visited SBQ, had purchased a plane ticket for SBQ to visit him (but petitioner-mother did not allow SBQ to go), had communicated with SBQ via telephone on multiple occasions, and had communicated with two prosecuting attorneys' offices in an attempt to establish legal paternity to SBQ (but petitioner-mother would not sign the affidavit of parentage). While we certainly do not know all of the circumstances of the interaction and relationship between petitioner-mother and respondent during SBQ's life, our review of the record does not lead us to the conclusion that the factual findings of the trial court underlying its decision to set aside the order terminating respondent's parental rights and placing SBQ for adoption were clearly erroneous.

III. CONCLUSION

In sum, because the trial court did not err in failing to hold an evidentiary hearing or take new evidence in reaching a decision on rehearing, because the trial court correctly interpreted and applied the two-year time period set forth in MCL 710.51(6)(b), and because the trial court did not err in concluding that respondent had made reasonable efforts to avoid the termination of his parental rights, we affirm the trial court's August 31, 2015 order setting aside its prior decision terminating respondent's parental rights to the minor child and placing the minor child for adoption.

Affirmed.

/s/ Amy Ronayne Krause
/s/ Michael F. Gadola
/s/ Colleen A. O'Brien