STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of LEM, Minor.

TINA MCDUFFIE and MICHAEL MCDUFFIE,

Petitioners-Appellants,

v

ERNEST CECIL HIGBEE, JR., and DANIELLE K. MCDUFFIE,

Respondents-Appellees.

UNPUBLISHED
August 27, 2002

No. 238692
Antrim Circuit Court
Family Division
LC No. 01-001003-AD

Before: Whitbeck, C.J., and Bandstra and Talbot, JJ.

PER CURIAM.

Petitioners Tina McDuffie and Michael McDuffie appeal as of right from the family court's orders denying their petitions to terminate the parental rights of respondent Ernest Higbee and to adopt the minor child, LEM, in this grandparent adoption case under the Adoption Code, MCL 710.21 *et seq*. We affirm.

I. Basic Facts And Procedural History

LEM was conceived out of wedlock. Higbee and LEM's mother, respondent Danielle McDuffie (McDuffie), lived with each other until about a month before the child's birth. At that time, McDuffie moved into the petitioners' home; the petitioners are her parents. Higbee moved downstate and obtained new employment, but returned to the area several months later. In February 2001, when LEM was about five months old, the petitioners, with McDuffies' consent, filed a petition to adopt the child. Following a bench trial, the family court determined that MCL 710.39(2) governed termination of Higbee's parental rights and dismissed the petition.

After the petitioners filed this appeal, McDuffie's attorney and Higbee, acting in propria persona, signed an order stipulating to dismiss a separate paternity action and reflecting Higbee's consent to the adoption. This Court remanded the case to the family court to enable the petitioners to take the legal steps necessary to accept Higbee's consent to have his parental rights terminated. On remand, apparently, Higbee failed to appear at the scheduled hearing and his whereabouts could not be determined. After the case returned to this Court, the petitioners filed a motion for peremptory reversal, seeking to have Higbee's parental rights terminated under

MCL 710.37. This Court denied the motion, but expressly stated that nothing barred the petitioners from filing another motion to remand in order to conduct further proceedings under MCL 710.36 and MCL 710.37. The petitioners did not file another motion to remand. Thus, we now consider the substantive issues that they present, namely whether the family court erred in applying MCL 710.39(2) instead of MCL 710.37, and whether, in any event, its decision was clearly erroneous under MCL 710.39(2). In short, the petitioners maintain that the family court erred in refusing to terminate Higbee's parental rights, which bars them from adopting their grandchild.

II. Standards Of Review

Because our analysis involves several types of inquiries, we must apply different standards of review to the questions this appeal poses. When we interpret and apply the adoption statutes at issue, we engage in review de novo.[1] To the extent that we must also review the family court's factual findings, we do so by examining the findings for clear error.[2] However, we review the family court's ultimate decision to grant or deny the adoption petition in light of the facts for an abuse of discretion.[3] We do wish to make one additional point clear about this somewhat complex mixture of standards of review. Contrary to the petitioners' arguments, the great weight of the evidence standard does not apply in this case because this case was not brought under the Child Custody Act, which specifically provides that standard of review.[4]

III. Statutory Provisions

The family court interpreted and applied MCL 710.39 in denying the petitioners' request to adopt their grandchild. That statute provides:

> (1) If the putative father does not come within the provisions of subsection (2), and if the putative father appears at the hearing and requests custody of the child, the court shall inquire into his fitness and his ability to properly care for the child and shall determine whether the best interests of the child will be served by granting custody to him. If the court finds that it would not be in the best interests of the child to grant custody to the putative father, the court shall terminate his rights to the child.
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> (2) If the putative father has an established custodial relationship with the child or has provided substantial and regular support or care in accordance with the putative father's ability to provide such support or care for the mother during pregnancy or for either mother or child after the child's birth during the 90 days before notice of the hearing was served upon him, the rights of the putative father

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[1] See *In re TMK*, 242 Mich App 302, 304; 617 NW2d 925 (2000).

[2] See *In re RFF*, 242 Mich App 188, 201; 617 NW2d 745 (2000).

[3] See *TMK*, *supra*.

[4] See MCL 722.28.

> shall not be terminated except by proceedings in accordance with section 51(6) of this chapter or section 2 of chapter XIIA.

The family court found that Higbee's circumstances fit MCL 710.39(2), and thereby rejected termination under MCL 710.37(1), which states:

> (1) If the court has proof that the person whom it determines pursuant to section 36 to be the father of the child was timely served with a notice of intent to release or consent pursuant to section 34(1) or was served with or waived the notice of hearing required by section 36(3), the court may permanently terminate the rights of the putative father under any of the following circumstances:
>
> (a) The putative father submits a verified affirmation of his paternity *and a denial of his interest in custody of the child.*
>
> (b) The putative father files a disclaimer of paternity. For purposes of this section the filing of the disclaimer of paternity shall constitute a waiver of notice of hearing and *shall constitute a denial of his interest in custody of the child*.
>
> (c) The putative father was served with a notice of intent to release or consent in accordance with section 34(1), at least 30 days before the expected date of confinement specified in that notice but failed to file an intent to claim paternity either before the expected date of confinement or before the birth of the child.
>
> (d) The putative father is given proper notice of hearing in accordance with section 36(3) or 36(5) but either fails to appear at the hearing *or appears and denies his interest in custody of the child.*[5]

IV. Decision Not To Apply MCL 710.37(1)(d)

Limiting our review to the evidentiary record before the family court at the time it rendered its decision, we conclude that the family court did not err in refusing to terminate Higbee's parental rights pursuant to MCL 710.37(1)(d). The record indicates that Higbee requested LEM's custody as long as McDuffie continued to pursue allowing her parents to adopt the child. Higbee continuously advanced his position throughout the proceedings that MCL 710.39(2) governed the case, and repeated his request for custody in response to petitioners' "advice of law." The plain language in MCL 710.37(1)(d) reveals that the Legislature mandated that a putative father who appears at a hearing deny interest in having custody of his child before the family court can terminate his parental rights.[6] Petitioners have not persuaded us that Higbee's conduct was tantamount to denying his interest in custody within the meaning of MCL 710.37(1)(d). Thus, the family court did not err in failing to apply MCL 710.37(1)(d).

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[5] Emphasis added.

[6] See *In re Lang*, 236 Mich App 129, 133, n 6; 600 NW2d 646 (1999).

V. Decision To Apply MCL 710.39(2)

Nor did the family court err when it determined that MCL 710.39(2) governed this case. The record demonstrates that Higbee had an established custodial relationship with LEM. Higbee could have done more to be with his child, such as taking steps to establish his legal paternity. However, Higbee did work toward having more contact with LEM in the approximately six months between the baby's birth and the date when the petitioners' filed the adoption petition. At the same time, the evidence revealed that petitioners and McDuffie were attempting to prevent Higbee from having contact with LEM. Further, while petitioners and McDuffie dispute the quality of Higbee's visits, as well as his motivation for visiting the child, the evidence on this matter was conflicting, and the family court had the distinct advantage in weighing the evidence.[7] The family court did not detail all the evidence that it weighed in finding an established custodial relationship between Higbee and the child. Nevertheless, the family court's factual findings were sufficient to conclude that it did not clearly err in finding an established custodial relationship because Higbee had more than an "'incidental, fleeting, or inconsequential offer of support or care'" of LEM.[8]

With respect to Higbee's financial support of McDuffie during her pregnancy, the family court found that Higbee was the sole support for McDuffie until she moved into her parents' home. Though the family court acknowledged that Higbee's financial contributions during that time had been very low, it also noted that it allowed the couple to survive. The family court also rejected McDuffie's improved circumstances living with her parents as evidence that Higbee had failed to provide support. Thus, the family court found that Higbee satisfied this element of the statute. We see no clear error in the family court's findings in this regard. The record suggests that the amount of support he provided McDuffie while she was pregnant was proportionate to his ability to give support; in other words, from the evidence of his income, the record does not leave any reason to believe that he had withheld any resources from McDuffie.

The family court did not address whether Higbee provided substantial and regular support or care for McDuffie and LEM during the ninety-day period before petitioners filed the adoption petition. However, we need not address the petitioners' argument regarding this provision. By inserting the disjunctive "or" in the statute, the Legislature intended that a parent meet only one of the conditions to avoid having his parental rights terminated. Because the family court did not clearly err when it found that Higbee supported McDuffie while she was pregnant and had an established custodial relationship with his child, Higbee did not have to demonstrate support within this ninety-day period to avoid having his parental rights terminated and the family court did not abuse its discretion in denying the adoption petition.[9]

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[7] See *In re BKD*, 246 Mich App 212, 220; 631 NW2d 353 (2001).

[8] See *Lang*, *supra* at 137-138, quoting *In re Gaipa*, 219 Mich App 80, 85; 555 NW2d 867 (1996) (emphasis in *Lang* omitted).

[9] See *BKD*, *supra* at 223.

VI. Remand

McDuffie argues that this Court should consider the situation concerning Higbee as it has developed while this appeal has been pending and should order the family court to terminate Higbee's parental rights on the basis of those circumstances. The facts to which she refers do not appear on the record we have, and we are not free to make our own factual findings.[10]

VII. Further Proceedings

Although the family court did not err, petitioners are free to file a new adoption petition that, if granted, would terminate Higbee's parental rights on the basis of what has transpired while this appeal has been pending, thereby allowing petitioners to adopt LEM. If petitioners choose to file a new petition, they must provide Higbee with notice according to MCR 3.802(A) if his whereabouts are known. Once actually notified, the family court can consider whether to terminate Higbee's parental rights pursuant to MCL 710.37(1) or MCL 710.39, depending on which statute best fits the circumstances that exist at the time.

If petitioners claim they cannot find Higbee following a diligent inquiry, they must engage in the process identified in MCR 3.802(B), which requires the family court to hold a hearing and determine whether petitioners made a "reasonable attempt" to locate Higbee.[11] If the family court determines that the petitioners made a reasonable attempt to locate Higbee, the family court will then proceed to apply MCL 710.37(2)(b), taking special notice that the statute requires proof that Higbee has failed to satisfy *all* the criteria for termination listed.

However, if petitioners claim they cannot find Higbee following a diligent inquiry and the family court determines that their efforts to find him were not reasonable, MCR 3.802(B)(2) requires the family court to adjourn the proceedings and order additional efforts to notify Higbee of the proceedings. If petitioners still cannot find Higbee and, in the family court's opinion, their efforts to do give him notice were reasonable, the family court can then proceed to apply MCL 710.37(2)(b). If, in this second round of efforts to find Higbee, the petitioners locate him and give him notice, the family court then must determine whether to terminate his parental rights under MCL 710.37(1) or MCL 710.39.

Affirmed.

/s/ William C. Whitbeck
/s/ Richard A. Bandstra
/s/ Michael J. Talbot

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[10] See MCR 7.210(A).

[11] See MCR 3.802(B)(2).