

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of SWE, Minor.

CHRISTINE KAISER,

Petitioner-Appellee,

v

WILLIAM SHANE EICHMAN,

Respondent-Appellant.

UNPUBLISHED

September 13, 2002

No. 240071

Saginaw Circuit Court

Family Division

LC No. 01-006269-AY

Before: Whitbeck, C.J., and Sawyer and Kelly, JJ.

PER CURIAM.

Respondent William Shane Eichman appeals as of right¹ from the family court's order terminating his parental rights to the minor child, SWE, pursuant to the adoption code, MCL 710.51(6). We affirm. We decide this appeal without oral argument pursuant to MCR 7.214(E).

I. Basic Facts And Procedural History

Eichman married petitioner, Christine Kaiser, in 1994. In 1996, after the couple had SWE, they divorced. The court handling the divorce granted Kaiser sole custody of SWE, and gave Eichman parenting time. The court also ordered Eichman to pay \$89.00 per week in child support, plus an arrearage of \$352.24. Kaiser remarried on November 3, 2001, and her new husband wished to adopt SWE. Kaiser and her new husband filed the adoption petition and concurrent petition to terminate Eichman's parental rights on November 29, 2001. The petition alleged that Eichman had failed to comply substantially with the court-ordered child support payments for two years or more before Kaiser filed the petition, and that he had had substantially failed to contact SWE during that time.

After numerous unsuccessful attempts to contact Eichman, the family court held a hearing on January 16, 2002. Eichman made an unexpected appearance and stated his intention to contest the termination petition. The family court adjourned the hearing to allow the parties time to gather evidence and to allow the Eichman to decide whether he wished to represent himself. Eichman was subsequently incarcerated for delinquent child support payments.

¹ Respondent's challenge to this Court's jurisdiction is meritless because petitioner properly requested appellate counsel. See *People v McKinley*, 383 Mich 529, 539-540; 176 NW2d 406 (1970).

When the hearing continued on January 30, 2002, Kaiser testified that Eichman had last had physical contact with SWE in March 1997. Since that time, Eichman had tried to contact Kaiser once, during the Memorial Day weekend in 2000. He asked Kaiser about seeing SWE and she told him that she did not think that it would be in SWE's best interests to see Eichman. Eichman did not deny her accusations of past violent behavior or substance abuse, but stated that he could change. She wrote him a letter about her concerns and he did not respond. She maintained that Eichman only wanted to contact his son because they had the same last name.

Kaiser also testified that the family court held a show cause hearing in December 2001, which Eichman did not attend. At that time, a bench warrant was issued for Eichman's arrest. Additionally, by the January 30, 2002, hearing, Eichman owed \$19,292.00 in unpaid, court-ordered child support. His weekly support amount, which had been \$68.00, was increased on December 4, 2001 to \$113.00. Kaiser stated that she had not received any child support in the last five years, with the exception of an involuntary tax refund in the amount of \$817.00 and once-a-year payments of approximately \$60.00 to \$80.00.

In support of her claim, Kaiser offered a financial history prepared by the Saginaw County Friend of the Court. She also stated that she had lived with her parents since the divorce, had kept her address current with the Friend of the Court, and had not attempted to avoid Eichman. She had never refused telephone calls or correspondence from him. Kaiser stated that she provided her address to Eichman in her June 2000 letter to him. She discussed a letter sent by Eichman's sister to the court. The letter claimed that Eichman had tried to send Kaiser money orders that she returned, which Kaiser denied. The family court then noted that it would not accept this ex-parte communication in lieu of witness testimony.

Eichman did not testify, nor did he question Kaiser. He did not object to the exhibits introduced by Kaiser. He did, however, make an opening statement and a closing argument. He admitted that all the evidence presented by Kaiser's attorney was true. He asked for a chance to change, and stated that he did not contact SWE because he did not want the child subjected to his inappropriate life.

The family court then found sufficiently clear and convincing evidence to terminate Eichman's parental rights, making its factual findings and legal conclusions on the record. The family court noted that Eichman had substantially failed to comply with the child support order for two years or more before the petition was filed, and that he had had the ability to visit or contact SWE, but had regularly and substantially failed or neglected to do so for the same period. In the family court's opinion, Eichman had made few child support payments and had not sought visitation with the exception of one contact in spring 2000. Eichman, however, never made any real effort to spend time with his son, and no one had prevented him from having this time with his son.

Eichman now challenges the evidence, claiming that it did not support the family court's order to terminate his parental rights. He also argues that he was denied due process because the family court did not appoint an attorney to represent him in the proceedings.

II. Statutory Grounds For Termination

A. Standard Of Review

“A petitioner in an adoption proceeding must prove by clear and convincing evidence that termination of parental rights is warranted.”² Consequently, we review the family court’s findings of fact for clear error.³

B. Ability To Pay Support

The family court applied the stepparent adoption statute, MCL 710.51(6), which 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.^[4]

“In order to terminate parental rights under the statute, the court must determine that the requirements of subsections (a) and (b) are both satisfied.”⁵

According to Eichman, the family court lacked the evidence of his ability to pay support to satisfy MCL 710.51(6)(a). More specifically, he argues that the family court erred in relying on Kaiser’s testimony regarding his failure to pay child support, contending that she was not credible because she was interested in the outcome of the proceedings and failed to give complete information concerning the number of payments he actually made. By Eichman’s count, he made seven payments in 2000 in addition to the tax refund Kaiser received. Further, he claims that the family court in this case could not assume that, simply because he was subject to a support order, the court entering that order had determined that he had the ability to pay the amounts ordered.

Eichman, however, fails to acknowledge several key factors supporting the family court’s decision. First, at the hearing on the petition, he admitted to Kaiser’s allegations. Second, even

² *In re Hill*, 221 Mich App 683, 691; 562 NW2d 254 (1997).

³ *Id.* at 691-692.

⁴ Emphasis added.

⁵ *In re ALZ*, 247 Mich App 264, 272; 636 NW2d 284 (2001).

accepting his estimation of the number child support payments he made, Kaiser's testimony did not mischaracterize the number of payments. They were, indeed, sporadic, showing no regular pattern of payment, whether full payment or partial payment. Though Eichman suggests that the family court should have inquired about any additional payments he may have made through the Friend of the Court, he does not contend that he actually made any other child support payments. Third, while Eichman focuses on the evidence of his alleged inability to pay child support, the portion of subsection (a) that applies to him does not contemplate an inquiry into his ability to pay.⁶ Rather, the statute presumes that the court entering the support order has already considered the ability to pay.⁷ Regardless of whether, in practice, there are flaws in applying this assumption,⁸ the statute does not permit a collateral challenge to the support order as a rebuttal of the petitioner's evidence of substantial noncompliance with the order itself.⁹ Fourth, though Eichman challenges Kaiser's credibility, questions concerning credibility are properly entrusted to the family court.¹⁰ Additionally, Kaiser only attempted to visit his son once. In sum, we have no basis from which to conclude that the family court clearly erred in finding that the record reflected sufficient evidence necessary to terminate Eichman's parental rights.

III. Due Process

Though Eichman raises a constitutional issue regarding his right to counsel in the family court proceedings, the record belies his argument that the family court denied him his right to counsel, which is actually discretionary and not necessarily constitutional in nature.¹¹ As Kaiser notes, the family court properly informed Eichman during the first day of the hearing that it would appoint counsel for him if Eichman could demonstrate that he could not afford his own attorney.¹² Although Eichman claims that his sister requested appointed counsel on his behalf in a letter to the court, he has not furnished this Court with a copy of the letter. In addition, even though Eichman was incarcerated between hearings, he did write the family court twice while incarcerated requesting transportation to the hearing, but did not request counsel. Moreover, Eichman did not request counsel during the second day of the hearing when the family court asked whether Eichman would represent himself. Thus, this issue is without merit.

Affirmed.

/s/ William C. Whitbeck

/s/ David H. Sawyer

/s/ Kirsten Frank Kelly

⁶ See *In re Colon*, 144 Mich App 805, 811-812; 377 NW2d 321 (1985).

⁷ *Id.* at 812.

⁸ The remedy is to petition the court that issued the support order to seek modification of the support order. See *In re Newman*, 238 Mich App 486, 492; 606 NW2d 34 (1999).

⁹ *Id.*

¹⁰ See *In re BKD*, 246 Mich App 212, 220; 631 NW2d 353 (2001).

¹¹ See *In re Sanchez*, 422 Mich 758, 760-761, 766; 375 NW2d 353 (1985).

¹² See *id.* at 760-761.