STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of N. R. K. M, Minor.

RICHARD McARTHUR and DAUN McARTHUR,

Petitioners-Appellants,

v

RONDA LYNN ST. ANDREW,

Respondent-Appellee.

UNPUBLISHED
December 10, 2002

No. 240204
Gladwin Circuit Court
Family Division
LC No. 01-001014-AD

In the Matter of A. M. M., Minor.

RICHARD McARTHUR and DAUN McARTHUR,

Petitioners-Appellants,

v

RONDA LYNN ST. ANDREW,

Respondent-Appellee.

No. 240205
Gladwin Circuit Court
Family Division
LC No. 01-001015-AD

Before: Neff, P.J., and Hoekstra and O'Connell, JJ.

PER CURIAM.

Petitioners appeal as of right the family court's orders dismissing their petitions for stepparent adoption after the court found an insufficient basis to terminate respondent's parental rights to her children. We affirm.

In December 2001, petitioners, stepmother and father of the minor children, filed petitions for adoption pursuant to MCL 710.51(6), which provides that the court may issue an order terminating a parent's rights to permit a stepparent adoption if two conditions are met:

> (a) The other [nonpetitioning] 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.
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> (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. [*In re ALZ*, 247 Mich App 264, 272; 636 NW2d 284 (2001).]

The family court found that petitioners failed to establish the second prong of § 51(6), i.e., that respondent had "the ability to visit, contact, or communicate" with her children and "regularly and substantially failed or neglected to do so for a period of 2 years or more before the filing of the petition." We agree.

A petitioner in an adoption proceeding has the burden of proving by clear and convincing evidence that a termination of parental rights is warranted. *In re ALZ*, 247 Mich App 264, 272; 636 NW2d 284 (2001); *In re Hill*, 221 Mich App 683, 691-692; 562 NW2d 254 (1997). This Court reviews the trial court's findings of fact under the clearly erroneous standard. *Id*. A finding is clearly erroneous if, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake was made. *Id*. at 692. In addition, this Court defers to the trial court's determination of credibility. *In re Newman*, 189 Mich App 61, 65; 472 NW2d 38 (1991).

At the outset, we note that respondent was not represented by counsel in the termination proceedings, apparently because the family court erroneously believed that it did not have discretion to appoint counsel for an indigent parent with regard to stepparent adoption. The Supreme Court has held that the family court is authorized to appoint counsel for a nonconsenting noncustodial parent in proceedings brought pursuant to § 51(6), at both termination proceedings and on appeal. *In re Sanchez*, 422 Mich 758, 760-761, 770-771; 375 NW2d 353 (1985). A family court has the discretion to appoint counsel if necessary to:

> assur[e] the nonconsenting parent the ability to present a case properly, measured in the particular case by factors such as the relative strength of the adversaries and the presence or absence of legal, factual, procedural, or evidentiary complexity. [*Id*.]

An abuse of discretion will be found where the court fails to consider the relevant factors to determine whether legal representation is required. *Id*. at 771; see also *In re Fernandez*, 155 Mich App 108, 115; 399 NW2d 459 (1986) (trial court committed error requiring reversal by failing to exercise its discretion to sua sponte appoint counsel for a noncustodial indigent parent to assist in contesting a termination petition where it was apparent that the appointment of counsel was essential to protect the indigent parent's rights).

On appeal, as in the lower court proceedings, respondent is not represented by counsel, and no brief has been filed on her behalf. Because we affirm the trial court's dismissal of the petitions for adoption on the merits, this issue is not dispositive. Nonetheless, the lack of counsel renders the termination proceedings, and the evidence therein, of questionable validity as the basis of any subsequent adverse rulings against respondent. In any future proceedings, the family court must consider a request for counsel, applying the appropriate standard.

Addressing the merits of petitioners' appeals, we find no clear error in the court's determination that respondent did not have the ability to contact or communicate with her children because of a court order holding her parenting time in abeyance until further order of the court. The family court found that given respondent's level of sophistication, it was logical that she did not pursue contact with the children because she was ordered not to do so. The court's finding is in keeping with the purpose of MCL 710.51 and is supported by this Court's holdings in other cases with analogous circumstances. See *ALZ, supra; In re Kaiser*, 222 Mich App 619, 624-625; 564 NW2d 174 (1997). Having reviewed the record, we are not left with a definite and firm conviction that a mistake has been made.

In *Kaiser*, *id*. at 623-625, this Court reversed an order terminating the respondent mother's parental rights under § 51(6) where, even though she had not made substantial and regular contact with her children, she was prevented by an order of the circuit court from having any visitation with her children. In *Kaiser*, the order terminating visitation stemmed from charges by the petitioner father that the respondent had sexually abused the children.[1] *Id*. at 623.

In this case, as in *Kaiser*, a court order entered in 1998 at petitioner father's request suspended respondent's parenting time because she had allegedly failed to visit the children and pay child support. The order was in effect during the two years preceding the petition for adoption, the time period in question. In reviewing whether petitioners have met their burden of proof, "the court must determine whether statutory grounds for termination exist by looking at the two years immediately preceding the filing of the termination petition." *In re Caldwell*, 228 Mich App 116, 120; 576 NW2d 724 (1998). Given the court order suspending respondent's visitation rights, it cannot be said that respondent, having the ability to maintain contact with her children, failed to do so. *Kaiser, supra* at 625. Thus, petitioners have not met their burden of showing by clear and convincing evidence that the termination of respondent's parental rights was warranted. *ALZ, supra* at 272.

We reject petitioners' argument that despite the court order suspending respondent's parenting time, she was not prevented from "any other contact or communication" with her children, and therefore her lack of other contact or communication is fatal to her claim. As the lower court observed, it is logical that under the circumstances, respondent would be under the impression that she could not contact the children and therefore would not make phone calls to petitioners' home to speak with the children. We would undermine the very basis of our legal system to fault a parent for failing to violate a court order, either in word or principle.

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[1] The respondent was acquitted of the charges three years before the adoption petition was filed. *Kaiser, supra* at 620, 623.

"The primary purpose of MCL 710.51 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,' yet refuses or is unavailable to consent to the adoption." *ALZ, supra* at 277, quoting *In re Newton*, 238 Mich App 486, 492; 606 NW2d 34 (1999). In this case, the cessation of respondent's contact with her children stemmed from the petition filed in 1998 by petitioner father. Respondent has since taken steps to regain her parenting time. Petitioners thereafter filed the petitions to terminate respondent's parental rights. It does not further the purpose of the statute to allow termination of the parental rights of a noncustodial parent who attempts, albeit late in the game, to establish contact with the children and is prevented from doing so. See *ALZ, supra* at 277; *Kaiser, supra* at 624-625.

Our decision is in no way intended to thwart the beneficial actions of parents who have put aside their own adverse interests in favor of the children's best interests. *Id*. at 625. Whether termination is in the children's best interests in this case is a matter for the family court. *ALZ, supra* at 273. However, we concur with the *Kaiser* Court that foremost in the minds of all parents in these circumstances should be their obligation to put aside their personal feelings toward each other to ensure the health and well-being of their children. *Kaiser, supra* at 625.

Affirmed.

/s/ Janet T. Neff
/s/ Joel P. Hoekstra
/s/ Peter D. O'Connell