STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of KYLE THOMAS LEMCOOL, Minor.

ALLISON RAE DRAVES and JEREMY SHANE DRAVES,

Petitioner-Appellees,

v

GREGORY DONALD LEMCOOL,

Respondent-Appellant,

UNPUBLISHED
December 21, 2004

No. 255805
Iosco Circuit Court
Family Division
LC No. 2004-000918-AY

In the Matter of GREGORY JOHN LEMCOOL, Minor.

ALLISON RAE DRAVES and JEREMY SHANE DRAVES,

Petitioner-Appellees,

v

GREGORY DONALD LEMCOOL,

Respondent-Appellant.

No. 255840
Iosco Circuit Court
Family Division
LC No. 2004-000919-AY

Before: Hoekstra, P.J., and Griffin and Borrello, JJ.

PER CURIAM.

Respondent appeals as of right from the trial court's order terminating his parental rights to the minor children under MCL 710.51(6), which allows for the termination of the rights of a noncustodial parent during a stepparent adoption. We affirm.

Respondent first contends that the trial court breached its duty to advise him at the beginning of the proceedings, pursuant to MCR 3.915(B)(1), that he had the right to retain an attorney and that he had a right to a court appointed attorney if he was financially unable to retain one. Respondent argues that he did not have the knowledge or experience to represent himself, was at a disadvantage because petitioner was represented by counsel, and failed to get various documents admitted into evidence due to his lack of experience.

Respondent failed to raise the issue of representation until after his parental rights were terminated. Even if he had preserved the matter for our review, MCR 3.915(B)(1) governs child protective proceedings. Because the instant case occurred under the Adoption Code, MCR 3.800 to 3.806, which do not mention the right to counsel, apply to the proceedings. In *In re Sanchez*, 422 Mich 758, 769-771; 375 NW2d 353 (1985), our Supreme Court noted that the then-applicable court rules were silent as to the right to counsel in involuntary termination cases under the Adoption Code and found that appointment of counsel was in the discretion of the trial court based on a balancing of interests, including the relative strength of the adversaries and the presence or absence of legal, factual, procedural, or evidentiary complexities. In addition to failing to make any showing of indigency, respondent has not established the presence of any of the complexities listed in *Sanchez* that might require the appointment of counsel. Although defendant asserts that additional evidence would have been admitted had he been represented by an attorney, it is apparent from the lower court's opinion that it was aware of and considered this evidence. Consequently, we find that the trial court did not err by failing to inform respondent that he could seek appointment of counsel at the outset of the hearing.

Respondent next contends that the trial court erred in terminating his parental rights because petitioner failed to establish the two requirements for termination set forth in MCL 710.51(6). The statute in question states as follows:

> 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.

The petitioner bears the burden of proving by clear and convincing evidence that termination of the noncustodial parent's rights is warranted. *In re ALZ*, 247 Mich App 264, 272; 636 NW2d 284 (2001). In order to terminate parental rights under the statute, the trial court must find that the requirements of both subsections (a) and (b) have been satisfied. *Id.* We review the lower court's factual findings for clear error. *Id.*, at 271. "A finding is clearly

erroneous if, although there is evidence to support it, we are left with a definite and firm conviction that a mistake was made." *Id.*, at 271-272.

The period for determining whether the statutory grounds for termination exist begins on the date of the petition and extends back from that date for two years or more. *In re Caldwell*, 228 Mich App 116, 119-120; 576 NW2d 724 (1998). No exception exists for an incarcerated parent and courts properly examine the parent's ability to comply with the support and contact requirements of the statute within the context of the imprisonment. *Id.*, at 120-121.

Regarding the issue of support, the parties divorce judgment required respondent to pay petitioner $93 per week for the two children, or $60 for one child, until they reached the age of majority. The trial court noted that this obligation was suspended for approximately two years while respondent was imprisoned and that respondent had made some support payments following his release. But under the plain language of the statute, the court may consider more than just the past two years. *In re Hill*, 221 Mich App 683, 693; 562 NW2d 254 (1997). At the hearing in the instant case, petitioner testified that respondent had amassed an arrearage in support of more than $16,000 before his imprisonment. Although respondent testified that he did not think he owed this much, he acknowledged that the arrearage was a "considerable amount." Based on this testimony, we are not convinced that the trial court committed clear error in finding that respondent failed to provide regular and substantial support within the meaning of MCL 710.51(6)(a).

Concerning the issue of contact, respondent asserts that, while in prison, he wrote the children numerous letters and sent them to his mother but, unbeknownst to him, she failed to forward these letters to the children. Respondent further asserts that upon his release, he immediately attempted to initiate contact and, after having to file a parenting time enforcement request, had one visit with the children. However, the trial court noted that respondent had failed to have sufficient contact with the children even before his imprisonment, and specifically cited one instance where respondent failed to make contact even though he had notice that one of the children was undergoing major surgery. The court then held that because the children did not receive any calls, visits, or gifts from their father for more than two years before his recent visit, respondent had substantially failed to communicate with them.

In *Caldwell*, *supra*, at 121-122, this Court found that a trial court did not err in finding that an incarcerated respondent failed to satisfy the contact requirement of MCL 710.51(6)(b) where he sent his son only three letters in the two years preceding the termination petition. Furthermore, in *In re Kaiser*, 222 Mich App 619, 624; 564 NW2d 174 (1997), a respondent's attempts to communicate with her children via birthday cards and telephone calls were found insufficient to constitute "regular or substantial" contacts within the meaning of the statute. In the instant case, although respondent did attempt to send letters to his children via a third party, he failed to make actual contact with the children or ensure that his letters were received. We are not left with a definite and firm conviction that the trial court erred in finding that petitioner established by clear and convincing evidence that respondent failed to regularly and substantially contact or communicate with the children.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Richard Allen Griffin
/s/ Stephen L. Borrello