STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of ANTHONIUS JOHANNES VAN RIJN, Minor.

THEODORUS VAN RIJN and JAMIE LEA VAN RIJN,

Petitioners-Appellees,

v

COLLEEN MULLINS,

Respondent-Appellant.

UNPUBLISHED
January 15, 2008

No. 279660
Tuscola Circuit Court
Family Division
LC No. 07-002673-AY

Before: Jansen, P.J., and O'Connell and Fort Hood, JJ.

PER CURIAM.

Respondent appeals as of right the trial court's order terminating her parental rights to the minor child under the stepparent adoption statute, MCL 710.51(6). We reverse.

The petitioner in a stepparent adoption proceeding has the burden of establishing by clear and convincing evidence that termination of the noncustodial parent's parental rights is warranted. *In re Hill*, 221 Mich App 683, 691; 562 NW2d 254 (1997). In order to terminate parental rights under MCL 710.51(6), the trial court must determine that the requirements of both subsections of the provision are satisfied. *Id*. at 692. We review the trial court's factual findings for clear error. *In re Caldwell*, 228 Mich App 116, 121; 576 NW2d 724 (1998). Clear error exists where, although there exists evidence to support it, this Court is left with a definite and firm conviction that a mistake has been made. *Id.*

MCL 710.51(6) 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. [Emphasis added.]

In *In re Newton*, 238 Mich App 486, 493; 606 NW2d 34 (1999), this Court interpreted subsection (6)(a) to provide that the first clause of the subsection "applies where there is no support order and the second clause applies when there is an existing order." Thus, "[o]nly in cases in which there is no support order in place is an inquiry into ability to pay necessary or even allowed." *Id*. at 492. This Court reasoned that a support order has already taken into consideration the noncustodial parent's ability to pay and that requiring the court to inquire into the parent's ability to pay in stepparent adoption cases "would be a repetitious and inefficient use of judicial resources and would essentially allow a collateral attack of the support order." *Id*. at 491-492. This Court further stated that "[i]n cases where the order of support no longer accurately reflects such ability, either parent may petition the court for modification of the order." *Id*. at 492.

In the instant case, the trial court erred by inquiring into respondent's ability to pay when a child support order was in place. *Id*. The support order, which was already in place at the time of the proceedings below, specified that respondent's "child support obligation shall be zero." Because this support order was in place, the second clause of subsection (6)(a) limited the trial court's inquiry to whether respondent had failed to substantially comply with the support order during the two-year period immediately preceding the filing of the termination petition. *Id*. A contrary conclusion would have "allow[ed] a circumvention of the official order of the court." *Id*.

We are mindful of the trial court's reasoning that the provision in the child support order requiring respondent to pay "zero" was not based on a finding of her inability to pay, but rather on an agreement between the parties. Thus, the trial court reasoned that an inquiry into respondent's ability to pay would not be duplicative. However, the plain language of the second clause of subsection (6)(a) makes no mention of whether the parent's ability to pay has actually been previously determined with respect to the child support order. Rather, the statutory language merely states that if a support order is in place, the inquiry is limited to whether the parent has substantially complied with that order. The trial court improperly read into the statutory text the additional requirement of a determination of the parent's ability to pay. If statutory language is plain and unambiguous, further interpretation is not permitted and courts may not "read in" additional requirements not plainly expressed by the legislature. *People v Gentner, Inc*, 262 Mich App 363, 367; 686 NW2d 752 (2004).

Moreover, this Court's decision in *In re SMNE*, 264 Mich App 49; 689 NW2d 235 (2004), is unhelpful in the present case. In *In re SMNE*, a provision in the parties' divorce judgment reserved the issue of child support because the respondent was unemployed at the time. In other words, the provision did not set forth any amount of support. *Id*. at 51-53. This Court determined that because the order did not set forth "some sum of money" that the respondent was

required to pay as child support, it was not a support order, and the trial court therefore properly inquired into the respondent's ability to pay under the first clause of MCL 710.51(6)(a). *Id*. at 55. Important to this Court's determination was that the order "reserved" the establishment of a certain sum of money for another time. *Id*. at 54-56.

In contrast, the issue of child support was not reserved for another time in the instant case. Rather, the parties agreed and the trial court specifically determined that respondent was obligated to pay "zero." Indeed, as noted earlier, the support order states that respondent's "child support obligation shall be zero" and that the child's father raised no objections to this particular arrangement. As recognized in *In re Newton*, *supra* at 492, either party could have petitioned the court for modification of the support order. However, the child's father never did so. To allow respondent's parental rights to be terminated despite her compliance with the express terms of the support order would essentially "blindside" her. See *id*. at 493. Because a support order was already in place, the trial court erred by inquiring into respondent's ability to pay. Moreover, because respondent was in substantial compliance with the support order, the conditions of MCL 710.51(6)(a) were not satisfied in this case. The court erred by terminating respondent's parental rights.

Reversed.

/s/ Kathleen Jansen
/s/ Peter D. O'Connell
/s/ Karen M. Fort Hood