STATE OF MICHIGAN

COURT OF APPEALS

In re BJH-M, IGH, and MCH, Minors.

UNPUBLISHED
August 21, 2014

No. 321056
Genesee Circuit Court
Family Division
LC No. 14-017510-AY

Before: MURPHY, C.J., and WHITBECK and TALBOT, JJ.

PER CURIAM.

The mother of the minor children, MH, appeals as of right the order dismissing the supplemental petition to terminate the parental rights of the children's father, JH, under the stepparent adoption statute of the Michigan Adoption Code.[1] We affirm.

MH first contends that the trial court erred in finding that JH's failure to report to the Friend of the Court ("FOC") all sources and amounts of his income did not constitute a failure to "substantially comply" with the support order.[2] We disagree.

"Statutory interpretation is a question of law that, on appeal, is reviewed de novo for error."[3] "A petitioner in an adoption proceeding must prove by clear and convincing evidence that termination of parental rights is warranted."[4] We review the lower court's findings of fact for clear error.[5] "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."[6]

MCL 710.51(6) provides:

[1] MCL 710.51(6).

[2] MCL 710.51(6)(a).

[3] *In re Hill*, 221 Mich App 683, 689; 562 NW2d 254 (1997).

[4] *Id*. at 691.

[5] *Id*. at 691-692.

[6] *Id*. at 692.

> 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:
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> (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.
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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.[7]

"[T]he applicable two-year statutory period 'commence[s] on the filing date of the petition and extend[s] backwards from that date for a period of two years or more.' "[8] "[A] court may [also] consider the best interests of the child in deciding whether to grant a petition to terminate the noncustodial parent's rights," and "need not grant termination if it finds that it would not be in the best interests of the child."[9]

MCL 710.51(6)(a) "addresses two independent situations: (1) where a parent, when able to do so, fails or neglects to provide regular and substantial support, and (2) where a support order has been issued and the parent fails to substantially comply with it."[10] In cases where the noncustodial parent is subject to a child support order, the petitioner is not required to prove that the noncustodial parent had the ability to pay support because "ability to pay is already factored into a child support order, and it would be redundant to require a petitioner under the Adoption Code to prove the natural parent's ability to pay as well as that parent's noncompliance with a support order."[11] This Court stated:

> [T]he support order in place has already taken "ability to pay" into consideration. In other words, there are effectively two questions inherent in the first clause in subsection 6(a): (1) What is the ability to support the child?; and (2) Was there a failure of such support? However, the second clause in subsection 6(a) asks only if there was a failure of support, since the existing support order already answers the first question. The court deciding the termination and adoption must follow

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[7] Citation omitted.

[8] *In re Hill*, 221 Mich App at 689 (citation omitted).

[9] *In re Newton*, 238 Mich App 486, 494; 606 NW2d 34 (1999).

[10] *Id*. at 491.

[11] *Id*. (citation and quotation marks omitted).

> the determination made regarding the respondent's ability to support the child in the support order as a matter already settled by a judgment. Moreover, the Legislature is presumed to know of and legislate in harmony with existing law. In cases where the order of support no longer accurately reflects such ability, either parent may petition the court for modification of the order. Any discrepancies between the circumstances of the parties and the order of support may be appropriately reviewed and corrected by the filing of such a petition. To require the court to inquire into ability to pay in cases such as this would be a repetitious and inefficient use of judicial resources and would essentially allow a collateral attack of the support order. Instead, the court order takes the place of any inquiry into the circumstances of the parents. Only in cases in which there is no support order in place is an inquiry into ability to pay necessary or even allowed. Any other interpretation in this case would allow a circumvention of the official order of the court. If the level of child support required of a parent by a court order is inadequate, then a modified order must be sought by the same processes by which the existing order has been obtained.[12]

This Court has concluded that where "the court *did not set forth some sum of money that respondent* was required to pay for child support, there [was] no support order in place *under the circumstances of this case*, and the trial court properly inquired about respondent's ability to support her child."[13]

The parties do not dispute that there was a support order in place providing that JH owed $0 in support because of his Social Security benefit credit. Because there was a support order in place, the trial court was not permitted to inquire into JH's ability to pay.[14] Rather, its determination was limited to whether JH substantially complied with the support order for a period of two years or more before the filing of the petition.[15] A party's only remedy to alter an order that it believes is inaccurate is to petition the court to modify the order.[16] If MH wished to modify JH's support obligation due to additional income, the proper procedure was to file a petition for modification of the support order before the judge who had ongoing jurisdiction over support.

Assuming for the sake of argument that the support order also required JH to report the sources and amount of his income to the FOC,[17] for purposes of determining whether a parent

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[12] *Id*. at 491-492 (citations omitted).

[13] *In re SMNE*, 264 Mich App 49, 55; 689 NW2d 235 (2004).

[14] *Id*. at 54; *In re Newton*, 238 Mich App at 492.

[15] *In re Newton*, 238 Mich App at 491-492.

[16] *Id*. at 492.

[17] Under the consent judgment of support, JH had an obligation to report the name, address, and telephone number of the source of his income and the amount of his income to the FOC. MH argues that the Uniform Child Support Order in place contained a similar requirement.

failed to substantially comply with a support order, the support order is the requirement for payment of "*some sum of money*."[18] Although the determination whether JH failed to report the sources and amount of his income would not be made for the purpose of obtaining additional support, the court would in effect be making a determination regarding JH's ability to pay, which the court is not permitted to do where there is a support order in place. This inquiry "would essentially allow a collateral attack of the support order."[19] To allow the court to consider the ability to pay and terminate parental rights where there is a support order in place with which the parent has complied would allow the parent to be "blindsided" by termination.[20] Moreover, it would be inconsistent with the primary purpose of the statute, 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."[21] Thus, the trial court properly found that JH's alleged failure to report the sources and amount of his income would not constitute a failure to substantially comply with the support order.[22]

The trial court further found that JH substantially complied with the support order for a period of two years before the filing of the petition to terminate his parental rights. MH does not dispute that JH has met his support obligations under the support order. Thus, the trial court did not clearly err in finding that JH substantially complied with the support order.[23]

Because MH failed to show by clear and convincing evidence that the requirements of MCL 710.51(6)(a) were met, it was not necessary for the trial court to consider whether MH satisfied MCL 710.51(b), as both subsections must be satisfied.[24] Moreover, it was not necessary

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[18] *In re SMNE*, 264 Mich App at 55.

[19] *In re Newton*, 238 Mich App at 492.

[20] *Id*. at 493 (quotation marks omitted).

[21] *Id*. at 492 (citation omitted).

[22] This Court's decision in *In re Kaiser*, 222 Mich App 619; 564 NW2d 174 (1997), is distinguishable. In that case, a judgment of divorce was entered in 1989, which required the respondent to inform the FOC of her employment. *Id*. at 620-621. In August 1994, a support order was entered, which also required the respondent to inform the FOC of changes in her employment. *Id*. at 621. In August 1995, a petition for termination was filed. *Id*. at 620. This Court concluded that the lower court did not clearly err in finding that the respondent failed to comply with the court's orders by failing to inform the FOC of her employment and that she had an ability to provide support, but failed to do so. *Id*. at 622. Because the support order had only been in place for one year at the time the petition was filed, the court could not have found that the respondent failed to substantially comply with the order for two or more years, as required under the second clause of MCL 710.51(6)(a). Accordingly, the court must have concluded that MCL 710.51(6)(a) was satisfied based on the respondent's failure to provide support when she had the ability to do so under the first clause.

[23] See *In re Hill*, 221 Mich App at 691-692.

[24] *In re Newton*, 238 Mich App at 494.

for the trial court to consider whether termination was in the children's best interest.[25] The trial court properly found that MH failed to prove by clear and convincing evidence that termination was warranted and properly dismissed the petition to terminate JH's parental rights.[26]

Affirmed.

/s/ William B. Murphy
/s/ William C. Whitbeck
/s/ Michael J. Talbot

[25] See *id*.

[26] See *In re Hill*, 221 Mich App at 691.