STATE OF MICHIGAN

COURT OF APPEALS

In re AWP II, Minor.

UNPUBLISHED
January 16, 2018

No. 339179
Sanilac Circuit Court
Family Division
LC No. 17-003250-AY

Before: TALBOT, C.J., and MURRAY and O'BRIEN, JJ.

PER CURIAM.

Petitioner mother appeals by right an order denying her petition seeking stepparent adoption of her biological son by her husband, as well as termination of the parental rights of respondent, the child's biological father. Because the lower court's reason for denying the petition amounted to clear legal error, we vacate the court's order and remand for further proceedings.

I. FACTS

The parties' son, AWP, was born in 2003. When he was one year old, a court order was entered giving respondent parenting time on Sundays and awarding petitioner child support. Respondent exercised his parenting time on a "spotty" basis until approximately 2006. He testified that he originally complied with the order but when disputes arose concerning parenting time, he "just got tired of it" and did not make further efforts to see his child. From age 3 to age 12, the child had no contact with respondent. In 2015, respondent filed a motion to enforce parenting time, reduce child support, and modify parenting. At a March 24, 2015 hearing, respondent expressed his desire to be involved in AWP's life, but the court declined to enforce parenting time due to respondent's extended absence. However, petitioner did not oppose reintroducing respondent into AWP's life on a gradual basis, and the referee recommended altered parenting time on an increasing schedule. Thereafter, a consent order was entered on September 27, 2015, and respondent was granted parenting time one weekend a month from Friday at 6:00 p.m. until Sunday at 6:00 p.m.

On January 17, 2017, a hearing was held regarding respondent's second parenting time enforcement request. Petitioner testified that respondent had missed three consecutive months of visits in October, November, and December of 2016, and that he had not contacted her about those missed visits. Respondent explained that he lost his cellphone, which contained petitioner's telephone number, and faulted petitioner for not contacting him. Respondent sent a message to petitioner on Facebook that went unanswered, and he did not attempt to write to

petitioner or AWP or visit their home. Once again, a referee determined that petitioner did not wrongfully deny parenting time to respondent.

On February 2, 2017, petitioner initiated the underlying action by way of a petition for stepparent adoption and termination of parental rights, alleging respondent's substantial noncompliance with parenting time and his failure to comply with the child support order. At a subsequent evidentiary hearing, petitioner testified that in the two years preceding the petition, respondent had made 2 of 24 required child support payments. Further, petitioner stated that from July 2015 to September 2015, respondent had attended "about half" of the scheduled weekly supervised visits, and that from October 2015 until the date of the hearing, respondent exercised his monthly parenting time a total of seven times.

The lower court found that respondent had failed to provide regular support for the child during the two-year period preceding the petition. However, the court observed that respondent had sought to enforce parenting time on several occasions in that time frame, which demonstrated that he had a continuing interest in seeing his son. The court explained that in light of respondent's demonstrated interest in seeing AWP, it was compelled by the holding of *In re ALZ*[1] to deny the petition. In particular, the court asserted that *In re ALZ* stood for the proposition that "a Mother cannot refuse a putative father contact with his child and then use the Father's lack of contact against him to support a petition for Stepparent adoption."

II. ANALYSIS

On appeal, petitioner argues that the trial court erred by finding that respondent exercised "a little over half" of his available parenting time, by failing to make specific findings under MCL 710.51(6)(b), and in its application of the holding from *In re ALZ*.

In a stepparent adoption proceeding, the lower court's findings of fact are reviewed for clear error.[2] "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."[3] When the issue on appeal involves the lower court's application of law, we review for clear legal error.[4] A court commits clear legal error when it "incorrectly chooses, interprets, or applies the law . . . ."[5]

MCL 710.51(6) provides for termination of a natural parent's rights in the context of stepparent adoption under the following conditions:

> 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

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[1] *In re ALZ*, 247 Mich App 264; 636 NW2d 284 (2001).

[2] *In re Hill*, 221 Mich App 683, 691-692; 562 NW2d 254 (1997).

[3] *Id*. at 692.

[4] See, e.g., *In re Keast*, 278 Mich App 415, 423; 750 NW2d 643 (2008).

[5] *Fletcher v Fletcher*, 447 Mich 871, 881; 526 NW2d 889 (1994).

> 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.
>
> (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 has the burden to prove by clear and convincing evidence that termination of the noncustodial parent's rights is warranted.[6] In order to terminate parental rights, the court must find that the requirements of subsections (a) and (b) are both satisfied.[7] Additionally, "even if the petitioner proves the enumerated circumstances that allow for termination, a court need not grant termination if it finds that it would not be in the best interests of the child."[8]

After finding that petitioner had established the requirements of subsection (a) by clear and convincing evidence,[9] the lower court concluded that the instant case was analogous to, and controlled by the outcome of, *In re ALZ*. In that case, the respondent father's paternity was not established until nearly six years after the child's birth when the respondent filed a complaint seeking an order of filiation and parenting time.[10] In the meantime, the petitioner mother rebuffed all efforts the respondent made to contact or visit the child.[11] Approximately two months after the respondent's paternity was established, the petitioner sought termination of the respondent's parental rights and adoption by the child's stepfather.[12] This Court affirmed the lower court's denial of the petition, agreeing with its rationale that MCL 710.51(6)(b) had not been established where the petitioner resisted the respondent's attempts to establish a relationship with the child, resulting in the respondent's *inability* to contact the child during the statutory two-year period.[13] In affirming the lower court's ruling, this Court distinguished the circumstances before it from those involved in cases where the noncustodial parent failed to

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

[7] *Id*. at 692.

[8] *In re Newton*, 238 Mich App 486, 494; 606 NW2d 34 (2000).

[9] Petitioner does not challenge the trial court's finding with respect to MCL 710.51(6)(a).

[10] *In re ALZ*, 247 Mich App at 265-268.

[11] *Id*. at 266-267.

[12] *Id*. at 268.

[13] *Id*. at 274.

request visitation privileges or otherwise failed to exercise an existing legal right to contact the child.[14]

Having reviewed the limited record from the lower court proceedings, we must conclude that the lower court misinterpreted the narrow holding of *In re ALZ* and committed clear legal error by misapplying it in this matter. Since deciding *In re ALZ*, this Court has considered other cases in which a petitioner has purportedly interfered with the respondent's ability to visit, contact, or communicate with his or her child, and emphasized the importance of the *In re ALZ* respondent's lack of established paternity until shortly before the subject petition. For instance, the respondent mother in *In re SMNE*[15] similarly alleged that the petitioner prevented her from having regular contact with her child, though the terms of the parties' divorce decree granted the respondent visitation rights. Given the respondent's legal right to visitation and her ability to enforce that right through the courts, we found *In re SMNE* distinguishable from *In re ALZ* and affirmed the lower court's finding that the respondent was not prevented from having regular and substantial contact with the child.[16]

Like in *In re SMNE*, respondent's paternity and right to parenting time was established well before the two-year period at issue in MCL 710.51(6). Respondent testified that he simply stopped exercising parenting time for over seven years, despite a court order granting him parenting time on a weekly basis. Moreover, although we agree that respondent's motions[17] to enforce parenting time reflect his present desire to remain in AWP's life, we disagree with the level of significance the lower court placed on these "disputes." When respondent first sought to enforce his parenting time in early 2015, the referee rejected his assertion that he had been kept from AWP for several years, instead finding that respondent "stopped requesting to see [his] child and just stopped doing [his] parenting time." Likewise, at the January 17, 2017 hearing concerning respondent's second motion, the referee explained,

> So as far as the parenting time that you missed at this point, I can't really say positively that [petitioner] wrongfully denied the parenting time. You didn't contact her. You said you lost the number.

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[14] *Id*. at 274-275, citing *In re Caldwell*, 228 Mich App 116; 576 NW2d 724 (1998) (incarcerated father failed to contact or communicate with child through available channels), *In re Simon*, 171 Mich App 443; 431 NW2d 71 (1988) (noncustodial father failed to request parenting time), and *In re Martyn*, 161 Mich App 474; 411 NW2d 743 (1987) (noncustodial father failed to exercise legal right to visit, contact, or communicate with child).

[15] *In re SMNE*, 264 Mich App 49, 51; 689 NW2d 235 (2004).

[16] *Id*.

[17] At the May 26, 2017 hearing concerning the underlying petition, respondent indicated that he had been to court three times since September 2016. However, he did not offer any court filings or orders to support his assertion, and the only transcripts introduced in evidence were those pertaining to the March 24, 2015 and January 17, 2017 hearings.

Accordingly, the lower court erred by reasoning that respondent's meritless motions to enforce parenting time precluded a finding that respondent had the ability to visit, contact, or communicate with AWP but regularly and substantially failed to do so for a period of two years or more before the petition.[18] We thus vacate the lower court's order denying the petition to terminate respondent's parental rights.

Because we find that the lower court's order must be vacated on the basis of the court's clear legal error, we need not address petitioner's remaining claims of error. Nonetheless, we note that petitioner correctly argues that the lower court erred by finding that respondent exercised "a little over half" of his available parenting time in the two-year period preceding the February 2, 2017 petition. Without deciding whether this error would warrant reversal in and of itself, we will address it for the sake of judicial efficiency in the proceedings on remand.

Between February 2, 2015 and September 27, 2015, respondent was entitled to exercise parenting time or otherwise communicate with AWP every Sunday.[19] Petitioner testified that respondent exercised "about half" of his weekly parenting time visits in July, August, and September of 2015. On September 27, 2015, a consent order was entered granting respondent parenting time one weekend each month, and petitioner testified that respondent complied with the order for the balance of the calendar year, i.e., October, November, and December of 2015. However, according to petitioner, in 2016 respondent only exercised parenting time in February, June, July, and September. Petitioner acknowledged that she refused to allow respondent to exercise parenting time in January 2017 pending the outcome of an investigation by Child Protective Services. Respondent did not specifically refute petitioner's account of his parenting time history. Thus, by our count, the record suggests that respondent exercised parenting time during 10 of 24 months, or 13 of approximately 46 to 50 available visits.[20] As such, even giving respondent the benefit of the doubt concerning his January 2017 parenting time, the trial court clearly erred by finding that respondent exercised "a little over half" of his allotted parenting time. In any event, MCL 710.51(6)(b) does not contain a numerical threshold in connection with petitioner's burden of proof and, on remand, the lower court is directed to determine whether respondent's history amounts to "regularly and substantially" failing or neglecting to visit, contact, or communicate with AWP under MCL 710.51(6)(b).[21] Should the court conclude that

[18] See MCL 710.51(6)(b).

[19] Following the hearing on respondent's first motion to enforce parenting time, the parties agreed with the referee's recommendation to begin with three weeks of written correspondence, followed by five weeks of supervised visits, before reverting to weekly unsupervised visits.

[20] The record is unclear as to the precise number of parenting time visits that were available to respondent between February 2, 2015, and entry of the September 27, 2015 consent order.

[21] The lower court is also free to consider the extent to which petitioner may have interfered with respondent's ability to exercise his parenting time, with the understanding that the mere filing of unsubstantiated motions to enforce parenting time is not dispositive.

petitioner satisfied her burden of proof with respect to subsection (b), it must also consider whether termination of respondent's parental rights is in AWP's best interests.[22]

III. CONCLUSION

We vacate the lower court's order denying the petition to terminate respondent's parental rights and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Christopher M. Murray
/s/ Colleen A. O'Brien

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