STATE OF MICHIGAN

COURT OF APPEALS

In re A. M. R., Minor.

UNPUBLISHED
January 15, 2019

No. 344560
Shiawassee Circuit Court
Family Division
LC No. 18-003887-AY

Before: BOONSTRA, P.J., and SAWYER and TUKEL, JJ.

PER CURIAM.

Respondent-father appeals by right the trial court's order terminating his parental rights to his son, AMR, under the Michigan adoption code, MCL 710.21 *et seq*., and specifically under MCL 710.51(6)(a) (failure to provide regular and substantial support) and MCL 710.51(6)(b) (failure to have regular and substantial contact). We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Petitioner Jessica Dizotell (hereinafter "mother") gave birth to AMR in August 2013. Mother and respondent-father were not married, but respondent-father executed an affidavit of paternity the next day acknowledging that he was AMR's father. Mother and respondent-father separated in the autumn of 2013.

Respondent-father did not provide child support. Mother filed a child-support action in April 2016. A child-support order was entered in July 2016 requiring respondent-father to pay $92 per month. Respondent-father made a partial payment in August, full payments in September and October, and a small partial payment (under three dollars) in November 2016. Respondent-father then stopped making payments. Mother moved the trial court for enforcement of the child-support order in March 2017. After a show-cause hearing, an updated child-support order was entered in April 2017 that increased respondent-father's support obligation to $138 per month. Respondent-father then made partial payments in May, June, and July 2017. Respondent-father did not make payments in August, September, or October 2017. There was a show cause hearing in November 2017, and respondent-father's child-support obligation was increased again to $141.50 per month. Respondent-father then made partial payments in November and December 2017.

Mother married petitioner Adam Dizotell ("Dizotell") in April 2017. Respondent-father filed a motion for parenting time with the trial court in December 2017. Respondent-father had never previously requested parenting time through the court. In January 2018, petitioners filed a petition to terminate respondent-father's parental rights so that Dizotell could adopt AMR.

At the hearing on the petition, mother testified that respondent-father had only seen AMR two to four times since his birth, and had had no contact with AMR since February 2014. The last time that mother had spoken to respondent-father was in July 2015. Respondent-father claimed that he had tried to contact mother in 2015 to arrange to visit AMR, but that mother gave him an excuse for why AMR could not see him. On July 26, 2015, mother told respondent-father to "take [her] to court" if he wanted to see AMR. Respondent-father admitted that he stopped trying to contact mother to see AMR in 2015. He claimed that he did not seek court-ordered parenting time because he was "trying to be civil."

The trial court found that respondent-father had had no contact with AMR for the two years preceding the filing of the petition, and that respondent-father had not substantially complied with the support order, only making partial payments when threatened with jail time. The trial court noted that respondent-father had testified that he was frequently unable to visit AMR because he had to work. The trial court terminated respondent-father's parental rights as described. Respondent-father filed a motion for reconsideration, which the trial court denied.[1] This appeal followed.

II. SERVICE OF PROCESS

Respondent-father argues that the petition to terminate his parental rights should have been dismissed because he was not served with a copy of the petition. We disagree.

"In general, issues that are raised, addressed, and decided by the trial court are preserved for appeal." *In re TK*, 306 Mich App 698, 703; 859 NW2d 208 (2014). Respondent-father failed to raise this issue in the trial court; therefore, the issue is unpreserved. Unpreserved claims are reviewed for plain error affecting substantial rights. *Demski v Petlick*, 309 Mich App 404, 426-427; 873 NW2d 596 (2015). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) the error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *Id*.

MCR 3.802(A)(2) states in relevant part: "[A] petition to terminate the rights of a noncustodial parent, must be served on the individual or the individual's attorney in the manner provided in MCR 5.105(B)(1)(a) or (b)." A civil action may be dismissed for lack of service of

[1] Respondent-father attached an affidavit to his motion for reconsideration containing factual allegations and exhibits not introduced at the termination hearing. There is no indication that this evidence could not have been presented at the hearing. We therefore only consider the evidence presented to the trial court at the time it rendered its termination decision. See *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000); see also *Pitsch v ESE Michigan, Inc*, 233 Mich App 578, 598 and n 10; 593 NW2d 565 (1999).

process. MCR 2.102(E)(1). However, when a defendant enters his general appearance in the circuit court, he submits to the jurisdiction of that court and waives defects in process. MCR 2.102(E)(1); *Daines v Tarabusi*, 246 Mich 419, 421; 224 NW 416 (1929); see also *In re Dunn's Estate*, 245 Mich 270, 275-276; 222 NW 194 (1928). Generally, any action on the part of the defendant that recognizes the pending proceedings will constitute a general appearance. *Penny v ABA Pharmaceutical Co*, 203 Mich App 178, 181-182; 511 NW2d 896 (1993), overruled in part 477 Mich 280 (2007). "Only two requirements must be met to render an act adequate to support the inference that there is an appearance: (1) knowledge of the pending proceedings and (2) an intent to appear." *Id*. at 182.

In this case, mother admits that it does not appear that respondent-father was served with a copy of the petition seeking to terminate his parental rights for the purpose of step-parent adoption. However, respondent-father admits that he did receive notice of the hearing, that he appeared at the hearing, and that he understood the purpose of the hearing. Respondent-father represented himself and testified as a witness. We conclude that respondent-father had knowledge of the pending proceedings and intended to appear. *Penny*, 203 Mich App at 182. Accordingly, respondent-father waived any defect in service of process. Additionally, respondent-father never raised as an issue at the termination hearing the lack of service of the petition, nor did he request an adjournment. We hold that the trial court did not plainly err by failing to sua sponte dismiss the petition to terminate respondent-father's parental rights. *Demski*, 309 Mich App at 426-427.

III. EVIDENTIARY STANDARD

Respondent-father also argues that the trial court committed clear error because it did not announce the evidentiary standard that it was applying to its decision. We disagree. Whether the trial court applied the correct evidentiary standard is a question of law that we review de novo. See *Demski*, 309 Mich App at 426.

Respondent-father claims that because the trial court failed to state which evidentiary standard it was applying, we should infer that it applied an incorrect legal standard. However, respondent-father does not supply any legal authority in support of his argument. And as we have stated many times:

> It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position. . . . Failure to brief a question on appeal is tantamount to abandoning it. [*People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001) (citation omitted).]

Because respondent-father failed to provide any authority for his position, requiring us instead to infer error, we conclude that respondent-father has abandoned this issue on appeal.

In any event, "[a] trial judge is presumed to know the law." *Demski*, 309 Mich App at 427. Although the trial court did not announce which evidentiary standard it was applying, there is no evidence that it applied an incorrect one. Nor did the trial court violate any court rule or

statute by failing to explicitly announce the evidentiary standard to be employed in reviewing the petition for termination. Since the trial court is presumed to know the law, we presume that it applied the correct evidentiary standard. *Id.* We find no error requiring reversal resulting from the trial court's failure to announce the evidentiary standard that it was applying to the case.

IV. STATUTORY GROUNDS FOR TERMINATION

Respondent-father argues that the trial court clearly erred by finding that termination of his parental rights under MCL 710.51(6) was proven by clear and convincing evidence. We disagree.

> A petitioner in an adoption proceeding must prove by clear and convincing evidence that termination of parental rights is warranted. This Court reviews the probate court's findings of fact under the clearly erroneous standard. 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. [*In re Hill*, 221 Mich App 683, 691-692; 562 NW2d 254 (1997).]

This Court reviews de novo issues of statutory interpretation. *In re Newton*, 238 Mich App 486, 489; 606 NW2d 34 (1999).

MCL 710.51(6) governs when a non-custodial parent's parental rights may be terminated under the Michigan adoption code to allow for step-parent adoption, and provides:

> (6) 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 a parent having custody of the child according to a court order 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.

MCL 710.51(6)(a) applies "(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." *Newton*, 238 Mich App at 491. If a child-support order is in place, a trial court need not determine whether a parent has the financial ability to support the child, as that determination is inherent in the child-support order. *In re SMNE*, 264 Mich App 49, 53-54; 689 NW2d 235 (2004). The applicable statutory two-year period runs

immediately backwards two years from the date of the filing of the petition. *In re Halbert*, 217 Mich App 607, 612; 552 NW2d 528 (1996).

In this case, the petition to terminate respondent-father's parental rights for step-parent adoption was filed on January 10, 2018. Therefore, the retrospective two-year statutory period reaches back to January 10, 2016. However, the child-support order did not enter until July 25, 2016. Therefore, respondent-father's parental rights could not have been terminated solely for failure to comply with the child-support order, because the child-support order had not been in effect for the statutory two-year period as of the point in time that the petition was filed. Nonetheless, the trial court was permitted to determine that respondent-father had failed to provide regular and substantial support to AMR despite having the ability to do so.

Because a child-support order was entered as of July 25, 2016, the trial court did not need to determine respondent-father's ability to pay from that time until the filing of the petition on January 10, 2018. *SMNE*, 264 Mich App at 53-54. However, the trial court did need to determine respondent-father's ability to pay from January 10, 2016 until July 25, 2016. Mother testified that respondent-father told her multiple times in 2015 that he could not visit AMR because he had to work. Mother also testified that respondent-father was paying almost no child support before the child-support order was entered, although she conceded that he made a few sporadic payments in 2015. There was no evidence presented that respondent-father had lost his job or otherwise become unable to pay support from January 10, 2016 until the child-support order was entered on July 25, 2016; rather, the record supports the conclusion that respondent-father, although employed, continued his usual practice of not providing for AMR during that period. The trial court did not clearly err by concluding that respondent-father had the ability to provide some level of support to AMR from January 10, 2016 until July 25, 2016, but failed or neglected to do so. After the child-support order was entered, respondent-father did not make any child-support payments for at least eight of the seventeen months during which the child-support order was in effect, and mostly made partial payments in the remaining months, only meeting his full monthly support obligation on two occasions. Further, show-cause hearings and the threat of jail time were generally necessary to force even this level of compliance. The trial court did not clearly err by finding that respondent-father had failed to substantially comply with the child-support order. Termination of respondent-father's parental rights under MCL 710.51(6)(a) was warranted.

Regarding MCL 710.51(6)(b), mother testified that respondent-father had only seen AMR two to four times since his birth and had not seen him since February 2014. Although respondent-father claims that he did not have the ability to visit, contact, or communicate with AMR because mother prevented him from doing so, the record indicates that after she told respondent-father to "take her to court" if he wanted to have parenting time with AMR, respondent-father took no further action until December 29, 2017, when he filed his first parenting-time request with the trial court. The evidence indicated that mother kept the Friend of the Court updated with her telephone number and address, and that respondent-father could have petitioned the trial court sooner. Respondent-father acknowledged that he did not ask mother to allow him to contact AMR or attempt court intervention before December 29, 2017. Nonetheless, respondent-father's request for parenting time fell within the two-year period at issue. Although at the eleventh hour, we conclude that respondent-father's petition for parenting time constituted a request for contact with AMR. See *in re ALZ*, 247 Mich App 264, 276-277;

636 NW2d 284 (2001). Notwithstanding this lone attempt at contact after more than three years of total absence, we cannot conclude that the trial court clearly erred by holding that respondent-father had the ability to visit, contact, or communicate with AMR, but "*regularly and substantially failed or neglected to do so* for a period of two years or more before the filing of the petition." MCL 710.51(6)(b)(emphasis added). Unlike the respondent-father in *ALZ*, 247 Mich App at 274, who possessed no legal right to visitation prior to filing his complaint for paternity, here respondent-father possessed the legal right to visitation or communication with AMR by virtue of his acknowledged paternity, but only made one attempt to exercise that right between July 2015 and January 2018. Accordingly, the trial court did not clearly err by holding that termination of respondent-father's parental rights under MCL 710.51(6)(b) was warranted.

V. BEST-INTEREST DETERMINATION

Finally, respondent-father argues that the trial court clearly erred by holding that termination of respondent-father's parental rights was in AMR's best interests, and by doing so without explicitly considering the best-interest factors found in MCL 710.22(g). We disagree. The trial court has the discretion to issue an order terminating the rights of a parent under the adoption code if the requirements of MCL 710.51(6)(a) and (b) are met. See *Hill*, 221 Mich App at 696. In exercising this discretion, the trial court *may* but is not *required* to consider the best interests of the child. *Id.*[2] The trial court is not required to explicitly consider the best-interest factors found in MCL 710.22(g), and its failure to do so was not an abuse of discretion. Similarly, the trial court's comments indicating that the termination was in AMR's best interests were not necessary to the exercise of its discretion to terminate respondent-father's parental rights pending step-parent adoption under MCL 710.51(6). *Hill*, 221 Mich App at 696.

Affirmed.

/s/ Mark T. Boonstra
/s/ David H. Sawyer
/s/ Jonathan Tukel

[2] The trial court is required to consider the child's best interests before approving a child's adoption by a step-parent. See MCL 710.51(1)(b). The trial court informed respondent-father that if the adoption was not approved, his parental rights would be reinstated, which is permitted by MCL 710.62.