

STATE OF MICHIGAN
COURT OF APPEALS

UNPUBLISHED
November 10, 2011

In the Matter of DKS, Minor.

No. 302008
Washtenaw Circuit Court
Family Division
LC No. 10-000062-AD

Before: WHITBECK, P.J., and MURRAY and DONOFRIO, JJ.

PER CURIAM.

Respondent appeals as of right the order terminating his parental rights to the minor child, DKS, pursuant to MCL 710.51(6) of the Adoption Code, MCL 710.21 *et seq.* Because petitioners established the statutory grounds for termination and respondent was not denied the effective assistance of counsel, we affirm.

The child was born in 2002 when his mother and respondent were involved in a year-long relationship. In 2008, the child's mother married her husband, the child's stepfather, who wished to adopt the child, and they filed a petition for adoption. In order to terminate respondent's parental rights, they were required to prove the requisite statutory factors set forth in MCL 710.51(6)¹ by clear and convincing evidence. *In re ALZ*, 247 Mich App 264, 272; 636 NW2d

¹ 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.

(continued...)

284 (2001). We review the trial court’s findings of fact under the clearly erroneous standard. *In re Hill*, 221 Mich App 683, 691-692; 562 NW2d 254 (1997). “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.” *In re ALZ*, 247 Mich App at 271-272.

Under MCL 710.51(6)(a), where there is a child support order, as in this case, the petitioner must show that the noncustodial parent “failed to substantially comply with the order” for at least two years.² MCL 710.51(6)(a); *In re Newton*, 238 Mich App 486, 493; 606 NW2d 34 (1999). Respondent admitted that he had not provided regular financial support for his child in the last two years. He sent money for his son’s care only three times and last gave money for the child’s care in November 2008. Respondent’s inability to pay child support after his incarceration in January 2009 was a consequence of his own wrongdoing. He chose to engage in criminal activity and put his income and ability to provide for his child at risk. Moreover, an incarcerated parent retains the ability to financially support his child to some extent, and there exists no incarcerated parent exception to MCL 710.51(6). *In re Caldwell*, 228 Mich App 116, 120-121; 576 NW2d 724 (1998). Thus, respondent failed to substantially comply with the child support order.

To establish subsection (b) of MCL 710.51(6), a petitioner must show that the noncustodial parent failed to regularly visit, contact, or communicate with the child for at least a two-year period. Here, respondent substantially failed to communicate with his child for two years or more before petitioners filed their petition. Although respondent maintained that he had written his son a letter every week since January 16, 2009, the evidence did not support his contention. Respondent claimed that he stopped contacting his son because the child’s mother obtained a PPO against him, which prohibited him from writing. Both petitioners refuted this testimony, testifying themselves that respondent wrote only two or three letters in June and July 2010, around the time that the child’s mother obtained the PPO. Moreover, although respondent asserted that he received receipts from stamp purchases that he made to send the letters, he did not provide the receipts as proof of his purchases. He also claimed that he had documented the dates on which he sent letters and cards, but he did not present such documentation in the proceedings below. Respondent’s credibility was dubious given his history of criminality and insistence to the court that he had changed despite evidence to the contrary. Thus, petitioners presented clear and convincing evidence to terminate respondent’s parental rights under MCL 710.51(6).

(...continued)

(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.

² Respondent argues that he did not have the ability to pay child support and contends that the Legislature intended that MCL 710.51(6)(a) include an assessment of a parent’s ability to pay regardless of whether a support order had been entered. Respondent acknowledges that this Court decided this issue to the contrary in *In re Colon*, 144 Mich App 805, 812; 377 NW2d 321 (1985). Because the *Colon* Court’s interpretation of MCL 710.51(6)(a) is consistent with the statute’s plain language, we decline to revisit this issue.

Respondent next argues that the trial court failed to affirmatively find that termination of his parental rights was in the child's best interests. Respondent erroneously relies on MCL 712A.19b(5), which applies when termination of parental rights is sought under the Juvenile Code, MCL 712A.1 *et seq.* MCL 710.51(6) of the Adoption Code does not require a trial court to make specific findings on the question of best interests. Nevertheless, contrary to respondent's assertions, the final paragraph of the trial court's written order states, "[t]he best interests of the child are served by terminating respondent's parental rights and approving the petition for adoption." Because there was no evidence of a strong bond between respondent and the child, and in light of respondent's extensive involvement in criminal activity, the trial court could easily determine that respondent was unfit to parent. Thus, respondent's argument lacks merit.

Finally, respondent argues that he did not receive effective assistance of counsel. In reviewing a claim of ineffective assistance of counsel in a termination of parental rights case, this Court must determine whether counsel's performance fell below an objective standard of reasonableness and whether it so prejudiced the respondent that it denied him a fair trial. *In re CR*, 250 Mich App 185, 198; 646 NW2d 506 (2002). In order to show prejudice, a respondent must establish a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Id.* Because respondent failed to preserve this issue for our review by raising it in an appropriate motion below, our review is limited to mistakes apparent on the record. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002); *In re Schmeltzer*, 175 Mich App 666, 673; 438 NW2d 866 (1989).

Contrary to respondent's assertion on appeal, his attorney called him as his own witness and cross-examined both petitioners. Although respondent contends that his attorney did not facilitate his presence at the termination hearing, he attended the hearing via speakerphone from prison and his counsel was physically present. There is no evidence that respondent objected to appearing at the hearing via speakerphone. Likewise, he never complained to the trial court about the contact, or lack thereof, that he had with his attorney before the hearing. Despite respondent's claims that he had written his son weekly since January 16, 2009, he did not provide any evidence of his weekly communications at the hearing. Moreover, respondent has not overcome the presumption that counsel's decision to limit her cross-examination of petitioners constituted sound trial strategy. See *In re Ayres*, 239 Mich App 8, 23; 608 NW2d 132 (1999) (counsel's decisions regarding the cross-examination of witnesses is a matter of trial strategy). Respondent fails to indicate the testimony that counsel should have elicited that would have assisted his case. In addition, although respondent faults his attorney for failing to make an opening statement and closing argument, there was no need to summarize and frame the evidence to be presented as there would have been in a jury trial and petitioners' attorney likewise waived her opening statement and closing argument.

Further, even if counsel's performance fell below an objective standard of reasonableness, there is no reasonable probability that the result of the proceeding would have

been different given respondent's failure to pay child support and regularly contact his child. As such, respondent has failed to establish prejudice and is entitled to no relief. *In re CR*, 250 Mich App at 198.

Affirmed.

/s/ William C. Whitbeck
/s/ Christopher M. Murray
/s/ Pat M. Donofrio