STATE OF MICHIGAN

COURT OF APPEALS

UNPUBLISHED
September 20, 2011

In the Matter of MGMC, Minor.

No. 302449
Oakland Circuit Court
Family Division
LC No. 2010-775608-AY

Before: KELLY, P.J., and OWENS and BORRELLO, JJ.

PER CURIAM.

Respondent N. Muhammad appeals as of right from a circuit court order terminating his parental rights to the minor child pursuant to § 51(6) of the Adoption Code, MCL 710.51(6), for purposes of stepparent adoption.[1] We affirm.

A trial court may order termination of parental rights for purposes of stepparent adoption when both of the following circumstances are met:

> (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. [MCL 710.51(6).]

The petitioner in an adoption proceeding must prove both subsections (a) and (b) by clear and convincing evidence before termination can be ordered. *In re ALZ*, 247 Mich App 264, 272; 636 NW2d 284 (2001); *In re Hill*, 221 Mich App 683, 691; 562 NW2d 254 (1997).

In this case, the relevant two-year period is August 2008 to August 2010. A support order was entered on October 1, 2009. Respondent argues for the first time on appeal that

[1] Because this case was decided under § 51(6) of the Adoption Code, the parties' reliance on § 19b of the Juvenile Code, MCL 712A.19b, and cases construing that statute is misplaced.

because a support order was entered, only the second clause of § 51(6)(a) is applicable and, because the order had not been in effect for two years preceding the filing of the petition, termination could not be ordered. This argument assumes that a petitioner is limited to choosing one of the two circumstances and that termination can never be ordered if neither circumstance alone has existed for two years or more preceding the filing of the petition. However, we see no reason why the two circumstances cannot both be considered where, as here, a support order has been entered but has not been in effect during the whole two-year period.

With respect to § 51(6)(a), petitioners presented evidence that respondent was able to work and did work selling items on the street corner and training dogs when he was not in prison. This evidence showed that respondent had the ability to assist in supporting the child. Although respondent returned to prison in July 2009, the statute does not provide an exception for incarcerated parents who, despite their incarceration, "may still retain the ability to comply with the support and contact requirements of the statute." *In re Caldwell*, 228 Mich App 116, 121; 576 NW2d 724 (1998). Petitioner-mother testified that respondent trained dogs for the prison and was able to contribute to the support of his girlfriend's children. Further, respondent admitted that he worked in prison and earned $5 a month. Although that was not a substantial sum, it did enable respondent to minimally assist in supporting his child. Petitioner-mother also testified that apart from a payment of $300 in 2004 and buying some articles of clothing for the child in September and December 2008, respondent never contributed to the child's support. While respondent testified that he regularly contributed to the child's support personally or through friends, the trial court specifically found petitioner-mother's testimony to be more credible on the issue of support. This Court defers to the trial court's superior opportunity and ability to judge the credibility of witnesses. *Sparling Plastic Indus, Inc v Sparling*, 229 Mich App 704, 716; 583 NW2d 232 (1998). Affording deference to the trial court's credibility determinations, the court did not clearly err in finding that the little support respondent provided did "not rise to the level of . . . substantial and regular support."

Shortly after respondent returned to prison, a support order was entered requiring respondent to pay $433.33 a month in child support. That order took effect October 1, 2009. It is undisputed that respondent never paid support as required by the order between October 2009 and August 2010. Therefore, the trial court did not clearly err in finding that respondent failed to substantially comply with the order while it was in effect. Although the support order was not in effect during the entire two-year period under § 51(6)(a), as previously indicated, the trial court did not clearly err in finding that respondent failed to provide regular and substantial support during the remaining portion of the two-year period when the support order was not in effect. Accordingly, the trial court did not clearly err in finding that § 51(6)(a) had been proven by clear and convincing evidence.

The trial court also did not clearly err in finding that petitioners proved § 51(6)(b) by clear and convincing evidence. Petitioner-mother testified that respondent had regular contact with the child between April 2004 and September 2008. After that, he visited just two more times, once in December 2008 and once in January 2009. Although respondent could not visit the child after he returned to prison in July 2009, he could still maintain contact with her by telephone or by mail, and there was no indication that respondent maintained contact by such alternate means. The evidence was sufficient to clearly and convincingly show that respondent regularly and substantially failed to visit, contact, or communicate with the child during the

relevant two-year period. Although respondent testified that he had far more extensive contact with the child, at least during the period when he was not incarcerated, the trial court accepted petitioner-mother's testimony to the contrary. Giving due regard to the trial court's superior opportunity and ability to judge the credibility of the witnesses, we cannot find that it clearly erred in doing so. Therefore, the trial court did not clearly err in finding that § 51(6)(b) had also been proven by clear and convincing evidence.

Finally, we find no basis for concluding that the trial court clearly erred in finding that termination of respondent's parental rights was in the child's best interests. The trial court considered the child's best interests as defined by MCL 710.22(g) and found that factors (*i*) through (*viii*) and (*ix*) or (*xi*) favored termination for adoption. Respondent does not discuss these factors or argue that the trial court's findings regarding any of these factors were clearly erroneous. The crux of respondent's argument is that had the trial court accepted his testimony, it would have found that he supported the child and maintained a relationship with her such that termination was not in her best interests. However, the trial court accepted petitioner's testimony over respondent's and giving due deference to the trial court's superior opportunity and ability to judge the credibility of witnesses, it cannot be said that the trial court clearly erred in finding that termination was in the child's best interests.

Affirmed.

/s/ Michael J. Kelly
/s/ Donald S. Owens
/s/ Stephen L. Borrello