STATE OF MICHIGAN

COURT OF APPEALS

UNPUBLISHED
September 20, 2011

In the Matter of APO, Minor.

No. 302838
Oakland Circuit Court
Family Division
LC No. 2010-777220-AY

Before: SAWYER, P.J., and DONOFRIO and RONAYNE KRAUSE, JJ.

PER CURIAM.

Respondent 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. We reverse.

Termination of a natural parent's rights to a child so that a stepparent may adopt the child requires proof of the following elements:

> (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 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). The trial court's findings of fact are reviewed for clear error. *Id.* at 691-692. "A finding of fact is clearly erroneous if the reviewing court has a definite and firm conviction that a mistake has been committed, giving due regard to the trial court's special opportunity to observe the witnesses." *In re BZ*, 264 Mich App 286, 296-297; 690 NW2d 505 (2004).

In this case, respondent does not challenge the trial court's finding that a support order had been entered and that he did not substantially comply with that order during the relevant two-year period. Further, it is undisputed that respondent did not regularly and substantially visit, contact, or communicate with his child from 2006 to 2010. The issue in this case is

whether petitioner proved that respondent had the ability to visit, contact, or communicate with his child as required by § 51(6)(b). The trial court found that she did, finding that respondent "always held the key to visitation with his daughter" and that his "inability to see his daughter was the result of his inaction and failure to follow through with drug and alcohol testing." These findings are clearly erroneous.

Although the 2006 consent judgment required monthly drug testing, it does not appear that passing a drug test was a condition for exercising visitation. Rather, respondent was entitled to supervised visitation as long as he submitted to random monthly drug tests, but he could not progress to unsupervised visitation until he passed 12 consecutive monthly tests. The judgment required that petitioner "notify the Respondent and the substance abuse assessment professional that she is requesting that Respondent submit to said testing." Upon such request, respondent was to obtain a drug test within 36 hours. Petitioner admitted that she asked respondent to take a drug test only one time, that being in March 2006. The 2008 visitation order required respondent to undergo a substance abuse assessment with Lannie McRill, but did not require that respondent follow McRill's recommendations. It required only that respondent undergo an assessment and granted supervised visitation if he was found to be "clean," which he was. Further drug testing was to be governed by the consent judgment, which required that petitioner contact respondent and request a drug test. Petitioner admitted that she never asked respondent to submit to a drug test after March 2006.

We agree with the trial court that *In re ALZ* is factually distinguishable from this case in many respects. In *In re ALZ*, the petitioner mother refused the respondent father's requests to see the child. The respondent's paternity had not been established, so he was effectively a nonparent and had no legal right to visitation or communication with the child until his paternity was established. *Id.* at 273. Because the respondent was without a means of legal recourse due to his status as a nonparent, the petitioner's resistance to his requests for contact with the child resulted in his inability to contact the child. *Id.* at 274. In this case, by contrast, respondent's legal paternity was established, he had a legal right to visit the child as provided by the 2006 consent judgment, and he could (and did) seek legal recourse when there were problems obtaining parenting time. However, given the unique facts of this case, respondent was effectively without a means of legal recourse to remedy petitioner's interference with his parenting time during the relevant time period.

Respondent's ability to exercise parenting time was hampered by the fact that petitioner had removed the child to Mexico without his knowledge and without court authorization, and she did not divulge her whereabouts, leaving respondent without the ability to make contact with the child absent petitioner's cooperation. Although respondent successfully obtained an order from a Michigan court permitting him to visit the child in Mexico, petitioner still opposed visitation and obtained an order from a Mexican court barring visitation. A parent does not have the ability to visit, contact, or communicate with a child when a court order has been entered suspending visitation rights. *In re Kaiser*, 222 Mich App 619, 623-625; 564 NW2d 174 (1997). Respondent's attorney advised him that pursuing the issue in the Michigan court would be futile because any order could not be enforced in Mexico. Respondent thus waited until petitioner and the child had returned to this country to pursue his rights. Petitioner did not notify respondent of her return to the United States and respondent did not learn that petitioner and the child had returned until late 2010, around the same time the termination petition was filed. Petitioner then

relied on respondent's lack of contact with the child, which she herself had engineered, to terminate his parental rights, which is inconsistent with the purpose of MCL 710.51. *In re ALZ*, 247 Mich App at 277.

Accordingly, we conclude that petitioner failed to prove by clear and convincing evidence that respondent had the ability to visit, contact, or communicate with the child and that the trial court clearly erred in finding otherwise. We therefore reverse the trial court's order terminating respondent's parental rights.

Reversed.

/s/ David H. Sawyer
/s/ Pat M. Donofrio
/s/ Amy Ronayne Krause