STATE OF MICHIGAN

COURT OF APPEALS

UNPUBLISHED
September 27, 2011

In the Matter of PTS, Minor.

No. 303074
Wayne Circuit Court
Family Division
LC No. 10-000531-AD

Before: RONAYNE KRAUSE, P.J., and CAVANAGH and JANSEN, JJ.

PER CURIAM.

Respondent, the minor child's putative father, appeals as of right from a circuit court order terminating his parental rights to the minor child pursuant to § 39(1) of the Adoption Code, MCL 710.39(1). We affirm.

Petitioner argues that this Court does not have jurisdiction to hear this appeal by right. Petitioner did not raise this argument in a motion to dismiss, and the appeal has now been fully briefed by both parties. Consequently, and in the interests of achieving finality and resolving matters on their merits, if plaintiff's argument is correct, we exercise our discretion to accept the claim of appeal as an application for leave to appeal and grant it, so as to consider and resolve the merits of the issue raised. *Waatti & Sons Electric Co v Dehko*, 230 Mich App 582, 585; 584 NW2d 372 (1998).

Because respondent never had a custodial relationship with the child and never provided support for the child or the mother, the court was required to inquire into respondent's "fitness and his ability to properly care for the child' and "determine whether the best interests of the child will be served by granting custody to him." MCL 710.39(1). The trial court found that it would not be in the child's best interests to grant custody to respondent and terminated his parental rights. "The trial court's findings of fact regarding the best-interest factors are reviewed by this Court for clear error." *In re Zimmerman,* 277 Mich App 470, 480; 746 NW2d 306 (2008), aff'd in part and vacated in part 480 Mich 1143 (2008).

Initially, the trial court appears to have mistakenly cited the best interest factors in the Child Custody Act, MCL 722.23. This case was brought under the Adoption Code, so the trial court was required to consider the child's best interests as defined by MCL 710.22(g). However, it is clear from context that the trial court's analysis was substantively made under the Adoption Code. In any event, even if the trial court analyzed the child's best interests under the wrong statute, the error would have been harmless in this case because the relevant factors in the two

statutes are substantially similar and the trial court's apparent consideration of MCL 722.23(k) benefited respondent.

The trial court did not clearly err in finding that § 22(g)(*i*) did not favor granting custody to respondent. Respondent admitted that he had no personal interaction of any kind with the child, and his contact was limited to viewing a photograph of the child. While respondent offered excuses for his lack of contact with the child, "the statutory language does not allow for an exception to this factor where, as here, the child was immediately placed for adoption." *In re BKD*, 246 Mich App 212, 219; 631 NW2d 353 (2001).

The trial court did not clearly err in finding that § 22(g)(*ii*) did not favor granting custody to respondent. Respondent discussed with petitioner the possibility of pursuing custody, but only if his paternity was established by a DNA test, which he did not obtain. Respondent admitted that he had not completed high school and had not obtained a GED. While respondent's relationship with his daughter indicated that he had the capacity to provide a child with love and affection, his disinterest in this child's care before birth and absence from this child's life after birth showed that respondent lacked the disposition to provide this child with the same love and affection.

The trial court did not clearly err in finding that § 22(g)(*iii*) did not favor granting custody to respondent. Respondent had no assets apart from an old car. He had been unemployed for two years before obtaining a job as a dishwasher in November 2010. He earned $250 to $300 a week and was not eligible for benefits. He exercised parenting time with his daughter but did not contribute to her support. As the trial court put it, respondent has "limited understanding with regards to the medical needs of a newborn child," including the belief that unless ill, a baby does not require any medical care apart from six-month checkups.

The trial court did not clearly err in finding that § 22(g)(*iv*) did not favor granting custody to respondent. The child had resided with the proposed adoptive parents since birth and was doing well in their home. While respondent argues that he had maintained a stable residence before his recent move and currently had appropriate housing, this factor considers the environment of the child, not that of the putative father.

The trial court did not clearly err in finding that § 22(g)(*v*) did not favor granting custody to respondent. Respondent's living situation was not stable. He previously shared a home with various family members and his daughter on weekends, but he moved out for a period and then back in, and it is not known where he lived during that period. At the time of the hearing, respondent lived in a different location with a different combination of family members, and he expressed an intent to move within six months to another unidentified living configuration.

The trial court gave no explanation for its finding that § 22(*vi*) did not favor granting custody to respondent. We find that the trial court erred in so finding. What little dubious conduct respondent engaged in was not "a type of conduct that necessarily has a significant influence on how one will function as a parent." *Fletcher v Fletcher*, 447 Mich 871, 887; 526 NW2d 889 (1994) (emphasis and footnote omitted) (discussing MCL 722.23[f]).

The trial court did not clearly err in finding that § 22(g)(*vii*) favored respondent or in finding that §§ 22(g)(*viii*), (*ix*), and (*x*) did not apply.

Finally, with respect to § 22(g)(*xi*), the trial court found that the absence of any evidence of domestic violence favored respondent, but again noted respondent's complete failure to act on his professed interest in the child. While respondent contends that the trial court erred in considering the latter evidence because his paternity was in doubt, this Court has held otherwise, noting that such a situation "is common among putative fathers who come under subsection 39(1)." *In re BKD*, 246 Mich App at 225.

Respondent did not have any health problems or moral defects that would affect his ability to act as a parent to the child. However, the child had lived with the prospective adoptive parents all his life and was doing well in their care. Respondent did not assist petitioner during the pregnancy, took no action to pursue custody of the child before the petition was filed, had no emotional ties to the child, and had a limited capacity or disposition to meet the child's emotional, educational, spiritual, and material needs. Therefore, the trial court did not clearly err in finding that granting custody to respondent would not be in the child's best interests.

Affirmed.

/s/ Amy Ronayne Krause
/s/ Mark J. Cavanagh
/s/ Kathleen Jansen