STATE OF MICHIGAN

COURT OF APPEALS

UNPUBLISHED
October 25, 2011

In the Matter of AEP, Minor.

No. 303369
Oakland Circuit Court
Family Division
LC No. 2010-768373-AY

Before: Fort HOOD, P.J., and HOEKSTRA and METER, JJ.

PER CURIAM.

Respondent appeals as of right the trial court order terminating his parental rights to the minor child pursuant to § 51(6) of the Adoption Code, MCL 710.51(6). Because petitioner proved by clear and convincing evidence that the statutory elements for termination of parental rights were satisfied, we affirm.

Petitioner and respondent are the parents of the minor child, who was born out of wedlock on January 14, 1998. Petitioner married in May 2008, and petitioner and her husband filed a petition to terminate respondent's parental rights for purposes of stepparent adoption in February 2010. On appeal, respondent, who has been incarcerated since 1998, argues that the evidence did not support termination of his parental rights under § 51(6).

Termination under § 51(6) 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.

The petitioners in an adoption proceeding must prove both subsections (6)(a) and (6)(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). We review the trial court's findings of fact for clear error. *In re Hill*, 221 Mich App at 691-692. "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." *Id.* at 692.

Because there was no evidence that a support order had been entered against respondent, the trial court correctly determined that it was required to consider whether respondent had the ability to pay support under the first clause of § 51(6)(a). The evidence showed that respondent has been incarcerated since the child was approximately six months old. However, "the statute does not contain an 'incarcerated parent' exception" and it applies to an incarcerated parent who still retains the ability to comply with the support requirement. *In re Caldwell*, 228 Mich App 116, 120-121; 576 NW2d 724 (1998). The trial court's findings that respondent was employed in prison and earned $18 a month are supported by respondent's testimony and are not clearly erroneous. Although respondent did not earn a lot and certainly did not have sufficient income to support the child on his own, he did have a source of income and thus had the ability to contribute toward the child's support. Therefore, the trial court properly found that respondent had the ability to assist in supporting the child. Because the evidence showed that respondent had never paid any support, the trial court did not clearly err in finding that he failed or neglected to provide regular and substantial support for the child during the relevant two-year period. Even if we consider the few gifts sent to the child by others on respondent's behalf, those few gifts do not rise to the level of "regular and substantial support." Therefore, the trial court did not clearly err in finding that § 51(6)(a) was proven by clear and convincing evidence.

Respondent argues that his failure to pay support should be excused because the child's mother told him not to send her money. Respondent's own testimony indicated that the mother made the statement years earlier under circumstances that were no longer in effect. Further, a parent is obligated to support his unemancipated minor child, MCL 722.3(1), and the child has a right to receive financial support from a parent, *Borowsky v Borowsky*, 273 Mich App 666, 672-673; 733 NW2d 71 (2007), which right cannot be bargained away by the parties. *Laffin v Laffin*, 280 Mich App 513, 517-518; 760 NW2d 738 (2008). Therefore, the trial court did not clearly err to the extent it rejected respondent's excuse for not paying support.

Section 51(6)(b) considers whether the respondent maintained a relationship with the child by visiting, contacting, or otherwise communicating if he had the ability to do so. Because the terms "visit, contact, or communicate" are phrased in the disjunctive, petitioners were "not required to prove that respondent had the ability to perform all three acts. Rather, petitioner[s] merely had to prove that respondent had the ability to perform any one of the acts and substantially failed or neglected to do so for two or more years preceding the filing of the petition." *In re Hill*, 221 Mich App at 694.

The evidence showed that respondent had been incarcerated for most of the child's life and thus was unable to personally visit her unless someone brought her to see him. Again, however, the statute does not provide an exception for incarcerated parents who, despite their incarceration, "may still retain the ability to comply with the . . . contact requirements of the statute." *In re Caldwell*, 228 Mich App at 121. Respondent admitted that he was able to write and place telephone calls to the child and there was evidence that he had done so. Therefore, the trial court could properly find that respondent had the ability to contact or communicate with the child. *Id.*; *In re Hill*, 221 Mich App at 694.

Citing *In re ALZ*, respondent argues that he did not have the ability to contact or communicate with the child because the mother thwarted his attempts. We disagree. In *In re ALZ*, the respondent acceded to the petitioner's request to refrain from contacting the child

during the relevant two-year period. *In re ALZ*, 247 Mich App at 273-274. Although the respondent could have tried to see the child against the petitioner's wishes, his paternity "had not been established at that time and, because he was effectively a nonparent, he had no legal right to visitation or communication with the child" until his paternity was established. *Id.* at 274. 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.*

In this case, respondent established legal paternity in 1998. Thus, he had a legally enforceable right to contact or communicate with the child if the mother interfered with that right. See *In re SMNE*, 264 Mich App 49, 51; 689 NW2d 235 (2004). Further, there was no evidence that the mother ever asked respondent not to contact or communicate with the child. Respondent testified that his calls were "blocked," yet he admitted that he was able to leave messages on an answering machine or voicemail. If telephone contact was problematic, respondent could still contact the child by mail. Respondent did not have the child's home address, so he could not send anything to her directly. However, respondent had the maternal grandmother's address, and he knew he could contact the child through her grandmother (he testified that he had been directed to do so), the mother testified that had respondent sent anything to the child in care of the grandmother, "my mother would have given them to me," and the grandmother testified that respondent had not sent anything to her house during the relevant two-year period. Therefore, the trial court did not clearly err in finding that the mother did not interfere with respondent's relationship with the child to the extent that respondent's lack of contact could be considered an inability to contact or communicate with the child.

We agree with the trial court that respondent regularly and substantially failed to contact or communicate with the child during the relevant two-year period. The evidence showed that respondent maintained regular and frequent contact with the child between 1998 and 2004. After personal visits ended in December 2004, respondent maintained contact by mail and by telephone for a time, although the parties disagree on the frequency of that contact. Respondent testified that he placed an unknown number of telephone calls during the relevant two-year period. Those calls were not answered, so he had to leave a message, but his calls could not be returned. Respondent testified that he sent one card to the child in 2010, and that he sent the child a card and a letter, and his mother sent a card and a gift, in January 2011, which was almost a year after the petition was filed in February 2010. An unknown number of calls that did not result in an actual conversation with the child and one card sent during the relevant two-year period does not amount to regular and substantial contact or communication. Thus, the trial court did not clearly err in finding that § 51(6)(b) was proven by clear and convincing evidence.

Respondent also argues that the trial court erred in finding that termination was in the child's best interests as required by MCL 712A.19b(5). The parties' reliance on MCL 712A.19b(5) is misplaced because this case was decided under § 51(6) of the Adoption Code, and MCL 712A.19b is part of the Juvenile Code. Under the Juvenile Code, MCL 712A.1 *et seq.*, trial courts are statutorily required to consider the child's best interests before parental rights may be involuntarily terminated. MCL 712A.19b(5). Trial courts are not similarly obligated to consider the child's best interests in a case of involuntary termination under the Adoption Code, see MCL 710.37 and MCL 710.51(6). A trial court may order termination once the elements of § 51(6) have been proven, MCL 710.51(6); however, a trial court cannot approve an adoption

unless it finds that the child's best interests will be served by the adoption. MCL 710.51(1)(b). Nevertheless, trial courts may consider evidence regarding the best interests of the child when a petition is filed under § 51(6) because termination under § 51(6) is permissive. *In re Hill*, 221 Mich App at 696. A trial court is not required to order termination under § 51(6) if it finds that termination would not be in the child's best interests. *In re Newton*, 238 Mich App 486, 494; 606 NW2d 34 (1999). We review a trial court's findings regarding the best interests factors for clear error. *In re Archer*, 277 Mich App 71, 73; 744 NW2d 1 (2007).

The evidence did not support a finding that termination was not in the child's best interests. Respondent has been incarcerated for all but the first few months of the child's life. The child had regular contact with respondent until 2004. That contact diminished and eventually ceased almost altogether. Respondent had very little, if any, contact with the child during the relevant two-year period. Although respondent loved the child and wanted to renew his relationship with her, she was not interested in a relationship with him.

Accordingly, the trial court did not err in terminating respondent's parental rights to the child.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Joel P. Hoekstra
/s/ Patrick M. Meter