STATE OF MICHIGAN

COURT OF APPEALS

UNPUBLISHED
November 22, 2011

In the Matter of TET a/k/a TEI, Minor.

No. 304232
Oakland Circuit Court
Family Division
LC No. 2010-778420-AY

Before: K.F. KELLY, P.J., and METER and GLEICHER, JJ.

PER CURIAM.

Respondent father appeals as of right from an order that terminated his parental rights to the minor child pursuant to the step-parent adoption statute, MCL 710.51(6). We affirm.

I. BASIC FACTS

Petitioner and respondent were married in August 1999. The child was born on April 28, 2003, and the parties divorced in October 2004. The 2004 judgment of divorce granted the parties joint legal custody of the child and granted petitioner sole physical custody. The judgment also granted respondent "a reasonable amount of supervised parenting time" and required him to pay child support in the amount of $30 a month beginning March 15, 2005.

In April 2007, the parties appeared before a friend of the court (FOC) referee on issues of parenting time and support. The referee found that respondent "saw the child rarely during the child's infancy, and has been incarcerated a good portion of the child's life thereafter.[1] He has not seen the child since she was an infant." Respondent admitted "that he had a substantial substance abuse problem," but testified that he had been clean for 28 months. The referee

[1] According to the Department of Corrections' Offender Tracking Information System (OTIS) website, respondent has a criminal history dating back to 1997 for offenses including home invasion, retail fraud, and escape from jail. In February 2005, he was convicted of retail fraud and sentenced to two years' probation plus jail time. In December 2005, his probation was revoked and he was sentenced to 1½ to 20 years in prison. In April 2008, respondent was convicted of possession of cocaine and sentenced to 1 to 15 years in prison. In December 2010, respondent was convicted of larceny in a building and sentenced to 1 to 4 years in prison. His early release date is in December 2011 and his maximum discharge date is in July 2044.

recommended that respondent pay support in the amount of $280 a month. He also recommended against parenting time pending review in October 2007 "to determine if [respondent] can maintain a stable employment situation, home situation and be substance abuse free." Consistent with the referee's recommendation, the court entered an order setting the issue of parenting time for review in October. The following month, the court entered an order for child support in the amount of $280 a month, effective April 1, 2007.

Respondent was incarcerated as of August 2007. At that time, the court ordered that his child support obligation be abated effective June 15, 2007, until 30 days after he was released from prison. In October 2007, the court reviewed the issue of parenting time and denied it "until further order of the court" because respondent was "currently incarcerated on additional charges." At the same time, the court granted petitioner sole legal custody of the child. In August 2010, the court issued an order for respondent to show cause on September 28, 2010, why he should not be held in contempt for failure to pay child support. The motion, filed by the FOC, indicated that respondent's support arrearage was $2,393.79.

Petitioner married her current husband in October 2007. In November 2010, they filed petitions to terminate respondent's parental rights and for stepparent adoption. By the time of the termination hearing, petitioner had received a total of four payments of child support from respondent on September 21, 2010 ($55.63), September 28, 2010 ($53.56), October 5, 2010 ($55.63), and October 7, 2010 ($53.56). He had not seen the child since she was approximately ten months old. The trial court granted the petition, finding "'a substantial failure to provide regular and substantial support for two years prior to the filing of the complaint' as well as the years 2004-2008." The trial court also found that respondent's actions constituted a "'substantial failure' to visit, contact or communicate with a child where no legal obstacles prevented the non-custodial parent from having frequent visitation." The trial court concluded that termination of respondent's parental rights was in the child's best interests because she had no relationship with respondent and had grown up thinking petitioner's husband was her father. Respondent now appeals as of right.

II. STANDARD OF REVIEW

Petitioners in a stepparent adoption proceeding have the burden of proving by clear and convincing evidence that termination of the noncustodial parent's rights is warranted. *In re Hill*, 221 Mich App 683, 691; 562 NW2d 254 (1997). We review a trial court's factual findings for clear error. *In re Caldwell*, 228 Mich App 116, 123; 576 NW2d 724 (1998). "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).

III. ANALYSIS

Respondent's parental rights were terminated pursuant to MCL710.51(6), which provides:

> (6) 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.
>
> (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.

Because the relevant time period under each subsection is "2 years or more before the filing of the petition," the grounds for termination must be shown to have existed for at least two years immediately preceding the filing of the petition, although circumstances beyond the two-year period may be considered. *In re ALZ*, 247 Mich App 264, 272; 636 NW2d 284 (2001); *Hill*, 221 Mich App at 692-693. The applicable two-year period here is November 2008 to November 2010.

Section 51(6)(a) considers whether the respondent provided support if he had the ability to do so or, if a support order had been entered, whether the respondent substantially complied with the order. MCL 710.51(6)(a). Thus, if an order of support requiring payment of some sum of money has been entered, the respondent's ability to pay support need not be considered because the ability to pay has been factored into the order and the only issue to be determined is substantial compliance with the order for the two-year period in accordance with the second clause of § 51(6)(a). *In re SMNE*, 264 Mich App 49, 54-55; 689 NW2d 235 (2004); *In re Newton*, 238 Mich App 486, 492-493; 606 NW2d 34 (1999).

In 2004, respondent was originally ordered to pay $30 a month in support. That amount was increased to $280 a month in May 2007. Respondent spent a fair amount of time in prison and some of these payments were abated. However, there was a period of time prior to respondent's most recent incarceration, October 2009 through March 2010, where he was out of prison and should have been making support payments. There was no new abatement order entered. Petitioner received four partial support payments between November 2008 and November 2010, which derived from an income withholding order. Therefore, the trial court properly determined that petitioner had established the requirements of § 51(6)(a) by clear and convincing evidence.

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, petitioner is not required to prove that respondent had the ability to perform all three acts. Rather, petitioner merely has 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.

Respondent last visited the child when the child was less than a year old. Petitioner testified that respondent had not sent any cards or letters to the child or called her on the telephone. Respondent testified that he sent "numerous letters" without specifying how many or when they were sent, but he admittedly sent them to his aunt's house and petitioner testified that she had moved from that address sometime in 2003. Respondent bought one gift in April 2007, but it was not delivered to the child. Thus, the trial court did not clearly err in finding that respondent regularly and substantially failed or neglected to visit, contact, or communicate with the child during the relevant two-year period.

Because respondent had a legally enforceable right to maintain a relationship with the child and could have sought relief from the FOC or the divorce court if petitioner interfered with that right, petitioner's attempts to frustrate respondent's relationship with the child did not prevent him from having regular and substantial contact with child. *In re SMNE,* 264 Mich App 49, 51; 689 NW2d 235 (2004). Although respondent's attempts to obtain petitioner's current address through the FOC proved fruitless because the FOC apparently did not have that address on file, respondent did not seek assistance from the divorce court. Further, petitioner testified that while she did not make her current address available to respondent, she did provide it to two of his relatives and nothing prevented respondent from obtaining the child's contact information from them. Therefore, the trial court did not clearly err in finding that respondent had the ability to contact or communicate with the child.

Finally, the trial court did not clearly err in finding that termination of respondent's parental rights was in the child's best interests. A trial court's authority to terminate parental rights under MCL 710.51(6) is permissive rather than mandatory, and it need not grant termination, even if the statutory grounds are established, if it finds that termination would not be in the best interests of the child. *In re Newton*, 238 Mich App 486, 493-494; 606 NW2d 34 (1999). The factors to be evaluated in the best interests determination, MCL 710.22(g), include the proposed adoptive parent's emotional ties with the child, his or her ability to provide love and guidance as well as food, clothing and medical care, the length of time the adoptee has lived in a stable environment, and the permanence of the family unit in the proposed adoptive home. The evidence showed that the child had not seen or heard from respondent since she was less than a year old and had only recently learned that petitioner's husband was not her biological father. Respondent had been in and out of jail and prison the child's whole life and was once again in prison at the time of the hearing. Accordingly, the trial court did not clearly err in terminating respondent's parental rights.[2]

[2] Petitioner's and respondent's reliance on *In re Trejo,* 462 Mich 341; 612 NW2d 407 (2000), and MCL 712A.19b(5) is misplaced. *In re Trejo* concerned termination under § 19b of the Juvenile Code, MCL 712A.19b, of which § 19b(5) is a part. Also, whereas the version of § 19b(5) that was in effect when *In re Trejo* was decided provided that the court must order termination unless it finds that termination is clearly not in the child's best interests, the statute was amended in 2008.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Patrick M. Meter
/s/ Elizabeth L. Gleicher