

STATE OF MICHIGAN
COURT OF APPEALS

UNPUBLISHED
December 13, 2011

In the Matter of HMK, Minor.

No. 304575
Ogemaw Circuit Court
Family Division
LC No. 11-000811-AD

Before: WILDER, P.J., and TALBOT and SERVITTO, JJ.

PER CURIAM.

C. Murday appeals as of right an order terminating his parental rights to the minor child under the Adoption Code.¹ We affirm.

Murday was married and had a child, GM. He then left his wife and GM and became involved with SK, a high school student. SK became pregnant and shortly thereafter Murday was arrested, convicted of several offenses and sentenced to a lengthy prison term. SK's child was born in December 2010. SK wanted to place the child for adoption, but Murday would not consent. Murday has since reconciled with his wife, and his wife and GM reside with Murday's parents. Murday wanted his parents to raise the child until he was released from prison. The trial court found that granting custody to Murday was not in the child's best interests, and terminated his parental rights.²

Murday first argues that since he provided substantial and regular support or care to SK, the trial court erred in finding that his parental rights were to be determined under MCL 710.39(1) rather than MCL 710.39(2). We disagree. On appeal the trial court's findings of fact are reviewed for clear error, while its conclusions of law are reviewed de novo.³

MCL 710.39 provides, in pertinent part:

¹ MCL 710.39(1).

² *Id.*

³ *Chapdelaine v Sochocki*, 247 Mich App 167, 169; 635 NW2d 339 (2001).

(1) If the putative father does not come within the provisions of subsection (2), and if the putative father appears at the hearing and requests custody of the child, the court shall inquire into his fitness and his ability to properly care for the child and shall determine whether the best interests of the child will be served by granting custody to him. If the court finds that it would not be in the best interests of the child to grant custody to the putative father, the court shall terminate his rights to the child.

(2) If the putative father has established a custodial relationship with the child or has provided substantial and regular support or care in accordance with [his] ability to provide such support or care for the mother during pregnancy or for either mother or child after the child's birth during the 90 days before notice of the hearing was served upon him, the rights of the putative father shall not be terminated except by proceedings in accordance with [MCL 710.51(6)] or [MCL 712A.2].

In a proceeding involving a putative father, "the court must determine his rights" in accordance with the statute before it can consider termination.⁴ If the father does not have a custodial or supportive relationship but wants custody, his rights are determined under MCL 710.39(1) by considering his fitness as a parent and the child's best interests. The court may terminate the father's parental rights if it finds "that it would not be in the best interests of the child to grant custody to the putative father[.]"⁵ If the father has a custodial or supportive relationship, his rights are afforded the same protection as those of a legal father⁶ and they can only be terminated as outlined in the Adoption Code⁷ or after the initiation of child protective proceedings under the Juvenile Code.⁸

Murday admittedly did not have a custodial relationship with the child and never claimed to have "provided substantial and regular support or care . . . for either mother or child after the child's birth."⁹ Thus, the only issue is whether the evidence showed that Murday "provided substantial and regular support or care in accordance with [his] ability to provide such support or care for the mother during pregnancy."¹⁰

After leaving his wife, Murday lived in a home with SK's mother, sister, and sister's boyfriend. SK apparently lived with her father, but stayed at her mother's house on weekends

⁴ *In re MKK*, 286 Mich App 546, 559; 781 NW2d 132 (2009).

⁵ MCL 710.39(1).

⁶ *In re BKD*, 246 Mich App 212, 216; 631 NW2d 353 (2001).

⁷ MCL 710.39(2); MCL 710.51(6).

⁸ MCL 710.39(2); MCL 712A.2.

⁹ MCL 710.39(2).

¹⁰ *Id.*

and occasional weeknights. The parties assumed that SK became pregnant in late March 2010. Murday was arrested on April 28, 2010. Between the time of conception and Murday's arrest, Murday bought SK a cellular phone, gave SK lunch money, took SK to her mother or father's house after school, and paid for some meals. After Murday's arrest, his interaction with SK ceased. Although Murday did not have a job in prison and earned no income, his family sent him approximately \$20 a month, which Murday spent on toiletries and a prepaid calling card.

Even if Murday's interactions with SK in March and April 2010 constituted substantial and regular support or care commensurate with Murday's ability to provide the same, it cannot be said that he provided substantial and regular support or care in accordance with his ability during SK's pregnancy. The parties agree that MCL 710.39(2) does not provide an exception for an incarcerated father, who may have the ability to provide monetary support if, for example, he earns wages from a prison job.¹¹ Although Murday did not earn any wages from a prison job, the ability to pay support is not determined by the parent's "income" as that term is defined by the Support and Parenting Time Enforcement Act.¹² Rather, the ability to pay is determined by the parent's actual financial resources whatever their origin, including wages from employment, proceeds of a legal settlement, rental income, and monetary gifts.¹³ Murday admittedly received monetary gifts from his family every month, none of which he contributed to SK's support or care during the remaining eight months of her pregnancy. Because he did not provide substantial and regular support during SK's pregnancy, the trial court properly found that Murday's rights were to be determined in accordance with MCL 710.39(1).

Murday also argues that the trial court erred because it was not proven by clear and convincing evidence that it would not be in the child's best interests to grant custody to him. We disagree. If a putative father does not have a custodial or supportive relationship such that his parental rights are afforded the same protection as those of a legal father, "the court shall inquire into his fitness and his ability to properly care for the child and shall determine whether the best interests of the child will be served by granting custody to him."¹⁴ "The trial court's findings of fact regarding the best-interest factors are reviewed by this Court for clear error."¹⁵ "A finding is clearly erroneous if this Court is left with a definite and firm conviction that the trial court made a mistake."¹⁶

The child's best interests are determined by reference to the factors enumerated in § 22(g) of the Adoption Code. The trial court made findings on the factors that were relevant to this

¹¹ See *In re Caldwell*, 228 Mich App 116, 120-121, 123; 576 NW2d 724 (1998).

¹² MCL 552.602(m).

¹³ *In re Kaiser*, 222 Mich App 619, 621; 564 NW2d 174 (1997).

¹⁴ MCL 710.39(1).

¹⁵ *In re BKD*, 246 Mich App at 215.

¹⁶ *Id.*

case.¹⁷ The trial court did not clearly err in finding that § 22(g)(i) did not favor granting custody to Murday. While a putative father may have “the love and affection a natural father has for his child,”¹⁸ and Murday contends that he loves the child, he has never met the child and has had no personal interaction with her.¹⁹ Also, there is no evidence that the child has any love, affection, or emotional attachment to Murday.

The trial court also properly found that § 22(g)(ii) did not favor granting custody to Murday. Murday asserts that his ability to meet the child’s emotional needs can be inferred from the fact that he was a loving father to GM. Murday, however, abandoned GM and her mother. Additionally, he is serving a lengthy prison sentence and will not be available to act as a father to the child as she grows and develops.²⁰

The trial court also did not clearly err in finding that § 22(g)(iii) did not favor granting custody to Murday. It appears that the trial court again determined that Murday lacked the capacity to meet the child’s needs based on his lack of resources and admission that he “had no ability to provide [the child] with food, clothing, or education[.]” A parent may meet his obligation²¹ to provide proper care for his child by arranging for assistance from others,²² however, Murday’s plan was for his parents to wholly assume his parental duties while he is in prison. There was no evidence presented that his parents agreed to such an arrangement.

Section 22(g)(iv) considers how long the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity. Murday argues that “it is inappropriate to consider the adoptive parent’s [sic] home” in making that determination. The statute, however, expressly requires that the court consider whether the “the child has lived in a stable, satisfactory environment,” whether provided by the mother, putative father, prospective adoptive parents, or others.²³ The evidence shows that the child had resided with the prospective adoptive parents since birth and thus had been in a stable environment for at least five months. Therefore, the trial court properly found that § 22(g)(iv) did not favor granting custody to Murday.

Section 22(g)(v) considers the permanence as a family unit of the putative father’s home. Based on the record, the trial court inappropriately compared the adoptive parents’ home to

¹⁷ The trial court found and the parties agree that that MCL 710.22(g)(viii) (“[t]he home, school and community record of the adoptee”) and (ix) (“[t]he reasonable preference of the adoptee”) do not apply to this case due to the child’s age.

¹⁸ *In re Barlow*, 404 Mich 216, 238; 273 NW2d 35 (1978).

¹⁹ MCL 710.22(g)(i).

²⁰ MCL 710.22(g)(ii).

²¹ MCL 710.22(g)(iii).

²² *In re Barlow*, 404 Mich at 231-232 n 9.

²³ MCL 710.22 (g)(iv).

Murday's home in determining the permanence as a family unit of Murday's home.²⁴ The trial court, however, properly found that § 22(g)(v) did not favor granting custody to Murday as there is no evidence that Murday's family unit will remain intact.²⁵ Murday's argument focuses on the fact that his wife and GM were living with his parents and he wanted the child to join them. Murday, his wife and GM initially lived apart from his parents. Murday abandoned his wife and GM and went to live with SK's mother. After Murday was incarcerated, he reconciled with his wife and she moved in with his parents. Murday testified that, upon his release, he intended to live in his parents' home until he could afford a place of his own. As such, the evidence supports that Murday's family unit has changed over time and is expected to change again in the future and will not remain intact.

The trial court appropriately considered Murday's criminal activity in finding that § 22(g)(vi) did not favor granting custody to him. Murday's criminal activity is morally questionable conduct that is relevant to parental moral fitness.²⁶ Therefore, the trial court did not clearly err.

The trial court did err in finding that there was no evidence supporting § 22(g)(vii) regarding the child or Murday's mental and physical health. Although there was no evidence regarding the child's mental and physical health, Murday testified that he was in good physical health and did not have mental health issues. It is unclear whether the court weighed this factor for or against Murday, but given that Murday did not have any health problems that would negatively affect his ability to parent the child, this factor favored granting custody to Murday.

The trial court correctly found that § 22(g)(xi) did not favor granting custody to Murday. Given Murday's prison sentence of "a little less than ten years," despite his request for custody, he initially could not take custody of the child. Murday's contention that one of his criminal convictions would likely be reversed on appeal and that he would be eligible for boot camp after serving one more year of another sentence is wholly speculative. This Court can take judicial notice of its own records,²⁷ which show that Murday's belief is unfounded.²⁸

Finally, the trial court appropriately determined that § 22(g)(x) did not apply to this case. Murday contends that this factor favors granting custody to him because if the child is placed in

²⁴ MCL 710.22(g)(v).

²⁵ *Fletcher v Fletcher*, 200 Mich App 505, 517; 504 NW2d 684 (1993), aff'd in part and rev'd in part on other grounds 447 Mich 871, 884-885 (1994).

²⁶ *Fletcher v Fletcher*, 447 Mich 871, 887 n 6; 526 NW2d 889 (1994).

²⁷ *In re Jones*, 286 Mich App 126, 129; 777 NW2d 728 (2009).

²⁸ Murday's applications for leave to appeal his criminal convictions were denied by this Court for "lack of merit in the grounds presented." *People v Murday*, unpublished order of the Court of Appeals, issued September 7, 2011 (Docket Nos. 304888, 304889, and 304890), lv pending; *People v Murday*, unpublished order of the Court of Appeals, issued July 25, 2011 (Docket No. 304395), lv pending.

his parents' home, then she will have an opportunity to know and grow up with GM. Section 22(g)(x) concerns the adopting parents' ability and willingness to adopt the child's siblings. Because there was no evidence that GM was available for adoption, that the child's prospective adoptive parents planned to adopt GM, or that Murday's parents planned to adopt either child, the trial court did not err.

Considering all of the relevant factors and circumstances, the trial court did not clearly err in finding that granting custody to Murday would not be in the child's best interests and terminating his parental rights.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Michael J. Talbot
/s/ Deborah A. Servitto