STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of DJA and DRA, Minors.

LESLIE RAE JOHNSEN-FUCHS and TRAVIS LEE FUCHS,

Petitioners-Appellants,

v

RICHARD JAMES AYERS,

Respondent-Appellee.

UNPUBLISHED
June 18, 2013

No. 314103
Lapeer Circuit Court
Family Division
LC Nos. 12-003249-AY; 12-003250-AY

Before: OWENS, P.J., and GLEICHER and STEPHENS, JJ.

PER CURIAM.

Petitioners appeal as of right from two orders entered by the circuit court that denied their supplemental petitions to terminate respondent's parental rights to DJA and DRA, and consequently dismissed their petitions for stepparent adoption pursuant to MCL 710.51(6). We reverse and remand for entry of an order terminating respondent's parental rights to the two minor children.

Petitioner-mother is the custodial parent of DJA and DRA. She and respondent divorced in 2008, and respondent has been incarcerated since 2007 on charges stemming from domestic violence against petitioner-mother. Petitioner-mother has been with petitioner-stepfather since 2009, and they married in 2011. Subsequently, petitioner-stepfather filed petitions for the stepparent adoption of the two children, in which petitioner-mother joined. Respondent refused to consent to the adoptions, so petitioner-mother filed supplemental petitions to terminate respondent's parental rights to the children pursuant to MCL 710.51(6), stating lack of support and parenting time as reasons for termination. The trial court denied the supplemental petitions and dismissed the petitions for stepparent adoption, reasoning that petitioner-mother's act of writing a letter to the prison seeking a no contact order against respondent effectively prevented respondent from having the ability to contact the children during the applicable two-year statutory period, as required by MCL 710.51(6)(b).

"A petitioner in an adoption proceeding must prove by clear and convincing evidence that termination of parental rights is warranted." *In re Hill*, 221 Mich App 683, 691; 562 NW2d 254 (1997). Accordingly, we review the trial court's findings of fact regarding a petition to terminate under the Adoption Code for clear error. *Id.* 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.

MCL 710.51(6) provides:

> 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:
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> (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 purpose of MCL 710.51(6) is to "foster stepparent adoptions in families where the natural parent had regularly and substantially failed to support or communicate and visit with the child" and refuses to consent to the adoption. *In re Colon*, 144 Mich App 805, 810; 377 NW2d 321 (1985).

On appeal, petitioners are not challenging the trial court's determination that subsection (a) was proven by clear and convincing evidence.[1] The issue is whether respondent had the ability to contact the children, but substantially failed to do so under subsection (b). Petitioners argue that the trial court incorrectly applied *In re ALZ*, 247 Mich App 264; 636 NW2d 284 (2001). We agree.

In *In re ALZ*, the respondent wrote the petitioner-mother and requested visitation with the child, but the mother "asked that he refrain from doing so." *In re ALZ*, 247 Mich App at 273. This Court noted that respondent could have attempted to contact the child against the petitioner-mother's will, but because paternity had not been established, "he was effectively a nonparent"

[1] We note that the trial court's findings that respondent failed to substantially comply with the child support order for the two years preceding the filing of the petition were proper, given that respondent's prison account showed he had funds available to satisfy his child support obligation of $8 per month.

and "had no legal right to visitation or communication with the child." *Id.* at 273-274. This Court went on to state:

> Respondent's proper response to petitioner mother's resistance to his attempts to visit or contact the child was to file a complaint seeking an order of filiation, which he did on February 5, 1999, well within the two-year statutory period under MCL 710.51(6)(b). The family court determined that respondent's December 1998 letter and February 1999 complaint constituted ongoing requests for contact with A.L.Z., but that petitioner mother's resistance to these requests resulted in respondent's inability to contact the child, and we find no error in these determinations. [*Id.* at 274.]

Accordingly, MCL 710.51(6)(b) would be satisfied if the noncustodial parent substantially fails to contact the children, despite having the legal right to do so, and was not prevented from doing so by the custodial parent. *In re ALZ*, 247 Mich App at 275.

As stated, the trial court determined that petitioner-mother's actions effectively denied respondent the ability to have contact with his children. However, in her letter to the Department of Corrections, petitioner-mother did not request that respondent have no contact with the children. The Department made this interpretation, and subsequently issued an administrative order reflecting such. Thus, unlike the mother in *In re ALZ*, in this case there is no evidence that petitioner-mother refused to allow respondent to have contact with the children. It was not petitioner-mother's resistance that resulted in respondent's inability to contact the children; rather, it was respondent's own behavior of sending petitioner-mother unsettling and threatening letters and the Department of Corrections' resulting administrative order prohibiting respondent from contacting petitioner-mother or the children.

Additionally, after the Department's decision, respondent's proper response should have been to seek a court order for contact. Respondent had the legal right to contact the children, despite the Department's no contact order. However, in the two-year statutory period respondent did not make any attempts or requests for contact through his attorney or the court. See *In re Simon*, 171 Mich App 443, 449; 431 NW2d 71 (1988) ("While we recognize respondent's claim that the divorce decree prohibited visitation, we also are cognizant of the fact that respondent never requested visitation privileges."). In his statement regarding the Department's decision, he even acknowledged that he would have his attorney fight the decision, but never followed through. Furthermore, in our view respondent forfeited his ability to contact the children by threatening to harm the mother who had custody of them.

Finally, even if respondent thought that the no contact order denied him the ability to contact the children during the applicable two-year statutory period, we note that prior to this period respondent barely made contact with his children. See *In re Hill*, 221 Mich App at 692-693 (noting that "[i]nclusion of the words 'or more' [in MCL 710.51(6)(b)] indicates a legislative intent that circumstances beyond the applicable two-year statutory period may be considered"). Evidence indicates that he only sent a few letters to the children since 2007. Although he claims he sent more letters that the children did not receive, he did not provide any evidence of this. Infrequent contact, such as three letters in two years, is not enough to satisfy the statute. *In re Caldwell*, 228 Mich App 116; 576 NW2d 724 (1998).

Thus, it was clear error for the trial court to deny petitioners' motion to terminate respondent's parental rights to the two children because respondent substantially and regularly failed to contact the children, despite having the ability to do so, and there was no evidence that petitioner-mother refused to allow him to have contact with the children during the applicable two-year statutory period.

Reversed and remanded for entry of an order terminating respondent's parental rights to the two minor children. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ Elizabeth L. Gleicher
/s/ Cynthia Diane Stephens