

STATE OF MICHIGAN
COURT OF APPEALS

UNPUBLISHED
August 15, 2013

In the Matter of K.M.S., Minor.

No. 314151
Ingham Circuit Court
Family Division
LC No. 12-000159-AD

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

PER CURIAM.

Respondent is the biological father of KMS, a young child born out of wedlock. Respondent filed suit to establish paternity and to gain custody of his infant daughter. Petitioner-mother, however, preferred to place KMS in an adoptive home and fought respondent's custody efforts. In this adoption/termination of parental rights action, the circuit court refused to first resolve the separate paternity/custody action filed by respondent. As a result, the circuit court employed a less stringent standard to terminate respondent's parental rights to his child. We vacate the termination order and remand to allow the circuit court to address the termination action under the standards set forth in the Juvenile Code, MCL 712A.19b *et seq.*

I. BACKGROUND

Respondent and petitioner met in December 2011, and began cohabitating. Petitioner became pregnant shortly thereafter. Respondent drove petitioner to a prenatal appointment and twice to the emergency room when she experienced cramping and bleeding. Petitioner conceded that respondent offered to "help [her] out" if Medicaid failed to cover any expenses related to her pregnancy. Because Medicaid paid for everything, she never sought his financial assistance. During their short relationship, respondent and petitioner sporadically lived together in Washtenaw County and shared the cost of groceries and other essentials.

In February 2012, respondent and petitioner parted ways after a heated argument and petitioner moved in with her parents. According to petitioner, respondent threatened her with violence during this incident. Subsequently petitioner received voicemail, text and email messages containing respondent's apologies for his actions. Petitioner thereafter refused all contact with respondent and discontinued her cell phone service.

In the summer of 2012, petitioner contacted Bethany Christian Services for assistance in placing her then unborn child in an adoptive home. A caseworker contacted respondent, who

voiced opposition to the adoption and expressed a desire for custody of his child. Respondent then hired counsel. Counsel faxed a letter to the caseworker asserting that respondent “is the biological father” of the child and “shall be taking custody.” Counsel demanded that petitioner “immediately make the child available for paternity test[ing] upon birth.” In September 2012, counsel filed in Washtenaw County a notice of intent to establish paternity.

Unbeknownst to respondent, petitioner had since moved to Ingham County. She delivered the child during the first week of October 2012. The next day, she filed a petition seeking a direct placement adoption and termination of respondent’s parental rights.¹ The documents provided to the court in support of the petition included a “social/medical history” prepared by Bethany Christian Services. The history reported that petitioner had identified two putative fathers.²

Within two weeks after petitioner’s adoption filing, respondent voluntarily dismissed his Washtenaw County action and filed a paternity/custody action in the Ingham circuit court. On October 16, petitioner mailed to respondent a notice informing him that the termination hearing would take place on November 14, 2012. Two days later, respondent filed a motion requesting that the court stay the adoption/termination proceedings pending resolution of the paternity/custody action and that the court order DNA testing. Citing *In re MKK*, 286 Mich App 546; 781 NW2d 132 (2009), respondent contended that the court was required to establish KMS’s paternity before considering termination of his parental rights. Once his paternity was established, respondent averred, he would be a necessary party to the contested adoption proceeding and the petitioner would have to meet a more rigorous standard to terminate his parental rights.

On October 31, the circuit court heard respondent’s motion to stay and denied it, reasoning in relevant part:

[T]he Court is, you know, not here to make a determination of paternity or custody at this point. It’s just whether or not good cause has been shown to adjourn the adoption case to allow the paternity case, I guess, to trump it, through legal proceedings, to allow the father to establish legal paternity.

¹ MCL 710.36(1) provides for the filing of a motion contemporaneous with the adoption petition to identify the father and terminate his parental rights:

If a child is claimed to be born out of wedlock and the mother executes or proposes to execute a release or consent relinquishing her rights to the child . . . , and the release or consent of the natural father cannot be obtained, the judge shall hold a hearing as soon as practical to determine whether the child was born out of wedlock, to determine the identity of the father, and to determine or terminate the rights of the father as provided in [MCL 710.39.]

² The other putative father received notice of all proceedings but failed to appear.

At this point in time, there are several reasons why the Court is going to deny that request. First of all, there is another possible father, and the Court is well aware of that, so there is another possible biological father of this child. But secondly, based upon the statute itself, the Adoption Code itself, which at MCL 710.39, sections both 1 and 2, first of all, if the father can show that an established putative father establish a custodial relationship with the child or has provided substantial and regular support or care in accordance with his ability to do that, and, again, that's during the 90 days before the notice was served upon him, at that point, if the father establishes that, the Court cannot terminate his rights. So I don't find any fundamental right that could be at risk, because if that's the case, the Court still can't terminate his rights if that's been proven. And if that hasn't happened, then you flip back to section 1, and then the Court has to inquire into his fitness and ability to properly care for the child and determine whether the best interest of the child would be served by granting custody to him. So then he would have the right, again, to a best interest finding under the Child Custody Act as [respondent's counsel] sought. So I don't find the Adoption Code itself protects the putative father if he's been, kind of what they used to determine, do something, putative father. And if he hasn't been, then the Court still has to make a best interest determination that the father appears at that hearing and asserts and requests custody of the child.

So I don't find any, I guess, detriment to the father, or the putative father, by proceeding with the adoption case.

On November 27, 2012, the court ordered DNA testing which revealed that respondent is the child's biological father.³

In December 2012, the circuit court commenced a two-day termination hearing. In a written opinion dated December 21, 2012, the court terminated respondent's parental rights to KMS. The court's opinion recites that DNA testing revealed to a 99.99995% certainty that respondent is KMS's father.

In addressing petitioner's termination request, the court first determined which standard under MCL 710.39 to apply to the action. The statute provides, in relevant part:

(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

³ The parties have not provided this Court with the record of the paternity action. Although respondent requested paternity testing when he filed his motion to stay the adoption proceedings, the delay in obtaining an order for the testing is unexplained in the record provided. However, the results were known to the circuit court before it rendered its termination opinion.

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 the putative father's 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 section [MCL 712A.2A⁴].

The court declined respondent's request to proceed under subsection (2), concluding that respondent had not "established some kind of custodial or support relationship prior to the notice of hearing." Accordingly, the court determined that respondent was not entitled to the additional protection of requiring petitioner to establish a ground for termination and to prove that termination of respondent's parental rights is in the child's best interests under MCL 712A.19b. Instead, the court found that respondent had "not provided substantial or regular support for the mother or the child 90 days prior to the notice of hearing" so it only needed to "examin[e] the father's fitness and ability to properly care" for the child and decide whether "it would not be in the best interests of [the] child to grant custody to the putative father" using the factors outlined in MCL 710.22(g) of the Adoption Code.

The court rejected respondent's claim that he had actively participated in petitioner's life and health care until she ended all contact with him in February 2012. The court further noted that despite respondent's repeated attempts to reconcile with petitioner, "[t]here was no mention of him offering any support."⁵ The court found: "All respondent did during this time period was file a paternity action, in hopes to perfect his paternity [F]iling a paternity action, or notice of intent to claim paternity does not constitute support or care for the purposes of section 39(2)." The court acknowledged that respondent had purchased several items to prepare his mother's home for the arrival of his daughter, but found this was too little, too late.

⁴ This Court has found constitutional the disparate treatment of active and non-active putative fathers. "The United States Supreme Court has held that the father of an illegitimate child, who has taken steps to establish a custodial or supportive relationship with the child has a constitutionally protected interest in continuing that relationship." *In re BKD*, 246 Mich App 212, 221-222; 631 NW2d 353 (2001), citing *Caban v Mohammed*, 441 US 380; 99 S Ct 1760; 60 L Ed 2d 297 (1979), and *Stanley v Illinois*, 405 US 645; 92 S Ct 1208; 31 L Ed 2d 551 (1972). "However, where the father of an illegitimate child has not taken steps to establish a custodial or supportive relationship, the state may constitutionally terminate his parental rights through procedures and standards that are less stringent than those required to terminate the parental rights of a mother or a married father." *Id.* at 222; see *Lehr v Robertson*, 463 US 248; 103 S Ct 2985; 77 L Ed 2d 614 (1983).

⁵ This finding contradicts petitioner's admission that respondent offered to "help . . . out" if petitioner incurred expenses not covered by Medicaid.

Considering the factors of MCL 710.22(g), the court determined that it was in KMS's best interests not to grant custody to respondent and therefore to terminate his parental rights. The court cited the lack of contact between respondent and KMS that prevented any sort of emotional tie. The court determined that respondent "has no realistic concept of child rearing" and could not "provide guidance to" the child because "[h]e relies heavily on others for parenting assistance and information." Further, the court weighed against defendant that he still lived with his mother and had never lived independently. In the court's estimation, respondent's inability to work due to severe depression and limited disability income from Social Security rendered him financially unable to provide for the child. The court determined that KMS had lived in her adoptive placement since birth and that "maintaining continuity would be beneficial to her." Respondent's "family unit," on the other hand, "is unknown" and therefore represented a wild card for the child's future. The court also accepted petitioner's testimony that respondent had threatened her life during the argument that ended their relationship. This appeal followed. The sole issue presented is whether the circuit court abused its discretion by refusing to adjourn the adoption proceeding until the results of the DNA testing became available.⁶

II. ANALYSIS

The Adoption Code provides that an "adjournment or continuance of a proceeding under this chapter shall not be granted without a showing of good cause." MCL 710.25(2). This Court reviews a trial court's decision whether to adjourn or continue a proceeding for an abuse of discretion. *In re King*, 186 Mich App 458, 466; 465 NW2d 1 (1990). We conclude that the circuit court abused its discretion by denying respondent's request to stay the adoption/termination proceedings pending the resolution of the paternity/custody action as there was good cause to do so.

In *MKK*, 286 Mich App at 550, citing MCL 710.25(1), this Court acknowledged that the Legislature has provided that adoption proceedings should be resolved as quickly as possible and should be given priority on the court docket. The Legislature specifically provided an exception to this adoption priority rule, however. A challenging party may seek a postponement of the adoption action based on "good cause." *MKK*, 286 Mich App at 550, citing MCL 710.25(2).

"Good cause" is not defined in the statute or in our Court Rules. This Court has described it as "a legally sufficient or substantial reason." *In re Ultrera*, 281 Mich App 1, 10-11; 761 NW2d 253 (2008). Our Supreme Court recently stated that the term "simply means" a "satisfactory, sound or valid reason." *People v Buie*, 491 Mich 294, 319; 817 NW2d 33 (2012) (quotation marks omitted).

Good cause existed to adjourn the termination hearing for ten to fourteen days so that the DNA results could be obtained, and the circuit court abused its discretion by finding otherwise. A court abuses its discretion when it inappropriately interprets and applies the law, *People v Giovannini*, 271 Mich App 409, 417; 722 NW2d 237 (2006), or when it selects an outcome

⁶ Pursuant to MCL 722.16(5), if DNA testing reveals a 99 percent or higher probability that a man is a child's father, "paternity is presumed."

falling outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). Several valid, legally sufficient, and sound reasons supported a brief adjournment of the adoption proceedings. Primary among them were respondent's genuine, concerted and timely efforts to perfect his paternity and the absence of any prejudice to the child that would be occasioned by a brief delay.

In *MKK*, this Court held that good cause can be demonstrated by a putative father attempting to secure his parental rights.

[T]he Adoption Code generally protects the parental rights of putative fathers, [but] there may be circumstances in which a putative father makes a showing of good cause to stay adoption proceedings in favor of a paternity action. For example, in cases such as [*MKK*], where there is no doubt that respondent is the biological father, he has filed a paternity action without unreasonable delay, and there is no direct evidence that he filed the action simply to thwart the adoption proceedings, there is good cause for the court to stay the adoption proceedings and determine whether the putative father is the legal father, with all the attendant rights and responsibilities of that status. Upon a motion to stay adoption proceedings, the trial court must make a good cause determination based on the particular circumstances of the case. [*MKK*, 286 Mich App at 562.]

This Court emphasized that it did “not intend to create a ‘race to the courthouse’” between the child’s parents. *Id.*

[R]ather, the timing of a paternity claim is but one factor to be considered in determining whether there is good cause under *MCL 710.25(2)* to stay adoption proceedings. Furthermore, while a stated purpose of the Adoption Code is to “safeguard and promote the best interests of each adoptee,” upholding the rights of the adoptee as paramount to those of any other, see *MCL 710.21a(b)*, the general presumption followed by courts of this state is that the best interests of a child are served by awarding custody to the natural parent or parents, see, e.g., *Hunter v Hunter*, 484 Mich 247, 279, 771 NW2d 694 (2009) (holding that “the established custodial environment presumption in *MCL 722.27[1][c]* must yield to the parental presumption in *MCL 722.25[1]*”). Thus, giving a paternity action priority over an adoption proceeding does not necessarily conflict with protecting the best interests of the child. [*Id.* at 562-563.]

Here, respondent’s efforts to perfect his paternity began before the child’s birth and continued unremittingly thereafter. But for petitioner’s refusal to voluntarily consent to immediate DNA testing of the child, respondent would have established his paternity well before the adoption hearing. Just as in *MKK*, respondent “wished to be present for the child’s birth, to be named on the child’s birth certificate, and to sign an affidavit of parentage.” *Id.* Also as in *MKK*,

there was no unreasonable delay in respondent’s attempt to establish paternity. This is not a case in which a putative father delayed filing a paternity action for many months or years, or until an adoption petition had already been filed. To the

contrary, respondent filed a notice of intent to claim paternity before the child's birth. [*Id.*]

These facts establish valid, sound and legally sufficient reasons for permitting a short delay in the adoption action.

Moreover, the reasons advanced by the circuit court for denying the stay lack legal merit. That "another possible father" had been identified by petitioner supplies no logical basis to place respondent's paternity case on hold, particularly where, as here, the other putative father made no effort to involve himself in the proceedings. To the contrary, it reinforces the need for a speedier determination of paternity. Nor did the circuit court accurately interpret the law when it ruled that application of the Adoption Code would not place at risk any of respondent's "fundamental right[s]."

MCL 710.33(2) provides that "[a] person filing a notice of intent to claim paternity shall be presumed to be the father of the child for purposes of this chapter unless the mother denies that the claimant is the father." Given that petitioner did not deny that respondent could be the father of her child, respondent was entitled to the benefit of this rebuttable presumption. Had respondent's paternity been established before the adoption hearing commenced, he would have been "considered a 'parent,' with all the attendant rights and responsibilities, and termination of his parental rights [could] only be accomplished in cases of neglect or abuse under MCL 712A.19b." *MKK*, 286 Mich App at 558. Because the circuit court in this case did not consider respondent to be the established father during the adoption proceeding, the court employed the lesser standard to terminate his rights under MCL 710.39(2).

Furthermore, the child's best interests were not protected by advancing the adoption/termination proceeding without resolving the paternity action. Although the Adoption Code contemplates swift permanency proceedings, the stay sought here was for a matter of days, not weeks. In fact, respondent could have perfected his paternity long before the circuit court rendered its adoption decision. A child's best interests are presumed to be preserved when he or she remains with a parent. *MKK*, 286 Mich App at 563. Accordingly, the fundamental rights of KMS were potentially placed at risk by the circuit court's refusal to briefly stay the adoption proceedings while awaiting the DNA results. The circuit court's contrary finding constituted legal error. The circuit court apparently failed to recognize that as KMS's legal father, respondent's constitutionally protected liberty interest in the child's care and custody could be terminated only on the basis of clear and convincing evidence substantiating one of the statutory grounds set forth in the juvenile code. We must therefore vacate the circuit court's termination order and remand for reconsideration of the termination decision pursuant to MCL 712A.19b.

In light of our resolution of this case, we need not reach respondent's challenges to the circuit court's factual findings concerning provision of care and support to petitioner, or the child's best interests.

Vacated and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ Elizabeth L. Gleicher