

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of CWD, Minor.

DENNIS LEE CASTLE and CHARLENE MAE
CASTLE,

Petitioners-Appellants,

V

LAWRENCE DELL,

Respondent-Appellee.

UNPUBLISHED
November 16, 2001

No. 230491
St. Clair Circuit Court
Family Division
LC No. 00-006427

In the Matter of JMD, Minor.

DENNIS LEE CASTLE and CHARLENE MAE
CASTLE,

Petitioners-Appellants,

V

LAWRENCE DELL,

Respondent-Appellee.

No. 230538
St. Clair Circuit Court
Family Division
LC No. 00-006428

Before: Hoekstra, P.J., and Saad and Whitbeck, JJ.

PER CURIAM.

Petitioners Charlene and Dennis Castle¹ appeal as of right from a family court order denying their petition to terminate respondent Lawrence Dell's parental rights under the stepparent adoption provision in the adoption code.² We reverse and remand.

¹ We use "Castle" to refer to Charlene Castle.

² MCL 710.51(6).

I. Basic Facts And Procedural History

Dell and Castle are former spouses who have two children, a son and a daughter. For reasons not apparent and not relevant in this case, in March 1994 either Dell or Castle decided to initiate divorce proceedings in Lapeer County. The court handling the divorce entered an ex parte order granting Castle custody of the children, with Dell to have reasonable visitation. The order further specified that Dell had to pay \$216 a week in support for the children. The following summer the court set a regular visitation schedule for Dell and increased his support obligation to \$269 a week. The court also entered an order preventing Dell from having contact with Castle. Dell and Castle, however, each had problems when transferring the children to the other parent. Thus, with assistance from the friend of the court and a variety of restrictions, other people were able to facilitate these transfers and help Castle and Dell avoid contact with each other.

In February 1995, while the divorce proceedings were pending, Dell sent a package bomb to Castle at her workplace. The bomb exploded, and Castle suffered extensive burns and shrapnel wounds from which she still has not fully recovered. Joseph Dotson, Castle's father, was appointed a temporary guardian for the children while Castle was recovering. Dell was arrested soon after the explosion. In 1996, he was convicted of attempted murder, for which he was sentenced to forty to eighty years in prison, and sending an incendiary device, for which he was sentenced to life without the possibility of parole.³

The divorce judgment, entered the following year, ordered Dell not to have any contact with his children unless the children initiated the contact or unless the children's therapist recommended visitation. The divorce judgment awarded Dell property worth approximately \$18,000, as well as his tools. The divorce judgment did not impose on Dell an ongoing obligation to pay support for his children "based upon [his] incarceration," but reserved the possibility that he would be ordered to pay support in the future. At the time of the divorce, Dell owed \$26,970.81 in back support payments and court costs that had accrued with interest in the months leading up to the divorce. The divorce judgment ordered Dell to pay these accrued support expenses. The divorce judgment attempted to create a trust for the children to consist of assets not awarded to Dell in the event that this Court determined that Dell had an interest in those other assets, an event that never occurred.

Sometime following the divorce, Castle married her current husband, who had become like a father to her children and wanted to adopt them. Castle and her husband then petitioned the family court to terminate Dell's parental rights to the children under MCL 710.51(6), which 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

³ Dell has never conceded to committing this crime, instead stating that he was "falsely accused of it. Blatantly unjustly found guilty of something I had nothing to do with." Federal charges not specified in the record were pending at the time the family court held the hearing on the petition to terminate Dell's parental rights.

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.

In order to prove that Dell had not provided “regular and substantial support” for the children, Castle testified that Dell had given no support whatsoever in the preceding two years and more than \$3,500 in unpaid child support had accrued even before the bombing and Dell’s incarceration. The family court also accepted into evidence a copy of a resume Castle and Dell had prepared around 1990 so that he could apply for employment. The Castles submitted this resume to support their proposition that Dell, a skilled tradesman, had numerous talents that he could use to work in prison system. At the time of the hearing on the termination petition, Dell’s child support arrearage had grown to \$35,787.32 with interest.

Dell, however, claimed that while he was in prison he had attempted to provide some support for his children by having church groups send presents to his children for Christmas. He was not certain that the children ever received the gifts because he did not have their current address. Dell said that he had “little jobs . . . occasionally” doing primarily custodial work while incarcerated in Milan, but that he had been moved between prisons so frequently he had never been able to work long enough to earn much more than \$50. Dell noted that he had also been incarcerated in the Wayne County Jail for some time and that the jail did not offer jobs to inmates. Further, though he conceded the amount of property he received in the divorce, he said that his mother had used \$9,000, he had used the remaining \$9,000 to pay for his attorney, and he did not know where his tools were, effectively leaving him with nothing. When asked why he did not support his children at all, Dell responded:

Well, I was under the impression that the court [handling the divorce] had taken all the funds that I had that I earned during my whole lifetime working in skilled trades and [the money] was going to go to taking care of the children. There was a beautiful house that was left for these children that was paid for and was maintenance free and was completely up to modern conditions, that they would be comfortable in. Fifty dollars, a little of it went to cosmetic. Most of it went to the copy machine. We copy documents for the courts. And communications with the courts. As a matter of fact right now I’m presently in debt to the court and to the copy machine. I’m in the red in the prison system. I owe more money than I got.

As for the statutory matter of visitation, contact, or communication with the children, Dotson testified that while he was acting as the children’s guardian in 1995, Dell had no contact

with the children. Dotson was not aware of a court order preventing contact at that time. Castle said that Dell had some minimal contact with the children from the time he was incarcerated in 1995 until 1999. He had sent the children one or two cards each year, usually around their birthdays and Christmas. Castle said that she gave some of these cards to the children so that they could “remember the good times” rather than dwelling on the bombing. She stopped giving the cards to the children when her son’s emotional problems grew worse because of the contact. She had encouraged her son to write to Dell in order to express his anger, but her son had refused to do so.

According to Beth Knowlton, a caseworker with the Lapeer County friend of the court, Dell had not contacted the friend of the court to request visitation with his children at any time between November 1997 and the hearing on the termination petition in September 2000. Nor did she have any record of the children requesting to contact Dell. Knowlton also pointed out that Dell had objected when the friend of the court had attempted to collect some of the back support he owed from a profit-sharing check he had from his employer. Karen Roodvoets, a clerk with the Lapeer Circuit Court, added that Dell had not contacted the court that handled his divorce to request any sort of visitation with his children between February 1995 and January 1998.

Dell confirmed that he had sent cards to his children several times. He apparently interpreted the restrictions on contact with his family to apply only to Castle, not to his children. He would have called his children, but did not have their telephone number. This also impeded his ability to find the children’s current address so that he could write to them. Both Dell and his mother, Joyce Will, recalled an occasion when Will went to the post office and asked the postal employees to forward cards to the children. Dell said that he sent a card to his son at his son’s school with instructions on how his son could contact him in prison or could contact Will. However, Dell was not aware of how he could actually receive a telephone call while in prison.

Dell claimed that he was not experienced when it came to legal matters in order to explain his failure to make more of an effort through formal channels, like the friend of the court, to have contact with his children. However, Dell conceded that, despite this lack of legal sophistication, he had managed to object to his attorney’s efforts to place a lien on his tools, but had never contacted the friend of the court or the children’s therapist regarding visitation or communication with the children. He did not attempt to contact Castle’s parents because, he said, he was advised not to do so.

At the close of the hearing, the Castles’ attorney argued that incarceration did not exempt a parent from supporting or having contact with his children. She also contended that MCL 710.51(6) permitted the family court to look at evidence of failure to pay support or have contact with the children beyond the two years immediately preceding the termination petition. As a result, though the orders entered in the divorce action effectively barred Dell from having any significant contact with the children, there was evidence on the record of Dell’s failure to support and have contact with his children before Dell was subject to those orders. Further, though MCL 710.51(6)(a) referred to nonpayment of support when there was a support order, nothing excused Dell from paying support if he was able to do so, the other circumstance mentioned in the statute. In conclusion, the Castles’ attorney argued that Dell had voluntarily placed himself in a position

where he could do little to support his children and that terminating his parental rights was in the children's best interests.

Dell's attorney agreed that the family court was at liberty to look at facts outside the two years immediately preceding the termination petition. However, he stressed that the divorce judgment was structured so that it would satisfy Dell's support obligation by giving Castle almost all the marital assets. Dell's attorney emphasized that Dell had paid approximately ninety percent of his support obligation before he was incarcerated. Given the limitations of incarceration, he claimed that Dell had taken advantage of all the opportunities available to him to contact the children.

In a written opinion and order, the family court summarized the facts of the case, noting the different ways in which Dell had only limited opportunities to have contact with his children. Addressing the language in MCL 710.51(6), the family court explained that the statute

establishes a two-prong test by which the parental rights of the non-custodial parent may be terminated Each of those elements consists of a two-fold inquiry. The first inquiry in each element of the test is into the non-custodial parent's ability and opportunity to accomplish the requisites of the second inquiry of each element.

The family court understood that, when a support order is in place, a respondent's ability to pay support is not at issue under MCL 710.51(6), but evidently concluded that Dell was not subject to a court order for support. Instead, the family court focused on his ability to pay support, noting that "[n]o Michigan Court has suggested that where no support order has been issued, petitioner is relieved of the obligation to prove, by clear and convincing evidence, respondent's ability to pay support." Further, the family court remarked, *In re Halbert*⁴ held that incarceration "take[s] a] respondent outside the scope of MCL 710.51(6)" by preventing the parent from earning a living. The family court recognized that *In re Caldwell*⁵ had rejected any support exception for incarcerated parents. However the family court distinguished the facts of *Caldwell* from the facts of this case. In particular, the family court observed that the respondent-father in *Caldwell* had a support obligation of only \$10 a week, which he had the ability to pay because he had income of \$150 a month from a prison job.⁶ In contrast, Dell had earned only around \$50 and he was largely unable to find a job in the facilities where he was incarcerated. Consequently, the family court held:

The evidence is not convincing that Lawrence Dell *had the ability to pay support* having earned only \$50.00 in the detention system during this 2-year period. There was no evidence presented as to the availability of work or ability to support to counter Mr. Dell's testimony. There was no testimony that Lawrence Dell had other funds or assets from which he could pay support. Mr.

⁴ *In re Halbert*, 217 Mich App 607, 615-616; 552 NW2d 528 (1996).

⁵ *In re Caldwell*, 228 Mich App 116, 121; 576 NW2d 724 (1998).

⁶ *Id.* at 119, 123.

Dell testified that his personal account at the prison was in a deficient position because of the cost of legal proceedings.

It is unnecessary to address the issues of the ability to visit, contact, or communicate with the child as required by MCL 710.51(6)(b) because the requirements of MCL 710.51(6)(a) have not been satisfied.

Thus, the family court denied the petition to terminate Dell's parental rights.

The Castles contend in this appeal that the family court erred when it did not consider evidence of Dell's failure to support his children in years outside the two years immediately preceding the termination proceedings. They argue that by restricting its analysis to the two years preceding the termination petition, the family court did not recognize that Dell was subject to a support order, making his ability to pay support during his incarceration irrelevant.

II. Standard Of Review

The issue the Castles raise in this appeal require us to interpret and apply the adoption code, a task we undertake with de novo review.⁷ However, to the extent that we must review the family court's factual findings, we do so to determine whether the family court clearly erred.⁸

III. Statutory Interpretation

Our primary goal when interpreting statutes is to determine and give effect to the Legislature's intent.⁹ The best way to determine this legislative intent is to examine the language of the statute at issue¹⁰ because we presume that the Legislature intended to give the statute the meaning it "plainly expressed."¹¹ If the meaning of the statute is clear, then courts have no further role in interpreting it; the statute must be applied as written.¹² Courts must give effect to every phrase, clause, and word in a statute in order to avoid rendering any part of a statute meaningless.¹³ Unless specifically defined in the statute, every word or phrase in a statute should

⁷ *In re SD*, 236 Mich App 240, 243; 599 NW2d 772 (1999).

⁸ See *In re RFF*, 242 Mich App 188, 201; 617 NW2d 745 (2000).

⁹ See *State Farm Fire & Casualty Co v Old Republic Ins Co*, 242 Mich App 105, 108; 617 NW2d 715 (2000).

¹⁰ See *Gier v Auto Owners Ins Co*, 244 Mich App 336, 339; 625 NW2d 398 (2001).

¹¹ *Platte Lake Improvement Ass'n v Dep't of Natural Resources*, 218 Mich App 424, 427; 554 NW2d 342 (1996).

¹² See *Heinz v Chicago Rd Investment Co*, 216 Mich App 289, 295; 549 NW2d 47 (1996).

¹³ See *Heinz*, *supra* at 295.

be given its obvious and ordinary meaning, considering the context and any technical terms, which must be given their particular connotation.¹⁴

IV. Statutory Support Obligation

There is no question that MCL 710.51(6)(a) refers to a period of “2 years or more” when defining the amount of time a parent must fail substantially to support his children in order to terminate that parent’s parental rights and allow stepparent adoption. Nothing in the statute requires a family court to restrict its analysis to the two years immediately preceding the termination petition. Indeed, the wording “or more” suggests that a broader view may be appropriate in many instances. The construction of this phrase merely requires the family court to examine the two-years preceding the petition, while allowing it to look further back in time.¹⁵

We see no clear error in the family court’s factual determination that the circumstances of Dell’s incarceration actually prevented him from being able to pay support for his children in the two years preceding the petition to terminate his parental rights. However, the family court erred when, in its final analysis, it ignored the evidence concerning the period when the divorce was pending. Had the family court examined this evidence, it would have recognized that Dell was subject to a support order. True, the divorce judgment did not impose a continuing support obligation on Dell in the sense that he would have to continue to make *additional* periodic support payments. However, MCL 710.51(6)(a) does not require a support order to create an ongoing or future support obligation before the family court can determine whether the respondent-parent had failed substantially to comply with the support order. Rather, under the plain language of the statute, it is enough that “a support order has been entered” and, in the two or more years preceding the termination petition, the respondent-parent “has failed to substantially comply with the order[.]”

In this case, the divorce judgment “ordered” Dell to pay the “support” due under the support orders entered while the divorce was pending. This divorce judgment incorporated a support order that was in effect until it was satisfied. If the support order had ceased to be effective because of the children’s ages or other reasons, then the family court’s decision in this case to apply the “ability to pay” analysis would have been proper. However, the terms of the divorce judgment contradict any conclusion that Dell ceased to have a financial obligation to pay support under a court order. Simply put, “a support order ha[d] been entered” against Dell, which made his ability to pay support irrelevant.¹⁶ Thus, the family court erred as a matter of law when it determined that the Castles had failed to support their burden of proving that Dell had the ability to pay support because this analysis did not apply.

¹⁴ See MCL 8.3a; *Western Michigan University Bd of Control v State*, 455 Mich 531, 539; 565 NW2d 828 (1997).

¹⁵ See *Halbert*, *supra* at 612; see also *Caldwell*, *supra* at 119-120 (agreeing with portion of *Halbert* concerning timeframe for support and contact analysis).

¹⁶ *In re Newton*, 238 Mich App 486, 492; 606 NW2d 34 (1999).

On remand, the family court must consider whether Dell substantially complied with the order to pay the support arrearage in the two or more years preceding the termination petition. In doing so, the family may not consider his ability to pay during that period. If the family court determines that Dell failed substantially to comply with the support order, then it must proceed to examine whether there was sufficient evidence of Dell's failure to visit, contact, or communicate with the children when he had the ability to do so in the two years or more preceding the petition. The family court is free to hold additional hearings or request additional briefing if necessary.

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

/s/ Joel P. Hoekstra

/s/ Henry William Saad

/s/ William C. Whitbeck