STATE OF MICHIGAN

COURT OF APPEALS

In re MGG, Minor.

UNPUBLISHED
July 21, 2015

No. 323603
Oakland Circuit Court
Family Division
LC No. 14-820238-AD

Before: MURPHY, P.J., and STEPHENS and GADOLA, JJ.

PER CURIAM.

Respondent father appeals as of right the order terminating his parental rights to the minor child MGG under the Adoption Code, MCL 710.39(1). We affirm.

Petitioner in this case was the 17-year-old birth mother to MGG. Respondent, also 17-years-old, was the putative father of MGG. Petitioner determined early in her pregnancy with MGG that she wanted MGG to be adopted. Respondent, who was incarcerated at the time of MGG's birth and during the trial court proceedings, would not consent to the adoption. Petitioner petitioned the court under MCL 710.36 to determine respondent's putative father status and terminate his parental rights so that MGG would be available for adoption. Respondent challenged the petition and requested custody of MGG.

Respondent presents two claims of error on appeal. He first challenges the trial court's finding that he came within the provisions of MCL 710.39(1) and second, that termination of his parental rights was in the best interests of MGG.

I. TERMINATION OF PARENTAL RIGHTS UNDER MCL 710.39

In order for a child to be adopted, the parents must either release their parental rights, MCL 710.28(1)(a), or consent to the adoption, MCL 710.43(1)(a). When the parents are not married and a release or consent from the respondent parent is unobtainable, the petitioner can petition the court "to determine the identity of the father, and to determine or terminate the rights of the father" under section 39 of the Adoption Code. MCL 710.36(1). When a putative father is identified and requests custody, the court must determine his rights under MCL 710.39. *In re MKK*, 286 Mich App 546, 559; 781 NW2d 132 (2009). MCL 710.39 "classifies putative fathers into two groups, each having a different level of legal protection for their parental rights." *In re BKD,* 246 Mich App 212, 216; 631 NW2d 353 (2001). MCL 710.39 states, in pertinent 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 best interests of the child to grant custody to the putative father, the court shall terminate his rights to the child.
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> (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 section 51(6) of this chapter or section 2 of chapter XIIA.

"The above provisions create two categories of putative fathers: those who have a custodial relationship with, or provide support for, their child and those who do not." *In re Lang*, 236 Mich App 129, 134; 600 NW2d 646 (1999).

Respondent does not dispute that he did not establish a custodial relationship with MGG. His argument focuses on the support and care obligation cited in MCL 710.39(2). Respondent argues that if the trial court had analyzed the support and care obligation of subsection 39(2) in terms of respondent's "ability to do so", it should have found that he came within subsection 39(2) and not subsection 39(1). We disagree. This Court reviews the trial court's application and interpretation of a statute de novo. *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010). We review fact finding for clear error. *Matter of Hill*, 221 Mich App 683, 691-692; 562 NW2d 254 (1997).

We note at the outset that there are portions of the transcript in this case that were not preserved. The court's opinion was produced in its entirety and addresses the applicability of subsection 39(2). In its opinion, the court stated, "[h]ad Ms. Johnson not conceded to the fact that – had father and Ms. Johnson not conceded that he does not come within paragraph two this court would have found that anyway." Ms. Johnson, respondent's trial counsel, neither objected to this statement of concession at trial or in any affidavit supplied to us on appeal. Respondent, on whom the responsibility of producing the record is placed, did not provide any record evidence to challenge the court's statement of concession or seek to settle the record as provided for by the court rules. MCR 7.210(B)(1)(a); MCR 7.210(B)(2)[1].

[1] Under MCR 7.210(B)(2)(a), when a transcript is unavailable, within 28 days after the filing of available transcripts in a child custody case the appellant shall file with the trial court "a motion to settle the record and, where reasonably possible, a proposed statement of facts." The motion should be noticed for hearing in the trial court. MCR 7.210(B)(2)(b). The trial court "shall settle

Regardless of whether there was a concession, the record as presented does not support a finding that the respondent was a putative father under MCL 710.39(2) based upon his lack of support for the minor. Respondent argues that his incarceration and the maternal grandmother's decision to have MGG adopted unfairly prohibited him from being able to provide support or care for petitioner or MGG. We find no merit to either contention.

MCL 710.39(2) requires that respondent "provided" substantial and regular support for the mother during her pregnancy or for 90 days after the child is born. In *In re RFF*, 242 Mich App 188, 199-200; 617 NW2d 745 (2000), the Court noted that the amendment of subsection 39(2) was for the purpose of adding the words "substantial" and "regular" where the prior standard of just "support or care" was too low. There was no record of respondent providing support to petitioner during her pregnancy or to MGG within 90 days after she was born. There was competent testimony from the petitioner that she spoke to respondent in March 2014 prior to MGG's May 2014 birth and that he was, therefore, aware of the impending birth. The trial court rejected respondent's argument that he was prevented from providing support because of the interference of petitioner's mother. This rejection is supported by the record including the testimony of the petitioner, her mother and grandmother. There is evidence of gifts and other items provided after the birth but there is no evidence that respondent provided *substantial* and *regular* support in the months after her birth. While respondent was incarcerated for a portion of the minor's life, he failed to use his funds before incarceration for the support of the child and instead utilized those funds to purchase a car. Regardless, this Court has opined that section 39 "does not contain an incarcerated parent exception." *In re Lang*, 236 Mich App at 140. Incarceration does not alone preclude a putative father from providing substantial and regular care or support. There is also no record that respondent's family, to whom he asked the court to look at as his surrogate, provided consistent and or regular financial support for the child.

We cannot conclude that the trial court erred in analyzing respondent's putative father status under MCL 710.39(1) instead of MCL 710.39(2).

II. BEST INTERESTS

After the court determines that either no custodial relationship was established between the putative father and child, or that the mother and child were not substantially and regularly supported, the court must inquire into the putative father's fitness and ability to care for the child and whether termination of his parental rights would be in the child's best interests. MCL 710.39(1). Under the Adoption Code, the trial court shall enter an order terminating parental rights if the court is satisfied as to both of the following:

> (a) The genuineness of consent to the adoption and the legal authority of the person or persons signing the consent.[2]

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any controversy and certify a settled statement of facts as an accurate, fair, and complete statement of the proceedings before it." MCR 7.210(B)(2)(c).

[2] Petitioner's consent to adopt and release of rights were found valid by the court at a referee hearing on June 12, 2014.

(b) The best interests of the adoptee will be served by the adoption. [MCL 710.51(1)(a)-(b)].

"Because the Adoption Code is in derogation of the common law, its provisions must be strictly construed." *In re Schnell*, 214 Mich App 304, 310; 543 NW2d 11 (1995).

Respondent argues that the trial court erred in its evaluation of the best interest factors enumerated in MCL 710.22(f) and in finding that it was not in MGG's best interests that respondent be granted custody. We disagree.

This Court reviews the probate court's findings of fact in an adoption proceeding under the clearly erroneous standard. *Matter of Hill*, 221 Mich App 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

The best interests of the adoptee is determined by the court's consideration, evaluation and determination of the factors found at MCL 710.22(g)(*i*)-(*xi*) and their application "to give the adoptee permanence at the earliest possible date." MCL 710.22(g).

The first factor (*i*), is the love, affection and emotional ties existing between the child and the putative father. MCL 710.22(g)(*i*). The court found that factor (*i*) could not favor respondent because respondent had no relationship with MGG and he testified that he had never met MGG. Respondent argues that he was unfairly disadvantage by his incarceration and the child's infancy. This Court can acknowledge that "incarceration effectively prohibits a parent from establishing a custodial relationship with his child" but the Legislature has not yet created an incarcerated parent exception to section 39. *In re Lang*, 236 Mich App at 140. The child's infancy is also of no consequence where "[t]he statutory language does not allow for an exception to this factor where, as here, the child was immediately placed for adoption." *In re BKD*, 246 Mich App at 219. The trial court did not err in finding that factor (*i*) disfavored respondent where no bond existed between him and MGG.

Factor (*ii*) is the capacity and disposition of "the adopting individual or individuals or, in the case of a hearing under section 39 of this chapter, the putative father" to give the baby love, affection and guidance to educate, foster his religion, racial identity, and culture. MCL 710.22(g)(*ii*). The court found that factor (*ii*) did not favor respondent where respondent had the capacity to provide MGG with love and affection, but was without a plan for guidance. The court pointed to respondent's troubled youth. Respondent argues that the court undervalued this factor where respondent presented testimony that his mother and great grandmother would support and assist respondent in caring for the child during his incarceration. The court did not err in weighing this factor against respondent because MCL 710.39 "make[s] no provision for considering alternative care and custody arrangements by an incarcerated putative father." *In re Ballard*, 219 Mich App 329, 336-337; 556 NW2d 196 (1996).

Factor (*iii*) is the capacity or disposition "of the adopting individual or individuals or, in the case of a hearing under section 39 of this chapter, the putative father" to provide the child with food, clothing, education, permanence and medical care. MCL 710.22(g)(*iii*). The court determined that this factor did not favor respondent. The court based its finding on the facts that

respondent did not have any money, was not a high school graduate, did not have a license, and did not take driver's training. Respondent argues that he was willing and able to supply for the child through his mother and great grandmother. Again, as with factor (*ii*), respondent's focus is misplaced. Factor (*iii*) "specifically directs the court to determine the 'best interests of the child' by comparing the adoptive parents and the putative father, not by comparing the adoptive parents with alternative custody provisions arranged by the putative father." *In re Ballard*, 219 Mich App at 337. The court did not err in weighing this factor against respondent.

Factor (*iv*) is "the length of time the adoptee has lived in a stable, satisfactory environment, and the desirability of maintaining continuity." MCL 710.22(g)(*iv*). The court failed to evaluate this factor. The court only stated that it heard from the guardian ad litem that upon visiting MGG in her adoptive placement, she was found well cared for and in a decent home. Respondent argues MGG's infancy unfairly disadvantaged him. We disagree. MGG's infancy did not work for or against either the respondent or the proposed adoptive parents. MGG was in the proposed adoptive home for less than four months when respondent's parental rights were terminated. Given the other factors against respondent and the court's analysis regarding respondent's instability, respondent would not have prevailed in an argument to maintain a stable environment for MGG. The omission to evaluate this factor was harmless because it would not have changed the outcome of this case. MCR 2.613(A).

Factor (*v*) is "the permanence as a family unit of the proposed adoptive home, or, in the case of a hearing under section 39 of this chapter, the home of the putative father." MCL 710.22(g)(*v*). The court determined that this factor did not favor respondent. The court said that respondent did not have the permanence of a family unit. We agree. The court highlighted that respondent spent most of his teenage life incarcerated. He was incarcerated during the entire proceedings of this case, sentenced to at least 17 years in prison, and faced the possibility of additional incarceration with an upcoming murder trial. Respondent had not established a permanent home for MGG. His plan to have his child reside with his mother in a three-bedroom apartment with nine other people does not form a stable unit. The court did not err in finding that respondent did not have a stable family environment.

Factor (*vi*) is "[t]he moral fitness of the adopting individual or individuals or, in the case of a hearing under section 39 of this chapter, the putative father." MCL 710.22(g)(*vi*). The court found this factor did not favor respondent. The court took into consideration the fact that respondent was incarcerated and had been for most of his teenage life, and that respondent was going to trial for the capital offenses of armed robbery, felony firearm, and first degree murder. Respondent argues that the court unjustly presumed his guilt of the charges he was detained for, and weighed them against his moral fitness. Contrary to respondent's position, the court did not make a presumption of respondent's guilt. Instead, the court said, "You very well may be found not guilty. You very well may be not guilty. This court has no idea." The record does not establish that a presumption was made. Nevertheless, the court is able to consider respondent's criminal history as it relates to his moral fitness to be a parent. "[M]orally questionable conduct relevant to one's moral fitness as a parent" includes "illegal or offensive behaviors." *Fletcher v Fletcher,* 447 Mich 871, 887 n. 6; 526 NW2d 889 (1994). Further, this Court has since received information that respondent was convicted of armed robbery and felony firearm.

Factor (*vii*) is the mental and physical health of respondent. The court determined that this factor partially favored respondent. The court granted respondent physical health, but questioned his mental health because when respondent knew he would be a father he spent the last of his money on a car that he could not drive. The trial court erred in finding that this factor partially disfavored respondent. While the decision to purchase a vehicle with the last of one's money, without having a license to drive the vehicle, may not have been the most prudent of decisions, it does not come close to a showing of mental illness. The decision could have equally been related to respondent's age and immaturity. Without actual evidence of a mental disability or illness, the court should have found this factor favored respondent. See *In re Zimmerman,* 277 Mich App 470, 480, 477–478, 484; 746 NW2d 306 (2008), aff'd in part and vacated in part on other grounds 480 Mich. 1143 (2008) (upholding the court's finding that factor (*vii*) favored the putative father based on the absence of any health problems).

The trial court determined that factors (*viii*), (*ix*) and (*x*) did not apply and we agree.

The last factor (*xi*) is "[a]ny other factor considered by the court to be relevant to a particular adoption proceeding, or to a putative father's request for child custody." MCL 710.22(f)(*xi*). Under this factor the court considered respondent's instability as it related to his incarceration and his plan for MGG. The court stated that respondent's case presented "too many ifs." The court theorized that even if respondent was found not guilty of the armed robbery and felony firearm charges he faced, he had a trial for murder charges in December 2014. The court's comments, taken together, express a concern for the child's permanence and stability, which are valid considerations in any adoption matter.[3]

Respondent argues that the court improperly considered his immaturity and motives for seeking custody. The court told respondent that it thought that respondent was seeking custody of MGG to appease his mother and grandmother who did not want MGG to be adopted by strangers. The court explained that it did not consider the arrangement of allowing respondent's mother and/or grandmother to raise MGG until respondent was able to assume responsibility as establishing permanency for MGG. Very similar considerations were stated by the trial court in *In re RFF*, 242 Mich App 188. There "[t]he trial court indicated that it had an overwhelming impression that appellant was seeking custody to satisfy his parents and fulfill a sense of duty toward them. In addition the trial court discussed appellant's immaturity and his lack of any sense of joy or elation in seeking custody." *Id*. at 203 (quotation marks omitted). The Court did not state that it was error for the trial court to make such an evaluation. *Id*.

Because six of the eight applicable factors did not favor respondent, the trial court did not err in finding that granting custody to respondent was not in MGG's best interests.

Respondent also appears to argue that the trial court should have waited to analyze the best interest factors and instead given him and his family an opportunity to plan for the child.

[3] The purposes of the Adoption Code include "[t]o achieve permanency and stability for adoptees as quickly as possible." MCL 710.21a(d).

Such an argument may be appropriate under the Juvenile Code[4], but it has no place in the Adoption Code. MCL 710.39 is very clear that if: 1) the putative father does not come within subsection (2), and 2) appeared at a hearing requesting custody, then 3) the court shall inquire into the putative father's fitness and ability to properly care for the child and shall determine whether the child's best interests would be served by granting him custody. There is no pause in the proceedings or an obligation for the court to explore alternatives. Respondent appeared before the court and requested custody. The court properly determined respondent did not come within the provisions of subsection 39(2). The next immediate step was consideration of respondent's fitness and ability, along with whether custody to him would be in the best interests of the child.

Affirmed.

/s/ William B. Murphy
/s/ Cynthia Diane Stephens
/s/ Michael F. Gadola

[4] See for e.g. MCL 712A.19a, where parents have the opportunity to work toward reunification.