STATE OF MICHIGAN

COURT OF APPEALS

In re ECH, Minor.

UNPUBLISHED
April 7, 2022

No. 358205
Livingston Circuit Court
Family Division
LC No. 21-004916-AY

In re NBH, Minor.

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Before: GLEICHER, C.J., and K. F. KELLY and PATEL, JJ.

PER CURIAM.

A trial court has discretion to terminate a parent's rights and permit a stepparent to adopt a child when the conditions of MCL 710.51(6) are met. We affirm the trial court's determination under MCL 710.51(6)(a) that respondent-father had not provided court-ordered financial support for a period of two years. MCL 710.51(6)(b) requires the petitioner to establish that the other parent had the ability to visit, contact, or communicate with the children, and substantially failed or neglected to do so for a period of two years. Contrary to the trial court's assessment in this case, petitioner-mother made this showing. Accordingly, the trial court was required to consider whether the termination and adoption would be in the children's best interests. We vacate the court's orders and remand for further consideration.

I. BACKGROUND

Petitioner-mother and respondent-father were married for approximately 4½ years. In 2013, petitioner gave birth to a son, NH. Five months after respondent filed for divorce in 2016, petitioner gave birth to a daughter, EH. The consent judgment of divorce entered March 20, 2017 gave the parties joint legal custody of the children, but awarded petitioner physical custody. The parties agreed to a flexible parenting-time arrangement: "[F]ather shall have the right of reasonable

parenting time with the minor children at reasonable times and places provided that the . . . mother receives at least 24 hours' notice before parenting time takes place . . . ." If the parties could not reach an agreement, the judgment provided a set parenting-time schedule. Respondent-father was also ordered to pay $220 monthly in child support.

Petitioner met her now-husband, ZT, the same month that the divorce was finalized. The couple moved in together and eventually married. In February 2020, petitioner and ZT asked respondent if he would agree to ZT adopting NH and EH. Respondent refused. A year later, petitioner and ZT filed petitions in the current actions to terminate respondent's parental rights and to permit ZT to adopt the children. Shortly thereafter, respondent filed a complaint with the Friend of the Court seeking enforcement of the parenting-time provisions in the divorce judgment. Respondent had not previously sought the Friend of the Court's help with any parenting-time related issues. The parenting-time action was held in abeyance pending the resolution of the termination/adoption matters.

In their petition, petitioner and ZT alleged that respondent had not provided the financial support required by court order. They further asserted that respondent had not visited, contacted, or communicated with the children in the previous two years. At an evidentiary hearing, respondent admitted that he had not paid child support as ordered, but claimed that petitioner had agreed to forego payment in exchange for receiving the child tax credit for both children. Respondent also admitted that he had not visited with the children during the relevant two-year period from May 6, 2019, to May 6, 2021. However, respondent contended that he had tried to arrange visits and Facetime contacts with his children but that petitioner blocked his access by always claiming they were busy. Petitioner claimed that she accommodated respondent's requests to visit and communicate with the children as well as she could, but complained that respondent should have developed more concrete plans to spend time with the children.

The court denied petitioner's requests to terminate respondent's parental rights to allow ZT to adopt the children. Relying on MCL 710.51(6), the court noted that petitioner had to establish two factors by clear and convincing evidence. The first—that respondent had not made court-ordered support payments—was established in the court's estimation. The court acknowledged respondent's challenged claim that petitioner had agreed to an alternate arrangement, but reasoned that this agreement was not reduced to a court order.

The other factor—that respondent had the ability to, but substantially failed to, visit, contact, or communicate with the children for the two years leading up to the petition—was not met, the court concluded. The court considered the parties' testimonies as well as text messages presented into evidence. The court could not "come to a clear conviction without hesitancy that father . . . has had the ability to . . . visit, contact, or communicate, and has failed and, and neglected to do that." The court rejected petitioner's claim that respondent bore an obligation to arrange visitation with advanced planning—"The statute does not say that he failed to plan in advance his parenting time or he failed to be an organizer or he failed to make effort to plan in advance." Rather, the court found:

> This record demonstrates to me that dad made regular and substantial communications with mom to be involved with the kids, communicate with them, visit with them. And you can't come into the court with clean [sic unclean?] hands

> and frustrate those attempts or deny those attempts on a lot of requests, and then want to terminate parental rights. . . . [T]he analysis is not whether the kids want to engage with parenting time with dad. That's not the analysis. It's whether dad's had the ability and he, and he didn't. So as I said, . . . you can't not agree to parenting time and then use that as a basis.

The court continued:

> I also take note and want to make findings on the record that these are small children, so . . . these are children who, during the, the window period, would have been between six and eight and two and four years old. So dad's ability to have contact[,] communication[,] and visitation with them is through the mother. . . . His only ability to be able to effectuate his parenting time and . . . his visitation, his contact, his communication, is through her, and unfortunately this record does not support a finding where that was facilitated or scheduled on, on a regular and substantial basis.

Petitioner and her husband now appeal.

II. ANALYSIS

We review for an abuse of discretion a trial court's denial of a petition to terminate a parent's rights to allow for a stepparent adoption. *In re TMK*, 242 Mich App 302, 304; 617 NW2d 925 (2000). We review for clear error the trial court's underlying factual findings. *In re AGD*, 327 Mich App 332, 338; 933 NW2d 751 (2019); *In re ALZ*, 247 Mich App 264, 271; 636 NW2d 284 (2001). "A finding is clearly erroneous if although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made." *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989) (cleaned up). "When reviewing the trial court's findings of fact, this Court accords deference to the special opportunity of the trial court to judge the credibility of the witnesses." *In re Fried*, 266 Mich App 535, 541; 702 NW2d 192 (2005).

MCL 710.51(6) permits stepparent adoptions as follows:

> 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 a parent having custody of the child according to a court order 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. A child support order stating that support is $0.00 or that support is reserved shall be treated in the same manner as if no support order has been entered.

> (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 petitioner has the burden to prove by clear and convincing evidence that termination of the noncustodial parent's rights is warranted. In order to terminate parental rights under the statute, the court must determine that the requirements of subsections a and b are both satisfied." *ALZ*, 247 Mich App at 272 (citations omitted).

In his appellate brief, respondent challenges the trial court's conclusion that he failed to provide regular and substantial support, or court-ordered support, for a period of two years. The judgment of divorce and support order provided that each party would claim one child as a dependent for tax purposes and that respondent would pay $220 monthly in support. Respondent admitted that in the two years before the petition was filed he had not made court-ordered support payments. Respondent claimed that petitioner and ZT agreed to forego these payments in exchange for his agreement to allow petitioner to claim both children as dependents for tax purposes. Petitioner denied having this conversation with respondent or agreeing to this exchange. Absent any documentary proof, the trial court was left to resolve the credibility contest. We will not interfere with the trial court's judgment in this regard.

The trial court clearly erred in finding that respondent did not have the *ability* to visit, contact, or communicate with the children because his only access was through petitioner. Even had petitioner completely blocked respondent's access to the children (which the record does not substantiate), respondent still had the *ability* to visit, contact, or communicate with the children. The divorce judgment gave respondent the right to visit the children according to an alternative schedule in the event the parties could not agree on to reasonable parenting time. Respondent insisted that he did not believe the court could help him as he and petitioner had opted out of the Friend of the Court system. This was belied by respondent's repeated threats to take the matter to court. Instead of pursuing his legal rights, respondent sat back for more than two years and only filed a complaint with the Friend of the Court after petitioner moved forward with the adoption action. Accordingly, contrary to the trial court's ruling, respondent did have a specific, court-ordered, stipulated ability to visit, contact, or communicate with the children, he just did not act on it. See *In re SMNE*, 264 Mich App 49, 51; 689 NW2d 235 (2004) (holding that a parent with parenting time awarded in a court judgment has the ability to see the children through enforcement of the order). Compare *ALZ*, 247 Mich App at 273-274 (holding that a biological father did not have the ability to visit, contact, or communicate with his child where the mother blocked his access and a court had yet to adjudicate paternity).

Moreover, the evidence does not support that petitioner blocked respondent from visiting the children in person or speaking to them through Facetime or phone. The stipulated language in the divorce judgment required respondent to provide petitioner with "at least 24 hours' notice before parenting time takes place." Several of respondent's requests for visits were last-minute or otherwise not consistent with the judgment. Despite any difficulties in arranging for visits, respondent could have sent the children letters, cards, and presents. By using the disjunctive "or," the Legislature signaled that a parent need only have the ability to achieve connection in one manner—visitation, contact, *or* communication. *AGD*, 327 Mich App at 347. Respondent admitted that he knew the children's address at all times. Yet, respondent never mailed the children

birthday or holiday cards or presents. See *In re Caldwell*, 228 Mich App 116, 121; 576 NW2d 724 (1998) (holding that the respondent, who was incarcerated and could not visit the child, could have complied with the statute by contacting or communicating with the child by mail).

Despite having the ability to visit his children by making even a minimal effort to enforce the divorce judgment or simply by mailing the children presents and cards, respondent last saw his children on February 3, 2019, and last spoke with NH sometime in April 2019. Accordingly, there is no factual dispute that respondent "has regularly and substantially failed or neglected" "to visit, contact, or communicate with" his children for the requisite two-year period.

Although the trial court erred in its factual findings relevant to MCL 710.51(6)(b), petitioner is not automatically entitled to relief requested. Rather, the statute gives a court discretion to refuse to terminate a parent's rights and permit a stepparent adoption even when the statutory conditions are met. *ALZ*, 247 Mich App at 272-273; *TMK*, 242 Mich App at 304. The court may deny a petition to terminate a parent's rights if the court determines that this action would not serve a child's best interests. *ALZ*, 247 Mich App at 273 ("Even if the petitioner proves the enumerated circumstances that allow for termination, a court need not grant termination if it finds that it would not be in the best interests of the child.") (quotation marks and citation omitted); *In re Hill*, 221 Mich App 683, 696; 562 NW2d 254 (1997) ("Because the probate court has discretion, it was not error for it to consider the best interests of the child. Moreover, because the Legislature set forth in the Adoption Code the criteria to be evaluated in determining the best interests of the adoptee, we think it unlikely that the probate court is prohibited from considering such evidence when ruling on a petition filed pursuant to § 51(6).") (citations omitted). See also *In re Newton*, 238 Mich App 486, 494; 606 NW2d 34 (1999) ("[C]ontrary to petitioners' assertions, the permissive nature of the statute does not allow for a termination of rights based *solely* on consideration of the child's best interests. A petitioner must still show by clear and convincing evidence that the requirements of both subsections 6(a) and 6(b) have been met.") (citation omitted).

On remand, the trial court must consider the statutory factors of MCL 710.51(6) as met and exercise its discretion to further consider whether termination of respondent's parental rights, and permitting ZT to adopt NH and EH, are appropriate. Evaluating this decision requires the trial court to weigh the children's best interests. The trial court must conduct a full best-interest hearing and consider up-to-date evidence in making this determination. See *Fletcher v Fletcher*, 447 Mich 871, 889; 526 NW2d 889 (1994) (BRICKLEY, J.); *Pierron v Pierron*, 282 Mich App 222, 262; 765 NW2d 345 (2009).

We vacate the orders denying the petition to terminate respondent's parental rights and denying ZT's request to adopt the children. We remand for further consideration in light of this opinion. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher
/s/ Kirsten Frank Kelly
/s/ Sima G. Patel