

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of CARTIER ROBERT EDWARD
ESTELLE, Minor.

LINDY RENE COOK and BRADY LEWIS
COOK,

UNPUBLISHED
December 16, 2008

Petitioners-Appellees,

v

CARLUS LYNN ESTELLE,

Respondent-Appellant.

No. 285209
Jackson Circuit Court
Family Division
LC No. 07-006847-AY

Before: Cavanagh, P.J., and Jansen and Meter, JJ.

PER CURIAM.

Respondent appeals as of right from a circuit court order terminating his parental rights pursuant to § 51(6) of the Adoption Code, MCL 710.51(6). We affirm.

MCL 710.51(6) permits termination of a noncustodial parent's parental rights if two conditions are met:

(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. [MCL 710.51(6).]

The petitioners in an adoption proceeding must prove both subsections (a) and (b) by clear and convincing evidence before termination can be ordered. *In re ALZ*, 247 Mich App 264, 272; 636 NW2d 284 (2001); *In re Hill*, 221 Mich App 683, 691; 562 NW2d 254 (1997). The trial court's findings of fact are reviewed for clear error. *Id.* at 691-692. "A finding of fact is clearly erroneous if the reviewing court has a definite and firm conviction that a mistake has

been committed, giving due regard to the trial court's special opportunity to observe the witnesses." *In re BZ*, 264 Mich App 286, 296-297; 690 NW2d 505 (2004).

Because a support order was entered against respondent, petitioners were only required to prove a substantial failure to comply with the order for at least two years before the filing of the petition, *In re Hill, supra* at 692, although the court may consider any reasons for noncompliance with the order. *In re Martyn*, 161 Mich App 474, 480; 411 NW2d 743 (1987). If the respondent offers "evidence to satisfactorily explain his failure to comply," the court may properly decline to terminate his parental rights. *In re Colon*, 144 Mich App 805, 812; 377 NW2d 321 (1985). However, the court is not obliged to accept the respondent's explanation. *In re Martyn, supra* at 480.

A judgment of divorce entered in 2002 required respondent to pay \$74 a week in child support. Respondent made sporadic payments between April 2003 and June 2004, and then did not pay anything again until sometime in October 2007, after he was picked up on a bench warrant; he had made two or three payments of some unspecified amount. This evidence showed that respondent did not have a regular, bona fide pattern of payment for more than three years preceding the filing of the petition. See *In re CDO*, 39 P3d 828, 831 (Okla App, 2001). Further, respondent failed to offer a reasonable excuse for his failure to comply with the support order. Although respondent was incarcerated for a period of time, the 30-day jail sentence was imposed on October 1, 2007, and does not excuse the failure to pay between June 2004 and September 2007. Moreover, while respondent testified that Lindy Cook refused an offer of cash during a chance meeting in 2005, respondent offered no excuse for failing to comply with the judgment of divorce, which required that support be paid directly to the Friend of the Court. Therefore, the trial court did not clearly err in finding that § 51(6)(a) was proven by clear and convincing evidence.

Section 51(6)(b) considers whether the respondent maintained a relationship with the child by visiting, contacting, or otherwise communicating if he had the ability to do so. Because the terms "visit, contact, or communicate" are phrased in the disjunctive, petitioners are "not required to prove that respondent had the ability to perform all three acts. Rather, petitioner[s] merely ha[ve] to prove that respondent had the ability to perform any one of the acts and substantially failed or neglected to do so for two or more years preceding the filing of the petition." *In re Hill, supra* at 694. We reject respondent's contention that he lacked the ability to visit or contact the child because of Lindy Cook's interference. The order of filiation established respondent's paternity, thus vesting him with the legal right to a relationship with the child, and the judgment of divorce specifically granted him the right to exercise parenting time. Respondent could have enforced those rights through the assistance of the court if such contact was denied by the mother. That he apparently elected not to do so does not mean that he lacked the ability to maintain a father-son relationship. *In re SMNE*, 264 Mich App 49, 51; 689 NW2d 235 (2004).

Respondent was involved in the child's life until April 2002, when he and Lindy Cook were divorced. For whatever reason, he did not arrange to exercise supervised visitation as authorized by the judgment of divorce, and his contact with the child was limited to a few chance meetings in 2005 and two outings for haircuts sometime between 2005 and 2007. Lindy Cook testified that respondent did not call, write, or send gifts, and respondent did not testify

otherwise. Under the circumstances, the trial court did not clearly err in finding that § 51(6)(b) was proven by clear and convincing evidence.

Termination under § 51(6) is permissive rather than mandatory and thus even if petitioners meet the requirements of the statute, the court need not order termination if it finds that it would not be in the child's best interests. *In re ALZ, supra* at 272-273; *In re Newton*, 238 Mich App 486, 494; 606 NW2d 34 (1999). Respondent loved his son and apparently was a regular part of the child's life until the 2002 divorce. Thereafter, due to personal problems that caused him to fall into "a funk," respondent lost interest in and ultimately gave up on his parental rights and responsibilities. He stopped paying any support after June 2004, made no effort to exercise the supervised visitation afforded him by the judgment of divorce, and apart from twice taking the child out for a haircut, he did not see his son unless he happened to run into him in public or at his parents' house. The trial court did not clearly err in finding that termination was not contrary to the child's best interests.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Patrick M. Meter