STATE OF MICHIGAN

COURT OF APPEALS

UNPUBLISHED
May 21, 2013

In the Matter of BESOK, Minors.

No. 313092
Oakland Circuit Court
Family Division
LC Nos. 2011-789026-AY
2011-789027-AY

Before: BORRELLO, P.J., and K.F. KELLY and MURRAY, JJ.

PER CURIAM.

Respondent appeals as of right the opinion and order terminating his parental rights to the minor children under MCL 710.51(6) (failure to comply with a support order for two years or more, and failure, having the ability, to visit, contact or communicate with the children for two years or more), and granting the petition for step-parent adoption filed by petitioners. We affirm.

Respondent argues that the trial court clearly erred in finding that he had the ability to visit, contact, or communicate with the minor children for two years or more before the filing of the termination petition. This Court reviews for clear error a trial court's findings of fact regarding a petition to terminate parental rights under the Adoption Code, MCL 710.21 *et seq*. *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, we are left with a definite and firm conviction that a mistake was made." *Id*. at 271-272. Due regard is given to the special opportunity of the trial court to assess the credibility of the witnesses. MCR 2.613(C); *In re Fried*, 266 Mich App 535, 541; 702 NW2d 192 (2005).

The trial court terminated respondent's parental rights pursuant to MCL 710.51(6) of the Adoption Code, which provides:

> (6) 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 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.

As this Court explained in *In re ALZ*, 247 Mich App at 272-273 (quotation marks, citations, and brackets omitted):

> 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. The court's authority to terminate parental rights under the statute is permissive rather than mandatory. 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.

The applicable two-year period referenced in MCL 710.51(6) begins on the date that the termination petition is filed and extends backward from that date for two years or more. *In re Hill*, 221 Mich App 683, 689; 562 NW2d 254 (1997). Because the statutory period is two years *or more*, "circumstances beyond the applicable two-year statutory period may be considered." *Id*. at 693.

Here, respondent conceded in the trial court and on appeal that he failed to comply with the Tennessee child support order for a period of two years or more before the filing of the termination petition, and it is thus beyond dispute that petitioners satisfied the requirement of MCL 710.51(6)(a). Respondent also does not dispute that he has not seen the children since February 2006, and has not challenged the finding that he regularly and substantially failed or neglected to visit, contact, or communicate with the children for two years or more before the filing of the petition in December 2011. Respondent disputes, however, the trial court's finding that he had the *ability* to visit, contact, or communicate with the children, as required to establish the grounds for termination under MCL 710.51(6)(b).

MCL 710.51(6)(b) requires proof that the noncustodial parent had the ability to visit, contact, *or* communicate with the child during the applicable period. Because the term "or" generally refers to an alternative or choice between two or more things, a petitioner need not prove that the respondent had the ability to visit, contact, *and* communicate with the child. *In re Hill*, 221 Mich App at 694. Rather, a petitioner is only required to show that the "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." *Id*.

In *In re ALZ*, 247 Mich App at 265, 277, this Court upheld the denial of a petition to terminate the respondent-father's parental rights under MCL 710.51(6) because the respondent-father attempted to involve himself in his child's life but was consistently rebuffed by the petitioner-mother. In particular, the respondent wrote to the petitioner within the two-year

period preceding the filing of the termination petition, asking to visit with the child, and the petitioner then responded in writing asking the respondent not to do so. *Id*. at 273. The respondent's paternity had not been established at that time, and the respondent thus had no legal right to visit or communicate with the child. *Id*. at 274. The respondent then filed a paternity action within the two-year period. *Id*. This Court found no error in the trial court's determination that the respondent's letter and paternity complaint constituted requests for contact with the child, which the petitioner resisted, thereby resulting in the respondent's inability to contact the child. *Id*.

In *In re SMNE*, 264 Mich App 49, 51; 689 NW2d 235 (2004), this Court affirmed the termination of the respondent-mother's parental rights under MCL 710.51(6), and concluded that *In re ALZ* was distinguishable:

> Although respondent argued that petitioner-father prevented her from having regular contact with the child, she had a legal right to visit with the child under the terms of the divorce judgment. To the extent respondent felt that petitioner was unjustly and improperly denying her visitation rights, she should have sought assistance from the friend of the court or the divorce court, as she had in the past. For this reason, this case is distinguishable from *In re ALZ*, 247 Mich App 264, 273-274; 636 NW2d 284 (2001), and the trial court did not err in finding that respondent was not prevented from having regular and substantial contact with the child. Accordingly, we affirm the trial court's findings that petitioners met their burden of proof under § 51(6)(b).

We agree with the trial court that the instant case is more similar to *In re SMNE* than it is to *In re ALZ*. Respondent and petitioner-mother were married when the children were born, and, unlike in *In re ALZ*, respondent's paternity of the children was never in question. Under the terms of the 2004 Tennessee divorce judgment and permanent parenting plan order, respondent was awarded parenting time with the children. Although respondent's parenting time was reduced in 2005, he continued to have regular parenting time. The parties presented conflicting testimony regarding who failed to appear in February 2006 at the designated location to exchange the children for respondent's parenting time, after which respondent never again saw the children. Regardless of who failed to appear, respondent had the ability to enforce his parenting rights through the Tennessee court system as he had in the past, but he failed to do so.[1] Respondent contends that he was told he could not file anything without an attorney, but the trial court implicitly discredited this testimony by finding that it was incumbent on respondent to enforce his parenting rights under the divorce decree. The trial court's credibility determinations are entitled to deference. MCR 2.613(C); *In re Fried*, 266 Mich App at 541.

[1] Respondent testified that Tennessee lacks a friend of the court system, but he could have sought to enforce his rights through the divorce court itself as he had in the past. See *In re SMNE*, 264 Mich App at 51 ("To the extent respondent felt that petitioner was unjustly and improperly denying her visitation rights, she should have sought assistance from the friend of the court *or the divorce court*, as she had in the past.") (Emphasis added.)

Although petitioner-mother concededly failed to comply with a provision of the Tennessee permanent parenting plan order by failing to notify respondent of her change of address when she moved to Michigan in 2008, respondent could still have sought to enforce his parenting rights through the Tennessee court. In addition, respondent could have called the maternal grandfather to find out where petitioner-mother had moved. The maternal grandfather testified that he has had the same cell phone number since 1996, and that respondent had called him on that number several times in the past, including after the divorce and after the maternal grandfather had threatened to file trespassing charges if respondent came to the maternal grandfather's house. There was no restraining order barring contact, and calling the maternal grandfather would not have violated any court order. Although respondent claimed that the maternal grandfather had changed his number to an unpublished number, the trial court implicitly chose not to credit this testimony by finding that respondent had the means of locating petitioner-mother through the maternal grandfather, who lived at the same address and had the same phone number since 1996.

Thus, the evidence supported the conclusion that respondent had the ability to visit, contact, or communicate with his children and substantially and regularly neglected or failed to do so for a period of two years or more before the filing of the termination petition. The trial court did not clearly err in finding that petitioners established by clear and convincing evidence the grounds for termination under MCL 710.51(6).[2]

Affirmed.

/s/ Stephen L. Borrello
/s/ Kirsten Frank Kelly
/s/ Christopher M. Murray

[2] Respondent does not challenge on appeal the trial court's finding that termination was in the best interests of the children under the factors set forth in MCL 710.22(g) of the Adoption Code. In any event, there is no apparent ground on which the trial court's finding could be challenged.