

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of MICHAEL ROBERT BENBOW
III, Minor.

JENNIFER JOHNSON and CHAD JOHNSON,

Petitioners-Appellees,

v

MICHAEL ROBERT BENBOW II,

Respondent-Appellant.

UNPUBLISHED

April 17, 2008

No. 281194

Clinton Circuit Court

Family Division

LC No. 07-019831-AY

Before: Fort Hood, P.J., and Talbot and Servitto, JJ.

PER CURIAM.

Respondent appeals as of right from a circuit court order terminating his parental rights to the minor child pursuant to the Adoption Code, MCL 710.51(6). Because respondent substantially complied with child support orders for the relevant two-year period, termination of respondent's parental rights was in error and we therefore reverse.

"A petitioner in an adoption proceeding must prove by clear and convincing evidence that termination of parental rights is warranted." *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).

MCL 710.51(6) provides:

If the parents of a child are divorced . . . 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.

Because support orders were in place, it is not necessary to consider respondent's ability to pay. The only issue to be determined with respect to § 51(6)(a) is whether respondent substantially complied with the support orders for the relevant two-year period. *In re Hill, supra* at 692. The phrase "substantial compliance" has been defined as "a regular, bona fide pattern of payment" over the requisite period. *In re C.D.O.*, 39 P3d 828, 831 (Okla App, 2001).

Here, the trial court clearly erred in finding that respondent failed to substantially comply with the support orders for the requisite two-year period (July of 2005 through July of 2007). Respondent was incarcerated for most of 2005, and his support was completely abated by court order during that time. Because no support was required by court order, respondent did not fail to comply with the order by not paying support during his incarceration. Respondent's support obligation was reinstated in late December 2005. Respondent made no payments from December 2005 through March 2006. Beginning in April, 2006, and continuing for the next ten months respondent paid the full support amount biweekly via an income withholding order,¹ as well as additional support monies (except for the month of October 2006, when he only paid half of what was owed). After the February 16, 2007, payment, respondent did not make regular payments. However, the evidence reflects that respondent was once again incarcerated in February, 2007 and his support obligation had been completely abated by court order retroactive to February 2, 2007. Nevertheless, respondent paid over \$600 in support in March and April of 2007 through income tax interception and a last income withholding check. This evidence shows that respondent substantially complied with the support orders in place during the relevant two-year period, paying nothing when nothing was due and making regular payments of nearly all that was owed when his support obligation was reinstated. Therefore, the trial court clearly erred in finding that respondent did not substantially comply with the support orders during the two-year period.

"In order to terminate parental rights under the statute, the court must determine that the requirements of subsections (a) and (b) are both satisfied." *In re ALZ*, 247 Mich App 264, 272; 636 NW2d 284 (2001). Because petitioners failed to meet their burden of proof with respect to § 51(6)(a), the trial court clearly erred in terminating respondent's parental rights.

¹ The trial court clearly erred in finding that respondent's support obligation was \$95.96 a month. That appears to be a reference to the monthly payment amount contained in the income withholding order. However, that order plainly states that respondent is to pay \$22.06 a week and that the employer is to withhold different amounts depending on how often respondent is paid. Respondent's employer was only to withhold \$95.96 if respondent was paid once a month. Respondent testified that he was paid biweekly, and the order indicates that \$44.12 is the amount to be withheld in that instance. The record of payments indicates that \$44.12 was withheld and submitted to the friend of the court.

In light of our decision, it is unnecessary to address whether the second prong of the statute, § 51(6)(b), was satisfied.

Reversed.

/s/ Karen M. Fort Hood

/s/ Michael J. Talbot

/s/ Deborah A. Servitto