

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of CHRISTOPHER WARREN
DELL, Minor.

DENNIS LEE CASTLE and CHARLENE MAE
CASTLE,

Petitioners-Appellees,

v

LAWRENCE EUGENE DELL,

Respondent-Appellant.

UNPUBLISHED
September 16, 2003

No. 246899
St. Clair Circuit Court
Family Division
LC No. 00-006427

In the Matter of JAYLENE MARIE DELL, Minor.

DENNIS LEE CASTLE and CHARLENE MAE
CASTLE,

Petitioners-Appellees,

v

LAWRENCE EUGENE DELL,

Respondent-Appellant.

No. 246900
St. Clair Circuit Court
Family Division
LC No. 00-006428

Before: Smolenski, P.J., and Murphy and Wilder, JJ.

PER CURIAM.

In these consolidated cases, respondent appeals by delayed leave granted from a trial court order terminating his parental rights pursuant to MCL 710.51(6). We affirm. These appeals are being decided without oral argument pursuant to MCR 7.214(E).

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. [MCL 710.51(6).]

“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). In order to terminate parental rights under § 51(6), “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). The trial court’s findings of fact are reviewed for clear error. *Hill, supra* 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.

Because a support order was entered against respondent in the divorce action, the ability to pay was factored into the order. Therefore, petitioners were only required to prove a substantial failure to comply with the order for two or more years before the filing of the petition. *Hill, supra* at 692. The evidence showed that respondent substantially complied with the support orders between the filing of the divorce action in March 1994 and respondent’s incarceration in February 1995. During the next three years, respondent made only a few payments, such that he was nearly \$27,000 in arrears by the time the judgment of divorce, which suspended any further support obligation, was entered in January 1998. Therefore, the trial court did not clearly err in finding that § 51(6)(a) was satisfied.

Although an incarcerated noncustodial parent is normally entitled to the discharge of any support arrearage that accumulated while the parent was incarcerated, *Pierce v Pierce*, 162 Mich App 367, 371; 412 NW2d 291 (1987), the trial court never ordered such relief and its ruling preserving the arrearage cannot be collaterally attacked in this case. *People v Howard*, 212 Mich App 366, 369; 538 NW2d 44 (1995); *SS Aircraft Co v Piper Aircraft Corp*, 159 Mich App 389, 393; 406 NW2d 304 (1987).

Respondent maintained regular contact with his children until he was incarcerated in February 1995. Respondent was not prohibited from having contact with the children after his incarceration except for a one-month period immediately following his incarceration. Although respondent’s incarceration prevented him from voluntarily visiting the children, it did not, in itself, prevent him from otherwise contacting or communicating with them. *In re Caldwell*, 228 Mich App 116, 121; 576 NW2d 724 (1998). Upon entry of the judgment of divorce, respondent was prohibited from having contact with his children and thus no longer had the ability to contact or communicate with them. *In re Kaiser*, 222 Mich App 619, 624-625; 564 NW2d 174 (1997). During the nearly three-year period that respondent had the ability to contact or communicate with the children, his contact was limited to approximately two cards per child per year. Such contacts are not regular and substantial. *Id.* at 624. Therefore, the trial court did not clearly err

in finding that § 51(6)(b) was satisfied. Because petitioners satisfied both statutory requirements, the trial court did not clearly err in terminating respondent's parental rights.

Affirmed.

/s/ Michael R. Smolenski

/s/ William B. Murphy

/s/ Kurtis T. Wilder