

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of LAC, Minor.

UNPUBLISHED
August 16, 2011

No. 301843
Ingham Circuit Court
Family Division
LC No. 10-000104-AY

In the Matter of EKC, Minor.

No. 301844
Ingham Circuit Court
Family Division
LC No. 10-000105-AY

Before: MURRAY, P.J., and HOEKSTRA and STEPHENS, JJ.

PER CURIAM.

In these consolidated appeals, respondent E. McElhaneey appeals as of right from the circuit court's orders terminating her parental rights to the minor children pursuant to § 51(6) of the Adoption Code, MCL 710.51(6). We affirm.

A court may order termination of parental rights for purposes of stepparent adoption when both of the following circumstances 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).]

A petitioner in an adoption proceeding must prove both subsections (a) and (b) by clear and convincing evidence. *In re ALZ*, 247 Mich App 264, 272; 636 NW2d 284 (2001); *In re Hill*, 221 Mich App 683, 691; 562 NW2d 254 (1997).

Respondent does not challenge the trial court's finding that a support order had been entered against her and that she failed to substantially comply with that order for the requisite two-year period. Similarly, respondent does not challenge the trial court's finding that she failed to regularly and substantially visit, contact, or communicate with the child for the same two-year period. Respondent contends, however, that because a court order had been entered holding parenting time in abeyance, the trial court erred in finding that she had the ability to visit, contact, or communicate with the children for purposes of § 51(6)(b). We disagree.

This Court has held that a parent does not have the ability to visit, contact, or communicate with a child when a court order has been entered *terminating* visitation rights, reinstatement of visitation is dependent upon approval by a third party, and the affected parent is pursuing such approval. *In re Kaiser*, 222 Mich App 619, 623-625; 564 NW2d 174 (1997). Conversely, this Court has held that a trial court is not precluded from finding that a parent had the ability to visit, contact, or communicate with a child where an order has been entered suspending visitation rights until the affected parent shows cause why those rights should not be restored, and the parent has not taken any action to restore those rights. *In re Simon*, 171 Mich App 443, 445, 449; 431 NW2d 71 (1988). This respondent made efforts in the form of contacting the father, who admittedly ignored her calls. There was testimony that the father engaged in other conduct that frustrated any attempts by the respondent mother to contact the child. However, as odious as it is to reward such undermining behavior, the record is utterly devoid of any attempts by the respondent to contact the court to seek assistance in her efforts. We cannot find clear error in a court determining that her failure to seek court intervention defeats any claim she makes of making a good faith effort to continue contact with her child.

The petitions in this case were filed in May 2010. Respondent last visited the children in April 2008, before her visitation rights were held in abeyance. She sent Christmas presents through her sister on one occasion, and she made an unknown number of, but only very few, telephone calls. Although a June 2008 order prohibited respondent from visiting the children until further order of the court, it did not place any conditions on reinstating visitation, respondent did not object to the order before it was entered, respondent had the ability to seek relief from the order and did not do so, and there is no evidence that petitioners dissuaded her from doing so. Under the circumstances, the trial court did not clearly err in finding that § 51(6)(b) was proven by clear and convincing evidence.

Respondent also argues that the trial court erred by failing to consider the children's best interests before terminating her parental rights. Because respondent did not offer any evidence or argument regarding the children's best interests below, this issue is unpreserved and "review is limited to determining whether a plain error occurred that affected substantial rights." *In re Egbert R Smith Trust*, 274 Mich App 283, 285; 731 NW2d 810 (2007), *aff'd* 480 Mich 19 (2008).

When involuntary termination of parental rights is sought under the Juvenile Code, MCL 712A.1 *et seq.*, a court is statutorily required to consider the child's best interests before it may terminate parental rights. MCL 712A.19b(5). The court is not similarly obligated to consider the child's best interests in a case of involuntary termination under the Adoption Code, see MCL 710.37 and MCL 710.51(6), although it is required to consider the child's best interests before approving a child's adoption. MCL 710.51(1)(b). But because termination is permissive rather

than mandatory, this Court has held that the trial court is not prohibited from considering evidence relating to the child's best interests when ruling on a petition filed under § 51(6). *In re Hill*, 221 Mich App at 696. "Thus, 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." *In re Newton*, 238 Mich App 486, 494; 606 NW2d 34 (1999).

In this case, neither party offered any evidence regarding the children's best interests, much less evidence to show that termination of respondent's parental rights was not in the children's best interests. Therefore, the trial court did not err in failing to consider the children's best interests before terminating respondent's parental rights.

Affirmed.

/s/ Christopher M. Murray
/s/ Joel P. Hoekstra
/s/ Cynthia Diane Stephens