

STATE OF MICHIGAN
COURT OF APPEALS

UNPUBLISHED
January 24, 2012

In the Matter of GOC, Minor.

No. 305328
Mecosta Circuit Court
Family Division
LC No. 11-001252-AY

Before: HOEKSTRA, P.J., and MARKEY and BORRELLO, JJ.

PER CURIAM.

Petitioners, the mother and stepfather of the minor child, appeal as of right the trial court's order denying their petition to terminate respondent's parental rights to the minor child under MCL 710.51(6) of the Adoption Code. The trial court found that respondent, the incarcerated biological father of the minor child, had substantially complied with a modified support order, despite making no payments in the last two years, and therefore MCL 710.51(6)(a) had not been established. Respondent cross-appeals the same order to the extent it found that he had substantially failed to visit or communicate with the child, despite the ability to do so, for two years or more under MCL 710.51(6)(b). For the reasons set forth by the trial court we affirm.

In a stepparent adoption, the noncustodial parent's rights may be terminated under certain conditions where the custodial parent has legal custody of the child and has subsequently married, and the custodial parent's new spouse petitions to adopt the child. A petitioner in a stepparent adoption proceeding must prove by clear and convincing evidence that termination of the noncustodial parent's parental rights is warranted. *In re Hill*, 221 Mich App, 683, 691; 562 NW2d 254 (1997). For termination of parental rights under MCL 710.51(6), both of the following conditions must be established:

(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.

In this case, respondent went to prison on December 7, 2005, and one year later, on April 10, 2006, the court modified respondent's support order so that his support obligation was zero. Under MCL 710.51(6)(a), where there is a child support order, as in this case, the petitioner must show that the noncustodial parent "failed to substantially comply with the order" for at least two years. MCL 710.51(6)(a); *In re Newton*, 238 Mich App 486, 493; 606 NW2d 34 (1999). Although respondent admitted that he had not provided regular financial support for his child in the last two years and had been incarcerated since the child was almost two years old, respondent was in substantial compliance with his child support order, as there was no requirement for him to make payments while he was incarcerated. The testimony showed that respondent's child support arrearage was also held in abeyance until his release, and the Friend of the Court did not consider respondent to be in violation of his child support order because of his incarceration.

Petitioners argue that the trial court erred in not investigating respondent's ability to pay child support. Contrary to petitioners' contention, where the noncustodial parent is subject to a child support order, the petitioner is not required to prove that the noncustodial parent had the ability to pay support because the "ability to pay is already factored into a child support order, and it would be redundant to require a petitioner under the Adoption Code to prove the natural parent's ability to pay as well as that parent's noncompliance with a support order." *In re Colon*, 144 Mich App 805, 812; 377 NW2d 321 (1985). The support order in place had already taken "ability to pay" into consideration. According to the modified support order in this case, respondent had no ability to pay.

Petitioners also argue that the trial court's findings are not consistent with the statute or the purpose of the statute to foster stepparent adoptions where the natural parent has substantially failed to support or communicate and visit with the child, however, the language of the statute is clear. Additionally, this Court has held that only in cases in which there is no support order in place is an inquiry into ability to pay necessary or even allowed. See, *In Re SMNE*, 264 Mich App 49, 54-54; 689 NW2d 235 (2004). Any other interpretation in this case would allow a circumvention of the official order of the court. We also note that petitioners could have taken action if they were dissatisfied with the 2006 court order determining that respondent had no support obligation while incarcerated. In cases where the order of support no longer accurately reflects ability to pay, either parent may petition the court for modification of the order. MCL 722.720; MCL 552.17; *Kosch v Kosch*, 233 Mich App 346, 350; 592 NW2d 434 (1999). Any discrepancies between the circumstances of the parties and the order of support may be appropriately reviewed and corrected by the filing of such a petition. See *Colon*, 144 Mich App at 812.

Thus, the trial court correctly interpreted MCL 710.51(6)(a) to prohibit termination of parental rights where respondent would be "blindsided" with termination of parental rights for failure to comply with an obligation that both he and the Friend of the Court considered to be suspended until his release from prison. Here, respondent was in substantial compliance with his support order of May 12, 2006 because his child support was suspended. Because respondent complied with the existing court support order, termination of his parental rights is not allowed under the statute.

Because this Court has found no error in the trial court's determination that MCL 710.56(a) was not established, we do not need to reach the issue in respondent's cross-appeal.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Jane E. Markey
/s/ Stephen L. Borrello