

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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In the Matter of RE JNM, Minor.

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DALLACINA SAUCEDA-MUNOZ,

Petitioner-Appellee,

and

MODESTO SAUCEDO-MUNOZ,

Petitioner,

and

JNM,

Appellee,

v

JUANITO MATA,

Respondent-Appellant.

UNPUBLISHED

May 23, 2013

No. 313486

Ingham Circuit Court

Family Division

LC No. 12-000128-AY

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Before: HOEKSTRA, P.J., and TALBOT and WILDER, JJ.

PER CURIAM.

Respondent-father appeals as of right the trial court's order terminating his parental rights pursuant to MCL 710.51(6), part of the Michigan adoption code, MCL 710.21 *et seq.* Because we conclude that the trial court clearly erred by finding that petitioner proved the elements of MCL 710.51(6)(b) by clear and convincing evidence, we reverse.

Respondent and petitioner were never married; however, respondent acknowledged paternity and a parenting time order was in place entitling respondent to visitation every other weekend and on certain holidays. A child support order requiring respondent to pay \$276 a month was also entered. Petitioner married Modesto Saucedo-Munoz on June 14, 2011, and on August 22, 2012, Modesto filed a petition for stepparent adoption and termination of

respondent's parental rights pursuant to MCL 710.51(6). On the same day, petitioner filed a supplemental petition joining with Modesto's request and asking the court to terminate respondent's parental rights.

On October 10, 2012, respondent objected to the petition to terminate his parental rights claiming that even though he moved to Texas to find work he attempted to exercise his parenting time, but that petitioner denied him access to the minor child. In particular, respondent asserted that he attempted to contact the minor child several times but petitioner would not allow him to speak to the child; however, with the assistance of relatives he was occasionally able to speak to the child on the telephone. Respondent also alleged that petitioner called the police when respondent attempted to attend a birthday party for the minor child. Finally, respondent maintained that on July 27, 2012, he filed a complaint with the Friend of the Court requesting enforcement of his parenting time.

A brief hearing regarding petitioner's request for termination was held on October 11, 2012. Petitioner, who was not represented by an attorney, was the only witness to testify at the hearing. After petitioner was sworn in, the trial court instructed petitioner to "tell me your side of the story," and asked her several questions throughout her statement. Petitioner testified that during the first week of June 2009 she called respondent about his parenting time that weekend, and respondent declined to take the minor child because he had other plans. Petitioner testified that two weeks later she learned that respondent left the state for Texas, and that since that time until July 4, 2012, respondent had not visited the minor child or tried to contact him in any way. Petitioner testified that on July 4, 2012, she heard that respondent was back in town, and that she "received papers a month later saying that [respondent] wanted to get his rights back." At the trial court's prompting, petitioner clarified that respondent wanted to "start seeing [the minor child] again," and explained that he never "lost" his right to see the minor child, but that respondent had declined to exercise his parenting time previously and was now asking to resume visitation under the order.

After petitioner's brief testimony was concluded, the trial court told her she could "be seated" and asked respondent's attorney if there was "anything else." Respondent's attorney stated that he had the child support enforcement system records indicating the payments that were made by respondent, and the trial court asked to inspect the records. The trial court and respondent's counsel discussed the records, stating on the record that the child support records indicated respondent was approximately \$6,000 in arrears and that he had paid a little less than \$2,000 in the last two years. It was also noted on the record, ostensibly from the records presented by respondent's attorney, that respondent "had a tax intercept" in 2011 and paid \$764 in child support, and that in 2012 he paid \$1,260, and that there was another tax intercept in 2010 for about \$200. Respondent's attorney also offered to furnish respondent's current pay check stub, which he said showed that respondent was having child support taken out of his earnings.

Respondent's attorney also made an offer of proof, noting that there were family members present in the courtroom that would testify to respondent's attempts to contact the minor child. Respondent indicated he would call someone to testify, but that he would "leave that in the court's discretion." The trial court did not comment specifically on whether it wanted to hear any more testimony, and specifically declined to inspect respondent's pay check stub.

No additional witnesses were called. The trial court immediately issued its ruling on the record, stating:

The court finds that the non-custodial parent has failed to substantially comply with the support order for a period of two years or more before the filing of the petition. It does appear that he also has failed to visit, that he had the ability to visit, contact or communicate with the child, and he has regularly and substantially failed to do that for two years or more before the filing of the petition. It isn't an excuse that he says she didn't let him, because there's plenty of ways to enforce parenting time if a person wants to. Therefore, I am going to terminate his parental rights. That concludes your hearing.

Respondent moved for reconsideration, and the trial court denied his motion. Respondent now appeals as of right.

On appeal, respondent argues that the trial court erred by concluding that there was clear and convincing evidence to prove that he failed to substantially comply with the child support order and that he failed to regularly and substantially visit, contact, or communicate with the child for a period of two years.

We review a trial court's findings of fact in an adoption proceeding for clear error. *In re Hill*, 221 Mich App 683, 691-692; 562 NW2d 254 (1997). "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.

MCL 710.51 sets forth the procedure and standard for determining whether to terminate the parental rights of a noncustodial parent and allow adoption by a stepparent. The petitioner in an adoption proceeding has the burden of proving both MCL 710.51(6)(a) and (6)(b) by clear and convincing evidence before a termination of parental rights can be ordered. *In re ALZ*, 247 Mich App 264, 272; 636 NW2d 284 (2001).

MCL 710.51(6) 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.

The two-year statutory period referenced in MCL 710.51(6) does not mean any two-year period before the filing of the petition; rather, the two-year statutory period “commences on the filing date of the petition and extends backwards from that date for a period of two years or more.” *In re Hill*, 221 Mich App at 689 (quotation marks and citation omitted).

Regarding subsection (6)(a), the record does not contain much evidence regarding respondent’s compliance with the child support order. The order obligating respondent to pay \$276 a month in child support is attached to respondent’s brief on appeal.<sup>1</sup> During the hearing, petitioner testified that she is on public assistance so any payments made by respondent would go to reimburse the state, but that “to [her] knowledge” respondent did not pay any child support in 2011 and 2012. Respondent’s attorney indicated on the record that he had records with him showing that respondent paid child support; the trial court apparently inspected these records. The trial court, apparently reading the records presented by counsel, stated that in 2011 respondent had a tax intercept of \$764, and that in 2012 he paid \$1,260. The records referenced by respondent’s attorney during the hearing are not included in the trial court record. On appeal, respondent claims, without any documentation, that he paid a total of \$2,024 in 2011 and 2012 toward his total obligation of \$6,624 for those two years. The statements by the trial court on the record regarding respondent’s payments in 2011 and 2012 corroborate this claim. However, even assuming, without record evidence to substantiate the claim, that respondent paid \$2,024 in 2011 and 2012, that amount falls substantially short of the \$6,624 he was obligated to pay under the child support order. Under these circumstances, we cannot conclude that the trial court clearly erred by finding that respondent failed to substantially comply with the child support order.

There is similarly scant record evidence regarding subsection (6)(b). Petitioner testified to specific instances in 2008 and 2009 that she encouraged respondent to exercise parenting time, but he declined. She did not specifically address respondent’s claim that she actively prevented him from seeing the minor child in 2011 and 2012—the years relevant to the statutory period under subsection (6)(b). Petitioner did testify to the fact that respondent filed a motion to enforce the parenting time order in late July or early August of 2012, before the date that the petition for termination was filed. Respondent’s attorney did not cross-examine petitioner, nor did he call respondent or any other witnesses to testify. However, respondent’s attorney did make an offer of proof regarding testimony that could be offered by witnesses present in the courtroom. Respondent’s attorney stated that the witnesses would testify to respondent’s efforts to see and talk to the minor child and petitioner’s actions preventing respondent from seeing or talking to the minor child. The complaint that respondent filed to enforce parenting time was not offered as an exhibit during the hearing and is not part of the trial court record; however, respondent stated in his written objection to the petition that the complaint was filed on July 27, 2012.

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<sup>1</sup> While the trial court record does not contain this order, the amount that respondent was required to pay per month is not in dispute and petitioner testified that the child support order obligated respondent to pay \$276 per month.

In *In re SMNE*, 264 Mich App 49, 51; 689 NW2d 235 (2004), this Court held that § 51(6)(b) was satisfied despite the fact that the respondent maintained that she was prevented from regularly contacting the child by the petitioner because she had a legal right to visit her child under the terms of a court order. Similarly, respondent in this case cannot rely on his assertion that petitioner prevented him from seeing the child to rebut petitioner's evidence regarding his failure to regularly and substantially visit, contact, or communicate with the child. However, unlike the facts of *In re SMNE*, the record in this case demonstrates that respondent attempted to enforce his legal right to visitation before the petition for termination of his parental rights was filed. Specifically, respondent maintains that he filed a complaint to enforce his parenting time on July 27, 2012. Moreover, during the termination hearing, respondent's attorney explained that because petitioner would not allow respondent to contact the child, respondent had pursued legal action. Respondent's attorney stated that respondent contacted Friend of the Court in order to enforce his visitation rights, but that Friend of the Court indicated that because a petition for termination of respondent's parental rights was filed, it would not enforce the parenting time order until the termination proceeding was concluded.

Under these unique circumstances, we conclude that the trial court clearly erred by holding that petitioner proved by clear and convincing evidence that respondent failed to regularly and substantially visit, contact, or communicate with the child for a period of at least two years as required by MCL 710.51(6)(b).<sup>2</sup>

Reversed.

/s/ Joel P. Hoekstra  
/s/ Michael J. Talbot  
/s/ Kurtis T. Wilder

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<sup>2</sup> In light of our resolution of respondent's first issue on appeal we need not address his claim of ineffective assistance or counsel or his claim that reversal is required because the trial court failed to address the best interests of the child. However, we note that respondent's ineffective assistance of counsel claim likely had merit in light of counsel's failure to introduce any testimony or evidence in support of respondent's position. See *In re CR*, 250 Mich App 185, 197-200; 646 NW2d 506 (2001). Further, in a proceeding under the adoption code the trial court consideration of the child's best interest is permissive; thus, the trial court is not required to specifically address the best interests of the child. *In re Newton*, 238 Mich App 486, 494; 606 NW2d 34 (1999).