

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of JAMES LOOS III, Minor.

LORI M. STRATTON and COREY LEE
STRATTON,

UNPUBLISHED
May 22, 2008

Petitioners-Appellants,

v

No. 283463
Tuscola Circuit Court
Family Division
LC No. 07-002696-AY

JAMES LOOS II,

Respondent-Appellee.

Before: Owens, P.J., and Meter and Schuette, JJ.

PER CURIAM.

Petitioner Lori M. Stratton and respondent James Loos II had a child together in 1993. The couple divorced in 1996. Lori Stratton married petitioner Corey Lee Stratton in 2001. Petitioners filed a petition for stepparent adoption, which included a request for the court to terminate respondent's parental rights under MCL 710.51(6). After an evidentiary hearing, the circuit court found that the statutory requirements for terminating parental rights had not been met and dismissed the petition. We reverse and remand for further appropriate proceedings.

Petitioners argue that the trial court failed to properly apply the statute governing termination of parental rights. We review the trial court's factual findings in parental rights cases for clear error, *In re RFF*, 242 Mich App 188, 201; 617 NW2d 745 (2000), but we review questions of law de novo, *In re TMK*, 242 Mich App 302, 304; 617 NW2d 925 (2000). "Clear error exists if the reviewing court is left with the definite and firm conviction that the trial court made a mistake . . ." *People v Keller*, 479 Mich 467, 493-494; 739 NW2d 505 (2007) (internal citation and quotation marks omitted).

In a stepparent adoption, the non-custodial parent's rights may be terminated under MCL 710.51(6), which applies in situations where one parent has legal custody of the child, and, after a subsequent marriage, wishes to terminate the rights of the other parent so that the new spouse may adopt the child. Subsection (6) states, in relevant part, that the court "may issue an order" terminating parental rights if both of the following two requirements are satisfied:

(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.

Petitioners argue that because respondent failed to comply with a valid support order for several years, the trial court clearly erred by essentially inquiring into respondent's ability to pay. This Court has stated that MCL 710.51(6)(a) "addresses two independent situations: (1) where a parent, when able to do so, fails or neglects to provide regular and substantial support, and (2) where a support order has been issued and the parent fails to substantially comply with it." *In re Newton*, 238 Mich App 486, 491; 606 NW2d 34 (1999). Inquiry is proper under the first clause only where no support order is in place. *Id.* at 492-493. Allowing a court to inquire generally into a respondent's ability to support when there is a support order in place would be "repetitious and inefficient," *id.* at 492, and would "allow a collateral attack of the support order." *In re SMNE*, 264 Mich App 49, 54; 689 NW2d 235 (2004).

In the present case, a valid support order was in place and it was undisputed that respondent had not made a payment in accordance with that order since May 2004.¹ The trial court dismissed the petition after inquiry into respondent's social security disability benefits. In doing so, the court reasoned that Lori Stratton could have "mitigate[d]" by pursuing social security benefits on behalf of the child, but did not. The court stated: "It would have been better practice had [respondent] gone to the Friend of the Court and said here take a lien on my social security. The moment they give it to me, you got it. But she had the opportunity to mitigate and she didn't." The trial court's reasoning and inquiry demonstrate that it did, in an indirect manner, impermissibly inquire into respondent's ability to support the child, even though respondent was subject to a valid child support order. In fact, earlier in the hearing, the court specifically referred to the fact that respondent's unemployment benefits had run out and that Lori Stratton thus should have obtained money for the child by applying for social security benefits. Respondent's social security benefits and Lori Stratton's alleged opportunity to "mitigate" should not have been issues for the court, given that a valid support order was in effect. The court clearly erred by not limiting its inquiry under MCL 710.51(6)(a) to whether respondent substantially complied with the support order. The record reveals that respondent did not substantially comply with the order.

Petitioners also argue that the trial court clearly erred by failing to find, in accordance with MCL 710.51(6)(b), that respondent had substantially failed to visit, contact, or communicate with the child. The phrase "substantially failed" has not been clearly defined by the appellate courts; there is not a specific, threshold number of visits or contacts that a parent

¹ We disagree with respondent's argument that he substantially complied with the support order merely by notifying petitioner about available social security benefits for the child.

must make in order to avoid the operation of the statute. See *In re Martyn*, 161 Mich App 474, 482; 411 NW2d 743 (1987). However, this Court has applied the term to various factual situations.

In *Martyn*, this Court found that, under the circumstances in that case, “two visits and one phone call in two years is a substantial failure to visit, contact or communicate with a child.” *Id.* at 482. In *In re Simon*, 171 Mich App 443, 449; 431 NW2d 71 (1998), a respondent who was prohibited from visiting his daughter by a divorce decree, but who never requested visitation and made no effort to locate her, “substantially failed” to visit the child. However, where a respondent had written the petitioner to ask to visit his child and had brought an action for an order of filiation, but was prevented from seeing the child by the mother, the respondent had not “substantially failed” under the statute. *In re ALZ*, 247 Mich App 264, 273-276; 636 NW2d 284 (2001). Thus, interference by the custodial parent is only an excuse for non-communication to the extent that the non-custodial parent seeks to enforce whatever rights he or she may have. See *In re SMNE*, *supra* at 51. Also, where a respondent was unable to visit with a child because of incarceration, this Court has recognized that the respondent had other avenues of communication. *In re Caldwell*, 228 Mich App 116, 121-122; 576 NW2d 724 (1998).

In the present case, a court order authorized regular supervised visitation, but, significantly, respondent had not had a single planned visit with the child within the two years preceding the filing of the petition in September 2007.² Respondent’s parents had been supervising the visits in earlier years, but they had decided to stop doing so. Respondent sent at least one card to the child, using the child’s grandfather as an intermediary. Respondent testified that, in the months immediately preceding the filing of the petition, he attempted to contact the child three times by telephone, but he stated that the child hung up on him. Respondent admitted that he took no steps to alter the supervised visitation order before the filing of the petition, but he testified that he was in the hospital for long periods during the late spring and summer of 2007. The trial court found this testimony persuasive to demonstrate that respondent was unable, for four to five months, to either visit the child or take action to modify or enforce any orders. However, on the record before us, respondent’s illness and hospitalizations simply were not such a substantial barrier that he could reasonably rely on them in arguing that he had not substantially failed to “visit, contact, or communicate with” his son for a two-year period. Indeed, respondent testified that his hospitalizations occurred sporadically, with gaps in between them. He answered “Yes, sir” when asked the following by the court:

Okay. So you were in the hospital the beginning of May '07 for one or two weeks for pancreatitis. Then again at the beginning of June 2007 for two weeks for pancreatitis. Then July 3rd for three weeks for the gall bladder surgery. Then August 10 to about September 10 for post-operative pancreatic problems, is that correct?

² Respondent happened upon the child at a church function and talked with the child for about five minutes on one occasion in the fall of 2005.

The mere fact of these hospitalizations is not enough to demonstrate that respondent was unable to adequately visit, contact, or communicate with the child or to enforce or modify the parenting time order. The trial court clearly erred in essentially finding that respondent's illness excused his failure to visit his child for the two years before the filing of the petition. Given the sporadic and inadequate nature of respondent's interactions with the child, petitioners have satisfied the requirements of MCL 710.51(6)(b).

However, we note that a trial court's authority to terminate parental rights under the stepparent adoption statute, MCL 710.51(6), is permissive, so even if a basis for termination is established, "a court need not grant termination if it finds that it would not be in the best interests of the child." *Newton, supra* at 494. Because the trial court clearly erred in failing to find the above grounds for termination to have been established, we remand this case for the trial court to exercise its discretion regarding whether to terminate respondent's parental rights, in light of the existence of these grounds for termination.

Reversed and remanded for further appropriate proceedings. We do not retain jurisdiction.

/s/ Donald S. Owens

/s/ Patrick M. Meter

/s/ Bill Schuette