STATE OF MICHIGAN

COURT OF APPEALS

UNPUBLISHED
November 20, 2012

In the Matter of BMH, DAH, Minors.

No. 310667
Jackson Circuit Court
Family Division
LC Nos. 11-005579-AY
11-005580-AY

Before: TALBOT, P.J., and BECKERING and M. J. KELLY, JJ.

PER CURIAM.

Respondent-father appeals as of right the trial court's order terminating his parental rights to the minor children under MCL 710.51(6). We affirm.

I

Respondent-father and petitioner-mother are the biological parents of the minor children. Petitioner-mother and her husband filed petitions for stepparent adoption of the children on October 28, 2011, and subsequently filed supplemental petitions seeking to terminate respondent-father's parental rights to the children to allow for stepparent adoption. There were indications that the children may be Indian children, and the trial court held an Indian heritage hearing on March 20, 2012, to determine if the Indian Child Welfare Act (ICWA), 25 USC 1901 *et seq.*, applied. Following an adjournment, the trial court continued the Indian heritage hearing on April 27, 2012. At the continued hearing, the trial court found that the ICWA did not apply. The trial court proceeded with the termination proceedings that same day. Following another adjournment, the trial court held a continued termination trial on May 29, 2012, where it found that petitioners had established statutory grounds for termination under MCL 710.51(6). Respondent-father appeals the trial court's termination of his parental rights.

II

Respondent-father first argues that the trial court did not comply with the requirements of the ICWA. We disagree. "Issues involving the application and interpretation of ICWA are questions of law that are reviewed de novo. A court's factual findings underlying the application of legal issues are reviewed for clear error." *In re Morris*, 491 Mich 81, 97; 815 NW2d 62 (2012) (citations omitted). "A finding is clearly erroneous if, although there is evidence to support it, we are left with a definite and firm conviction that a mistake was made." *In re ALZ*, 247 Mich App 264, 271-272; 636 NW2d 284 (2001).

In 1978, Congress enacted the ICWA "to establish 'minimum Federal standards for the removal of Indian children from their families' in order to protect the best interests of Indian children and to promote the stability and security of Indian tribes and their families.'" *Empson-Laviolette v Crago*, 280 Mich App 620, 625; 760 NW2d 793 (2008), quoting 25 USC 1902. The "ICWA establishes various substantive and procedural protections intended to govern child custody proceedings involving Indian children." *In re Morris*, 491 Mich at 99. Therefore, before a court can determine whether ICWA applies to the proceedings, the court must first make the critical determination whether the child is an 'Indian child.'" *Id*. at 99-100. "As defined by ICWA, an 'Indian child' is 'any unmarried person who is under age eighteen and is either (a) a *member* of an Indian tribe or (b) is *eligible for membership* in an Indian tribe and is the biological child of a *member* of an Indian tribe.'" *Id*. at 100, quoting 25 USC 1903(4) (emphasis in *In re Morris*); see also MCR 3.002(5). "'Indian tribe' means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary [of the Interior] because of their status as Indians . . . ." 25 USC 1903(8). "[W]hen there are sufficient indications that the child may be an Indian child, the ultimate determination requires that the tribe receive notice of the child custody proceedings, so that the tribe may advise the court of the child's membership status" pursuant to the ICWA's notice provision, 25 USC 1912(a). *In re Morris*, 491 Mich at 100. The ICWA's notice provision, 25 USC 1912(a), precludes a court from holding termination-of-parental-rights proceedings until at least ten days after petitioners receive a return receipt showing that delivery of the notice has been made on the respective tribe. *Id*. at 100-102; 25 USC 1912(a).

In this case, petitioners filed their petitions for stepparent adoption on October 28, 2011. Terralyn Brown, an adoption coordinator assigned to this case, learned that the children may be Indian children through respondent-father, and she requested information from him regarding his Indian heritage. Thereafter, in December of 2011, Brown sent, via registered mail, notice of the pending proceeding to the Bureau of Indian Affairs as well as various Indian tribes, including the Six Nations Tribe. By December 28, 2011, Brown had received return receipts confirming the delivery of each notice she sent earlier that month. On January 10, 2012, the Six Nations Tribe sent Brown a letter stating that respondent-father was a member of the Six Nations Tribe and that the children were eligible for membership with the tribe. Brown continued to obtain more information from respondent-father and his family throughout the case, and she sent updated notices to the Bureau of Indian Affairs and various Indian tribes in April 2012, receiving return receipts confirming that these updated notices were delivered on April 16, 2012. No tribe other than the Six Nations Tribe ever indicated that respondent-father or the children were members or eligible for membership with the respective tribe. The trial court held the continued Indian heritage hearing on April 27, 2012—more than ten days after Brown received the return receipts.

It was undisputed that the children were unmarried minors who were not members of an Indian tribe. Thus, in order for the children to be considered Indian children under the ICWA, respondent-father had to be a member of an Indian tribe and the children had to be eligible for membership in an Indian tribe. See *In re Morris*, 491 Mich at 100; 25 USC 1903(4). During the Indian heritage hearing, petitioners presented the January 10, 2012, letter from the Six Nations Tribe, and respondent-father's mother and sister both testified that respondent-father was a member of the Six Nations Tribe, which was a Canadian tribe, and that a person may only be a member of one tribe. The trial court correctly noted that the Six Nations Tribe was not listed

among the 564 tribal entities that are federally recognized and eligible for funding and services because of their status as Indian tribes.[1] See 75 FR 60810-01 (October 1, 2010).

At the April 27, 2012, continued Indian heritage hearing, respondent-father indicated, for the first time, that he believed he was a member of the Tuscarora Band of Lewiston, New York. As the trial court noted below, the "Tuscarora Nation of New York" is listed among the federally recognized Indian tribes to which the ICWA applies. 75 FR 60810-01. Respondent-father's sole basis for this belief was a letter that the Indian and Northern Affairs of Canada sent to respondent-father's mother in 1992, confirming that she and respondent-father were members "of Tuscarora, Six Nations Band." On appeal, respondent-father argues that this was sufficient indication that he was a member of the federally recognized Tuscarora Nation of New York and that the trial court should not have proceeded to the termination trial without first sending notice to the Tuscarora Nation of New York pursuant to the ICWA's notice provision. We disagree. At this point in the proceedings, as discussed above, petitioners had presented the January 10, 2012, letter from the Six Nations Tribe confirming respondent-father's membership with that tribe, and the trial court had heard extensive testimony that respondent-father was a member of the Six Nations Tribe and no other tribe. It was uncontroverted that the Six Nations Tribe was a Canadian tribe that was not recognized under the ICWA. The 1992 letter itself was from the Indian and Northern Affairs of Canada, which further evidenced that respondent-father was a member of a Canadian Indian tribe, rather than the federally recognized Tuscarora Nation of New York. In sum, Brown had already sent notice to the Bureau of Indian Affairs and various Indian tribes in compliance with the ICWA's notice provision,[2] and respondent-father did not present reliable information on which his purported membership with the Tuscarora Nation of

[1] The court also later noted that the Six Nations Tribe had not petitioned to participate in the proceedings.

[2] Brown testified and produced documentation establishing that she sent notice of the proceedings by registered mail with return receipt requested to every tribe that came up during the course of the proceedings as potentially interested as soon as such information came to light, including to the following: Six Nations of the Grand River in Ontario, Canada; Seneca Nation of Indians; Seneca-Cayuga Tribe of Oklahoma; Saint Regis Mohawk Tribe; Cayuga Nation of New York; Tonawanda Band of Seneca; Oneida Indian Nation; Onondaga Nation; Cayuga Nation; Cattaraugus Indian Reservation; Allegany Indian Reserve; and the Bureau of Indian Affairs, Eastern Regional Office and Midwest Regional Office. Following respondent-father's contentions at the April 27, 2012, hearing, Brown also sent notice to the Tuscarora Indian Nation. She testified at the May 29, 2012, continued termination hearing that she received a voice mail message from Chief Stuart Patterson indicating that they had no records of the minors and that he could not be of help in the proceedings. While the proper remedy for an ICWA notice violation is to conditionally reverse the trial court and remand for resolution of whether the ICWA applies, we do not find that there was a violation of the notice provision, and it does not appear that a remand would establish that the ICWA applies in this case. See *In re Morris*, 491 Mich at 89, 121-122.

New York might be based. Accordingly, the trial court did not fail to comply with the ICWA's notice provision, 25 USC 1912(a), and did not err by finding that the ICWA did not apply to this case. See *In re Morris*, 491 Mich at 97.

III

Respondent-father also argues that the trial court clearly erred in finding that petitioners clearly and convincingly established statutory grounds for termination under MCL 710.51(6). We disagree. We review for clear error the trial court's factual findings regarding a petition to terminate parental rights under the Adoption Code. *In re ALZ*, 247 Mich App at 271. "When reviewing the trial court's findings of fact, this Court accords deference to the special opportunity of the trial court to judge the credibility of the witnesses." *In re Fried*, 266 Mich App 535, 541; 702 NW2d 192 (2005).

The procedure and standard for determining whether to terminate the parental rights of a noncustodial parent and allow adoption by a stepparent are governed by MCL 710.51(6), which provides in pertinent part:

> (6) If the parents of a child are divorced, or if the parents are unmarried but the father has acknowledged paternity . . . , 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. [*In re ALZ*, 247 Mich App at 272, quoting MCL 710.51(6).]

Thus, in order to terminate parental rights under MCL 710.51(6), the petitioners must prove both subsections (a) and (b) by clear and convincing evidence. See *id.*; *In re Hill*, 221 Mich App 683, 691-692; 562 NW2d 254 (1997). Because the relevant time period under both subsections (a) and (b) is "2 years or more before the filing of the petition," the petitioners must show that the grounds for termination have existed for at least two years immediately preceding the filing of the petition, although circumstances beyond the two-year period may be considered. *In re ALZ*, 247 Mich App at 273; *In re Hill*, 221 Mich App at 692-693.

In this case, petitioners filed their petitions for stepparent adoption on October 28, 2011; thus, the applicable two-year period in this case is October 28, 2009, through October 28, 2011. See MCL 710.51(6). Respondent-father was incarcerated for the majority of this two-year period.

With respect to MCL 710.51(6)(a), respondent-father simply presents a conclusory argument that he "did not *substantially* fail to pay child support for a period of two years prior to filing the petition, in light of his extended incarceration." A claim of error fails where the party asserting the claim "presents it as a mere conclusory statement without citation to the record, legal authority, or any meaningful argument." *Ewald v Ewald*, 292 Mich App 706, 726; 810 NW2d 396 (2011); see also *DeGeorge v Warheit*, 276 Mich App 587, 596; 741 NW2d 384 (2007) ("The appellant may not merely announce his or her position and leave it to this Court to discover and rationalize the basis for those claims."). Notwithstanding the conclusory nature of respondent-father's argument, we conclude that the argument lacks merit.

"Under the clear language of MCL 710.51(6), . . . no incarcerated parent exception exists." *In re Caldwell*, 228 Mich App 116, 121; 576 NW2d 724 (1998). Where there is a child-support order in place, "the petitioner need not prove that" an incarcerated respondent "had the ability to support the child[.]" *Id*. at 122. If a court has entered a support order requiring the respondent-father to pay "some sum of money" in child support, the respondent-father's ability to pay child support has already been factored into the order; consequently, the only issue to be determined is whether the respondent-father substantially complied with the order during the two-year period. *In re SMNE*, 264 Mich App 49, 54; 689 NW2d 235 (2004). It was uncontroverted below that the trial court had previously entered an order requiring respondent-father to pay child support for the children and that this order was in effect for the relevant two-year period. The Jackson County Friend of the Court generated a child-support payment report, which demonstrated that a child-support order was in place during the entire two-year period; indeed, respondent-father's own testimony acknowledged the existence of a child-support order for the children during the two-year period. Thus, the trial court did not clearly err by finding that there was a child-support order in place during the relevant two-year period and that petitioners were only required to show that respondent-father "failed to substantially comply with the order[.]" MCL 710.51(6)(a); *In re SMNE*, 264 Mich App at 54. Moreover, the evidence of record showed that respondent-father did not make any child-support payments during the relevant two-year period; the child-support payment report showed that respondent-father had not made any support payments since April 2008—well before the relevant two-year period—and both petitioners testified that respondent-father did not make any child-support payments during the two-year period.[3] Accordingly, the trial court did not clearly err in finding by clear and convincing evidence that respondent-father failed to substantially comply with the support order for two or more years. See MCL 710.51(6)(a); *In re ALZ*, 247 Mich App at 271-272.

With respect to MCL 710.51(6)(b), petitioners were required to prove by clear and convincing evidence that respondent-father, "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

[3] The trial court noted that while the most critical period is the two-year period, because the statute speaks of two years or more, it is appropriate for the court to look beyond the two-year period and that, here, respondent-father failed to substantially comply with the child-support order "virtually since the support order was entered, except for a very, very few pay – payments…."

or more before the filing of the petition." MCL 710.51(6)(b). On appeal, respondent-father does not argue that the trial court erred by finding that he did not visit, contact, or communicate with the children during the two-year period; rather, respondent-father argues that the trial court erred by finding that he had the ability to visit, contact, or communicate with the children.

According to respondent-father, he was unable to contact the children because he did not have petitioner-mother's telephone number or the children's mailing address. However, the record indicated that respondent-father had petitioner-mother's cellular-telephone number, and respondent-father provides no citation to the lower record to show otherwise. Specifically, petitioner-mother testified that respondent-father had her cellular-telephone number and that she never changed her number throughout the two-year period; respondent-father testified that he had called petitioner-mother's cellular telephone number during the two-year period and left her a voicemail. With respect to the children's mailing address, petitioner-mother testified that she and the children moved out of her parents' house in about August 2009 and that she never gave respondent-father the new mailing address. However, the record established that respondent-father had the maternal grandparents' mailing address and that he sent mail to that address during the relevant two-year period. Petitioner-mother and the maternal grandfather both testified at trial that the grandparents would always forward to petitioner-mother any mail that they received for her. Petitioner-mother testified that she never received any letters from respondent-father for the children during the two-year period. Accordingly, we do not find that the trial court clearly erred by concluding that respondent-father had the ability to contact the children by telephone or mail. See *In re ALZ*, 247 Mich App at 271-272.

Respondent-father points to two specific acts that he asserts prevented him from having the ability to contact the children: petitioner-mother's failure to return the voicemail that he purportedly left on her cellular telephone and one instance in which the maternal grandfather purportedly refused to allow him to speak with the children on the telephone. Respondent-father offered no proof of either incident other than his testimony at trial. Petitioner-mother testified that respondent-father never called her cellular telephone during the two-year period, and the maternal grandfather testified that respondent-father never called him to speak to the children. Moreover, petitioner-mother testified that she never prevented or discouraged respondent-father from contacting the children and that she was unaware of her parents ever refusing to allow the children to speak with respondent-father. "When reviewing the trial court's findings of fact, this Court accords deference to the special opportunity of the trial court to judge the credibility of the witnesses." *In re Fried*, 266 Mich App at 541. Given the special deference we accord the trial court's credibility determination, see *id*., the trial court's finding that respondent-father had the ability to contact the children does not leave us "with a definite and firm conviction that a mistake was made," *In re ALZ*, 247 Mich App at 272.

Affirmed.

/s/ Michael J. Talbot
/s/ Jane M. Beckering
/s/ Michael J. Kelly