

STATE OF MICHIGAN  
COURT OF APPEALS

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In the Matter of AML, Minor.

UNPUBLISHED  
June 14, 2011

No. 301990  
Muskegon Circuit Court  
Family Division  
LC No. 2010-007575-AY

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Before: SHAPIRO, P.J., and O'CONNELL and OWENS, JJ.

PER CURIAM.

Respondent appeals as of right from a circuit court order terminating his parental rights to the minor child pursuant to § 51(6) of the Adoption Code, MCL 710.51(6), for purposes of stepparent adoption. We affirm.

Termination of parental rights for purposes of stepparent adoption requires proof of both of the following elements:

(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).]

The petitioners in an adoption proceeding must prove both subsections (a) and (b) by clear and convincing evidence before termination can be ordered. *In re ALZ*, 247 Mich App 264, 272; 636 NW2d 284 (2001); *In re Hill*, 221 Mich App 683, 691; 562 NW2d 254 (1997). Only subsection (a) is at issue here. We review the trial court's findings of fact for clear error. *Hill*, 221 Mich App at 691.

To determine whether the petitioner has established subsection (a), a trial court must first determine whether a support order has been entered. If a support order has been entered, the trial court need not address whether the respondent has the ability to pay support because the ability to pay has been factored into the order. *In re SMNE*, 264 Mich App 49, 54-55; 689 NW2d 235 (2004); *In re Newton*, 238 Mich App 486, 492-493; 606 NW2d 34 (1999). If a judgment or order expressly reserves for future determination the respondent's obligation to pay support and

does not set forth a sum of money that the respondent is required to pay, there is no support order in place and the court is to inquire about the respondent's ability to pay under the first clause of § 51(6)(a). *In re SMNE*, 264 Mich App at 55.

In this case, the trial court found that a support order had been entered. This finding was erroneous. The child's mother and respondent divorced several years ago, and the divorce judgment required respondent to pay child support. Thereafter, respondent received a worker's compensation award. In 2005, he and the child's mother resolved a dispute over that award. The consent order provided, in pertinent part:

IT IS FURTHER ORDERED AND ADJUDGED that from the award of \$68,438, [the child's mother] is awarded \$12,000 as for past, present, and future child support as it relates to the workman's compensation award only . . . ;

IT IS FURTHER ORDERED AND ADJUDGED that [respondent] is awarded the remaining balance of the net workman's compensation award;

IT IS FURTHER ORDERED AND ADJUDGED that [respondent] shall report to the Muskegon County Friend of the Court and [the child's mother] any income, including but not limited to social security awards, future employment, etc., and that child support shall be established for said additional incomes. (However, no further child support to be awarded to [the child's mother] from the workman's compensation redemption set forth herein.)

The \$12,000 that respondent paid pursuant to this order was the only child support that respondent ever paid.

This order is ambiguous because it does not clearly delineate respondent's actual support obligation as of June 2005. It states that the payment of \$12,000 was meant as "past, present, and future child support," but only as it relates to the worker's compensation award. This suggests that respondent was still obligated to pay support as previously ordered, but need not satisfy that obligation from the remainder of the worker's compensation award. The order also requires that respondent report any future income so that child support can be established for that income. This suggests that respondent did not then have any alternative source of income from which to pay support, and that his support obligation was suspended until such time as he did. The Friend of the Court apparently determined that the order meant that respondent's support obligation was suspended because its Financial Detail Report indicates that respondent was not charged with child support between January 2008 and April 2010. Given that, and the fact that the order did not require respondent to pay support in any given dollar amount, we conclude that a support order had not been entered. The trial court clearly erred in finding otherwise.

Thus, it is necessary to decide whether respondent had the ability to assist in supporting his child and, if so, whether respondent failed to provide regular and substantial support. MCL 710.51(6)(a). A parent's child support obligation is based on the child's needs in light of the parent's ability to pay. *Vaclav v Vaclav*, 96 Mich App 584, 588; 293 NW2d 613 (1980). The parent's ability to pay support is determined by reference to his net income. See 2008 Michigan Child Support Formula Manual (MCSFM), §§ 2-3. A parent's net income is "all income minus

the deductions and adjustments permitted by th[e] manual.” MCSFM 2.01(A). A parent’s income includes not just actual monetary assets such as wages, pension benefits, interest earnings, and the like, but also includes intangible assets. For example, the value of gifts of cash or of food or shelter may be considered income to the extent it “(1) [i]s significant and regularly reduces personal expenses, or (2) [r]eplaces or supplements employment income.” MCSFM 2.05(B).

In this case, respondent had income in the form of support received from his mother, who paid all his daily living expenses except for \$200 a month in state food assistance benefits, which respondent used to provide groceries. Respondent’s mother also gave him money for gas and bought gifts for the child. Respondent’s mother testified that she expected respondent to repay her “when [respondent] gets his disability.” In light of such evidence, the record supports a finding that respondent had the ability to assist in supporting the child. Because it is undisputed that he failed to provide regular and substantial support, the trial court did not clearly err in finding that subsection (a) had been proven by clear and convincing evidence.

We note that neither this opinion nor the trial court’s order addresses or determines whether respondent is able to perform substantial gainful activity within the meaning of federal Social Security law.

Affirmed.

/s/ Douglas B. Shapiro

/s/ Peter D. O’Connell

/s/ Donald S. Owens