IN THE MICHIGAN SUPREME COURT

Appeal from the Michigan Court of Appeals
Wilder, PJ, and Meter and Riordan, JJ

IN THE MATTER OF Aidan Jay Roustan Minor child	Circuit Court No. 12-024817-AY Court of Appeals No. 312100 Supreme Court No. 147522
Scott Bassett (P33231) Attorney for Petitioners-Appellants 2407 89th Street NW Bradenton, FL 34209-9443 941-794-2904	Vivek S. Sankaran (P68538) Attorney for Respondent-Appellee University of Michigan Law School 701 S. State Street Ann Arbor, MI 48109 734-763-5000
Cynthia S. Harmon (P35197) Attorney for Petitioners-Appellants 903 E. Grand River Avenue East Lansing, MI 48823 517-337-4600	Trish Oleksa Haas (P65863) Attorney for Respondent-Appellee 21 Kercheval Avenue, Suite 270 Grosse Pointe Farms, MI 48236 313-417-2200

BRIEF ON APPEAL - APPELLEE

ORAL ARGUMENT REQUESTED

Submitted by:
Vivek S. Sankaran (P68538)
Trish Oleksa Haas (P65863)
Attorneys for Respondent-Appellee

Dated: January 31, 2014

INTRODUCTION[1]

The plain language of MCL 710.51(6) allows only "the parent having legal custody" over a child to seek termination of the other parent's rights. (emphasis added). Here, it is undisputed that Mrs. Merrill, who filed the petition to terminate Mr. Roustan's parental rights, was not "the parent having legal custody" over her son because, pursuant to a judgment of divorce, she shared legal custody of Aidan with Mr. Roustan. Thus, since Mrs. Merrill did not have sole legal custody of her son, the Court of Appeals unanimously held that MCL 710.51(6) was inapplicable and could not be used to terminate Mr. Roustan's parental rights.

In their brief, the Appellants ask this Court to ignore the plain language of MCL 710.51(6). Instead, they argue that this Court should redefine the phrase "the parent having legal custody" to mean "a parent having the legal right to physical custody." They ask this Court to view the Legislature's use of "the" and "a" as interchangeable. Appellant's Br. at 10. They also assert, without citing any supporting authority, that the phrase "legal custody" has a different meaning in MCL 710.51(6) than it does in other statutes affecting children and should be read to mean "the legal right to physical custody." Appellant's Br. at 15-16.

But the Appellants' arguments contravene two basic principles of statutory construction. First, this Court has consistently held that "the" and "a" have different meanings. The definite article "a" connotes singularity. For example, in *Paige v City of*

---

[1] Undersigned counsel would like to acknowledge the invaluable assistance given by law students Jason Zolle, Alanna Farber, Michael Brown, Danielle Kalil, and Nicole Kornblum in the preparation of this brief.

Sterling Heights, 476 Mich 495; 720 NW2d 219 (2006), this Court interpreted the use of "the" in the phrase "the proximate cause" found in MCL 418.375(2) to refer to the "sole proximate cause." *Id.* at 510. In contrast, the indefinite article "a," refers to any one of many. See, e.g., *People v Huston*, 489 Mich 451, 458-459; 802 NW2d 261 (2011) (holding that the phrase "a victim" in MCL 777.40(3)(a) refers to any victim, not necessarily the sole victim of the crime at issue in the case). Here, because the Legislature used the word "the" before "parent," this Court should interpret MCL 710.51(6), as the Court of Appeals did, to mean "the sole parent having legal custody."

Second, this Court has observed that words and phrases cannot be read in isolation; they must be interpreted in a consistent manner in statutes related to the same subject or having the same general purpose. Related statutes constitute one law, although enacted at different times, and containing no reference one to the other. *In re MCI Telecommunications Complaint*, 460 Mich 396, 416; 596 NW2d 164 (1999); *Michigan Oil Co v National Resources Com*, 406 Mich 1, 33; 276 NW2d 141(1979); *Rathbun v State*, 284 Mich 521, 543-544; 280 NW 35 (1935). So although the phrase "legal custody" is not defined in the Adoption Code, its plain meaning is well understood as it is used by other statutes related to the care of children. In *Grange Insurance Co v Lawrence*, 494 Mich 475, 511-512; 835 NW2d 363 (2013), this Court, interpreting one of these related statutes, defined "legal custody" as "decision-making authority as to important decisions affecting the child's welfare." *Id.* In contrast, this Court explained that physical custody pertains to the parent who has the right to physically care for the

child. *Id.* Courts have recognized the distinction between legal and physical custody observed in *Grange* for over a hundred years.

The Legislature's understanding of the differences between legal and physical custody is further evinced by its use of both phrases in at least ten different statutory provisions all related to the care of children, including three provisions in the Adoption Code. For these reasons, this Court should reject the Appellant's argument that "legal custody" has a different meaning in MCL 710.51(6) than in the judgment of divorce in this case and other statutes related to the care of children.

Here, because Mr. Roustan shared legal custody of his son with Mrs. Merrill, the termination of his parental rights pursuant to MCL 710.51(6) was erroneous, and the Court of Appeals was correct to reverse the trial court's decision.

But parents like Mrs. Merrill who share legal custody are not without options to terminate the other parent's rights. They may seek to modify their custody order to obtain sole legal custody over the child, which would then permit them to request termination under MCL 710.51(6). Or they may file a petition requesting jurisdiction and termination under the Juvenile Code. Upon remand to the trial court, Mrs. Merrill would be free to pursue either of those options.

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Page

CONSTITUTION

Michigan

STATUTES

COURT RULES

CASES

Michigan

Federal

OTHER AUTHORITIES

COUNTER-STATEMENT OF QUESTIONS INVOLVED

1. When two parents share joint legal custody of a child, can either of them be considered "the parent having legal custody" within the meaning of MCL 710.51(6)?

   Appellant answers yes.
   Appellee answers no.
   Court of Appeals answers no.
   Trial court did not answer the question.

2. Is the phrase "legal custody" in MCL 710.51(6) understood to mean "decision-making authority as to important decisions affecting the child's welfare" as it was defined by this Court in *Grange Insurance Co v Lawrence*, 494 Mich 475, 511-512; 835 NW2d 363 (2013) and as it has been used in other statutes and case law involving the custody of children?

   Appellant answers no.
   Appellee answers yes.
   Court of Appeals answers yes.
   Trial court did not answer the question.

3. If the Court of Appeals' interpretation is correct, can the Appellants still seek to terminate Appellee's parental rights by (1) filing a motion to obtain sole legal custody, after which they could refile for termination under MCL 710.51(6) or (2) filing a petition requesting jurisdiction and termination of the Appellee's rights under the Juvenile Code?

   Appellant answers no.
   Appellee answers yes.
   Court of Appeals did not answer the question.
   Trial court did not answer the question.

STATEMENT OF THE BASIS OF JURISDICTION

This Court has jurisdiction pursuant to Const 1963, art 6, §4; MCL 600.212; MCL 600.215(3); and MCR 7.301(A)(2) to review by appeal a case after a decision by the Court of Appeals.

On April 18, 2013, the Court of Appeals issued its decision in this case. Petitioners-Appellants filed a timely motion to reconsider which was denied on July 8, 2013. Then, Petitioners-Appellants filed a timely application for leave to appeal with this Court within 42 days of the denial of the motion to reconsider. MCR 7.302(C)(2). This Court granted the application on October 23, 2013.

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

In February 2009, Pierre Roustan and Susan Merrill, the parents of Aidan Jay Roustan, obtained a divorce after being married for nearly six years. While the judgment of divorce granted Mrs. Merrill sole physical custody of Aidan, it gave both parents joint legal custody over their son. 29a. Additionally, it permitted Mr. Roustan to have reasonable parenting time with Aidan and required him to pay child support. 30a, 31a.

Over the next three years, Mr. Roustan and Aidan shared a close bond. 142a-144a, 193a. Aidan affectionately referred to his father as "Daddy Pierre." 58a, 193a, 195a. During visits, Aidan enjoyed holding his father's hand, hugging him and talking to him about "Star Wars, Ninja, Cut the Rope, Harry Potter, the girls, [and] the stepsisters." 144a.

Unfortunately, visits did not happen as frequently as Mr. Roustan desired due to transportation issues and financial difficulties. 60a. Mr. Roustan did not own a car during much of this time and bus service did not exist between Norwich, where he resided, and Lowell, where Mrs. Merrill lived. 60a, 103a. He also lost his driver's license for some time. 100a. Mrs. Merrill never offered to transport Aidan to visits nor did she permit visits via Skype, which Mr. Roustan suggested. 60a, 136a. She also denied Mr. Roustan visits on several occasions due to scheduling conflicts. 132a, 133a, 137a.

Despite these setbacks, Mr. Roustan still visited Aidan at least six times and also sent Aidan numerous email messages and a voice recording. 55a, 78a, 105a, 120a. Even

though he experienced financial struggles, Mr. Roustan paid half of his court-ordered child support obligation, which totaled roughly $4500. 83a.

In June 2010, Mrs. Merrill remarried. Just under two years later, she and her new husband, Steven Merrill, filed a stepparent adoption petition, which requested the termination of Mr. Roustan's parental rights. 1a-5a. In the petition, Mrs. Merrill incorrectly asserted that she had legal custody over Aidan. 4a. In fact, Mrs. Merrill shared joint legal custody with Mr. Roustan. 29a.

The trial court commenced a two-day evidentiary hearing on the petition in July 2012. At the conclusion of the hearing, the trial court granted the petition and terminated Mr. Roustan's parental rights, ruling that the Merrills had satisfied the elements of MCL 710.51(6). 235a-244a.

Mr. Roustan appealed the trial court's decision to the Court of Appeals. In his brief, he made several procedural arguments, challenged the constitutionality of the stepparent adoption statute, and argued that the trial court's findings were clearly erroneous.[2]

---

[2] In his brief to the Court of Appeals, Mr. Roustan challenged the constitutionality of MCL 710.51(6) because the provision lacks the procedural safeguards that exist when a petitioner seeks to terminate a parent's rights pursuant to the Juvenile Code. Under the Juvenile Code, a parent is entitled to the right to counsel, to a jury trial, and to reunification services, among other protections, before a court can consider a request to terminate his parental rights. See MCR 3.911; MCR 3.912; MCL 712A.19a(2). But under MCL 710.51(6), a parent is entitled to none of these protections. Because of the fundamental rights at stake, this disparity raises serious constitutional concerns. See *Troxel v Granville*, 530 US 57, 65; 120 S Ct 2054; 147 L Ed 2d 49 (2000) (recognizing a parent's right to direct the care of his child as "perhaps the oldest of the fundamental liberty interests recognized by this Court"). However, the Court of Appeals did not need to address this argument. 248a.

The Court of Appeals granted relief for Mr. Roustan on one issue, obviating the need to address the merits of his other claims. 248a. It ruled that the trial court erred in terminating Mr. Roustan's parental rights pursuant to MCL 710.51(6) because "the statute only acts to terminate the rights of those parents who do not have legal custody." 246a. Since Mr. Roustan shared joint legal custody of Aidan with Mrs. Merrill, MCL 710.51(6) did not apply. 247a-248a. On this basis alone, the Court of Appeals reversed the trial court's decision.

On August 5, 2013, the Merrills filed an application for leave to appeal, which this Court granted on October 23, 2013.

ARGUMENT

Standard of Review

Questions of statutory interpretation are reviewed de novo. *Douglas v Allstate Ins Co*, 492 Mich 241, 255-256; 821 NW2d 472 (2012).

While Mr. Roustan did not raise in the trial court the argument that the Court of Appeals relied upon to reverse the trial court's decision, the Court of Appeals appropriately exercised its discretion to review an unpreserved error for plain error that affects substantial rights. *People v Carines*, 460 Mich 750, 773; 597 NW2d 130 (1999).

Introduction

The trial court erred in terminating Mr. Roustan's parental rights because the provision it relied upon to do so – MCL 710.51(6) – only permits the termination of the rights of a parent who does not have legal custody over his child. Here, because Mr. Roustan shared joint legal custody of Aidan with Mrs. Merrill, the statutory provision does not apply.

MCL 710.51(6) explicitly limits the situations in which a court may issue an order terminating the rights of the other parent to cases in which "the parent having legal custody of the child subsequently marries and that parent's spouse petitions to adopt the child." (emphasis added). To determine the scope of this statutory limitation, this Court must resolve two issues. First, did the Legislature's use of the phrase "the parent" as opposed to "a parent" reflect its intent that parents seeking to terminate the rights of the other parent have sole legal custody over the child? Second, does the phrase "legal custody" mean "decision-making authority as to important decisions

affecting the child's welfare," as this Court held in *Grange, supra,* instead of "the legal right to physical custody" as suggested by the Appellants without citation to authority? As will be discussed below, basic principles of statutory construction require this Court to answer "yes" to both of these questions and to affirm the Court of Appeals' decision.

A. MCL 710.51(6) Only Permits Courts To Terminate The Rights Of Parents Without Legal Custody Over Their Child.

MCL 710.51(6) only permits courts to terminate the rights of parents who lack legal custody over their children because the Legislature included the definite article "the" before the phrase "parent having legal custody." The use of "the," rather than "a," reflects legislative intent to require the parent initiating a termination of parental rights proceeding to be the sole parent having legal custody.

When interpreting a statute, this Court's primary goal is to ascertain and give effect to the intent of the Legislature. *Mich Ed Ass'n v Sec'y of State (On Rehearing),* 489 Mich 194, 217; 801 NW2d 35 (2011). This task begins by examining the language of the statute itself because that language provides the most reliable evidence of the Legislature's intent. *US Fidelity Ins & Guar Co v Mich Catastrophic Claims Ass'n,* 484 Mich 1, 13; 795 NW2d 101 (2009). If the statute's language is clear and unambiguous, then courts must assume that the Legislature intended its plain meaning and must enforce the statute as written, since the Legislature is presumed to understand the meaning of the language it enacts. *Robinson v City of Detroit,* 462 Mich 439, 459; 613 NW2d 307 (2000). In contrast, courts may not assume that the Legislature inadvertently made use of one word or phrase instead of another, nor can they presume that the Legislature

meant to say something different than what is reflected in the statute. *People v Williams*, 491 Mich 164, 174-180; 814 NW2d 270 (2012); *Robinson v City of Detroit, supra.*

Here, the Legislature's decision to use the phrase "the parent having legal custody" rather than the phrase "a parent having legal custody" is dispositive because, as this Court has repeatedly explained, the words "the" and "a" have very different functions:

> Traditionally in our law, to say nothing of our classrooms, we have recognized the difference between "the" and "a." "The" is defined as "definite article. 1. (used esp. before a noun, with a specifying or particularizing effect, as opposed to the indefinite or generalizing force of the indefinite article a or an).

Robinson v City of Detroit, supra at 461-462; see also *People v Huston, supra* at 458-459; *Robinson v Lansing*, 486 Mich 1, 14; 782 NW2d 171 (2010); *Massey v Mandell*, 462 Mich 375, 382 n 5; 614 NW2d 70 (2000) (all recognizing the different meanings of "the" and "a").

This Court has strictly applied this elementary rule of grammar on numerous occasions. For example, in *Paige v City of Sterling Heights, supra*, this Court interpreted the use of "the" in the phrase "the proximate cause" found in MCL 418.375(2) to refer to the "sole proximate cause." *Id.* at 510. The Court in *Paige* adopted the reasoning applied in *Robinson v City of Detroit, supra*, in which this Court held that it was "clear that the phrase 'the proximate cause' contemplates one cause." *Robinson v City of Detroit, supra* at 508. In contrast, this Court held, in *People v Huston, supra*, that the phrase "a victim" in MCL 777.40(3)(a) refers to any victim, not necessarily the sole victim of the crime at issue in the case. *Id.* at 459. And in *State Farm Fire and Gas Co v*

Old Republic Ins Co, 466 Mich 142; 644 NW2d 715 (2002), this Court interpreted the phrase "a property protection insurance policy" in MCL 500.3123(1)(b) to mean any policy, not the sole policy covering the vehicle involved in the accident. *Id.* at 146-147. This Court concluded, "If the Legislature had intended to use the definite article 'the' instead of the indefinite article 'a,' it could have simply changed the construction of the sentence. It is untenable that the Legislature intended a meaning other than that plainly expressed because it somehow felt itself confined to the particular grammatical construction utilized." *Id.* at 148-149.

So here, because the Legislature used the phrase "the parent having legal custody," with "the" being a definite article and "parent" being a singular noun, the provision only operates in situations where one parent has legal custody over the child.[3]

This interpretation is strengthened by the fact that the Legislature decided to use both the phrases "the parent" and "a parent" in other provisions of the Adoption Code.

---

[3] The Appellants also suggest that the phrase "the parent" in MCL 710.51(6) actually refers back to the phrase "a parent" in MCL 710.51(5). Appellant's Br. at 11. However, this reading ignores the well-established principle that provisions dealing with broad matters shall not submerge provisions dealing with specific matters. See *People v Katt*, 468 Mich 272, 282; 662 NW2d 12 (2003) ("a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment."). MCL 710.51(5) is a broad statutory provision that refers generally to all stepparent adoptions. That provision simply states that if a stepparent is able to adopt a child, then the rights of the parent to whom he is married shall not be terminated. That provision covers all stepparent adoptions, such as those involving situations where the other parent consents to the termination of his parental rights or is deceased.

In contrast, MCL 710.51(6) is a specific provision that applies only to situations in which the other parent does not consent to the stepparent's request to adopt the child. In such situations, MCL 710.51(6) only permits the termination of the non-consenting parent's rights if he does not have legal custody over the child.

See *Farrington v Total Petroleum Inc.*, 442 Mich 201, 210; 501 NW2d 76 (1993) (courts may not ignore the omission of a term from one section of a statute when that term is used in another section of the statute); *Robinson v City of Detroit, supra* at 459 (courts must presume that every word of a statute has some meaning and must avoid any interpretation that would render any part of a statute surplusage or nugatory). For example, MCL 710.23b only permits "the parent or guardian having legal custody of a child" to grant a child-placing agency with the right to make a temporary placement of a child for the purposes of a subsequent adoption. See also MCL 710.23d (requiring the child placement agency to obtain written authorization from "the parent"). But both MCL 710.23a and MCL 710.23b allow "a parent having legal and physical custody of a child" to make a temporary placement of the child with someone she or he personally selects. And MCL 710.51(5) prohibits a court from terminating the rights of "a parent" who is married to the individual petitioning for adoption. The fact that Legislature used the phrase "the parent" in some provisions and the phrase "a parent" in others further reflects its awareness of the differences in the meanings of "the" and "a." See *Robinson v City of Detroit, supra* at 460 (concluding that the Legislature's use of the phrase "a proximate cause" in some statutes and "the proximate cause" indicated its knowledge about the different meanings of the phrases).

The "judiciary has always adhered to the principle that the Legislature, having acted, is held to know what it has done." *Robinson v City of Detroit, supra* at 460. Here, the Legislature could have granted "a parent having legal custody" with the ability to terminate the other parent's rights. But it chose not to do so. Instead, it only gave this

right to "the parent having legal custody." This Court should hold that the phrase, consistent with its plain meaning, refers to the sole parent having legal custody.

B. The Legislature's Decision To Prohibit Courts From Terminating The Rights of Parents With Legal Custody Is Consistent With Other Statutory Provisions It Has Enacted To Safeguard The Rights Of Parents.

The Legislature's decision to permit a court to terminate the rights of a parent pursuant to MCL 710.51(6) only in situations in which that parent does not have legal custody over the child is consistent with the entire legislative scheme involving the termination of a parent's rights.[4] This scheme requires courts, as a condition precedent to terminating a parent's rights, to first strip that parent of legal custody.

Under Michigan law, there are only two statutory routes by which a court can terminate a parent's rights – the provision at issue in this case and the Juvenile Code. To terminate a parent's rights under the Juvenile Code, the juvenile court must first strip a parent of his right to legal custody. To do so, the State must file a petition setting forth allegations sufficient to adjudicate the child as abused or neglected under MCL 712A.2(b). Then, the parent is entitled to an adjudication trial at which the State must prove its allegations by a preponderance of evidence. Only if the State meets its burden at trial may the court issue an order assuming jurisdiction over the child. That decision by the court strips the parent of legal custody over the child and transfers those rights to

[4] Prior to the enactment of MCL 710.51(6), the spouse of a parent who had sole legal custody of the child could not adopt the child – under any circumstances – unless the other parent consented. The Legislature enacted MCL 710.51(6) to give the parent with legal custody the ability to seek termination of the other parent's rights if enumerated conditions were met. See House Legislative Analysis of HB 5791 (Sept. 19, 1980).

the court, which can then act as a surrogate parent to the child and make all-encompassing decisions about the child in the dispositional phase of the case. Only after the decision has been made to strip the parent of legal custody may the court even entertain a request from the State to terminate that parent's rights, which requires an even higher evidentiary showing and another fact-finding hearing. MCR 3.977.

In enacting MCL 710.51(6), the Legislature created an identical process in the context of stepparent adoptions. Before an adoption court can issue an order terminating a parent's rights, it must first find that that parent does not have legal custody over the child. Only then can it issue an order terminating that parent's rights.

The Legislature's decision in both the Adoption and Juvenile Codes to require a parent to lack legal custody prior to having his rights permanently terminated is consistent with this Court's mandate that procedural safeguards must exist to protect parents from the wrongful termination of their parental rights.[5] This Court has noted that cases involving the "involuntary, permanent termination of parental rights are unique in the kind, the degree and the severity of the deprivation they inflict" because "the decision to terminate a parent's rights is both "total and irrevocable." *In re Sanchez*, 422 Mich 758, 766; 375 NW2d 353 (1985); see also MCL 710.21a(b) (noting that a goal of

[5] The Appellants assertion that their statutory interpretation best protects the rights of the child is incorrect. In *Santosky v Kramer*, 455 US 745; 102 S Ct 1388; 71 L Ed 2d 599 (1981), the United States Supreme Court found that the rights of a child align with those of a parent until after the parent has been found to be unfit. *Id.* at 760. Children have no interest in being separated from presumptively fit parents. *Stanley v Illinois*, 405 US 645, 652; 92 S Ct 1208; 31 L Ed 2d 551 (1972). Here, it is undisputed that Aidan shared a bond with his father, who he affectionately referred to as "Daddy Pierre." 58a, 193a, 195a.

the Adoption Code is to protect the rights of the parties); *In re Newton*, 238 Mich App 486, 493; 606 NW2d 34 (1999) (recognizing that "the clear purpose" of the step-parent adoption statute "is to allow the creation of a two-parent family where one did not exist before, not to break up an existing parent-child relationship").

Thus unlike other custody proceedings, terminating a parent's rights "leaves the parent with no right to visit or communicate with the child, to participate in, or even to know about any important decision affecting the child's religious, educational, emotional, or physical development." *In re Sanchez, supra* at 766. As such, "it is hardly surprising that this forced dissolution of the parent-child relationship has been recognized as a punitive sanction by courts, Congress and commentators." *Id.* Given the important right at stake, the Legislature properly mandated – in both 710.51(6) and the Juvenile Code – that courts must make a threshold finding stripping that parent of legal custody of his child, prior to permanently terminating that parent's rights. Because Mr. Roustan shared legal custody over his son, the Court of Appeals correctly reversed the trial court's order terminating his parental rights pursuant to MCL 710.51(6).

C. Legal Custody Refers To A Parent's Right To Make Decisions On Issues Affecting A Child.

The Appellants do not dispute that Mr. Roustan shared legal custody over his son at the time of the termination of parental rights hearing. In fact, the plain language of the judgment of divorce issued at the time of Mr. Roustan's divorce from Mrs. Merrill explicitly states that "[t]he parties shall share joint legal custody." 29a.

Instead, the Appellants argue – without citing any legal authority – that the phrase "legal custody" in MCL 710.51(6) has an entirely different meaning than the same phrase included in the parties' judgment of divorce and commonly understood in the context of child custody proceedings. Essentially, they are asking this Court to define one statutory phrase in two different manners. In the context of adoption cases, they argue that legal custody means "the legal right to physical custody," a definition that eliminates any differences between the meanings of legal custody and physical custody and contravenes the plain understanding of the phrase. Since Mr. Roustan did not have full physical custody over his son, the Appellants contend that he also did not have "legal custody" over his son, as they suggest the phrase should be defined in the Adoption Code, despite the fact that he was explicitly awarded joint legal custody by the trial court.[6]

But in making this argument, the Appellants again fail to apply basic rules of statutory construction. Although the Adoption Code does not define "legal custody" or "physical custody," this Court must look at how the Legislature has used those phrases

---

[6] The Appellants suggest that the Legislature's decision to allow custodial parents to change the name of their children under certain circumstances reflects its intent to also allow custodial parents to terminate the rights of the other parent under MCL 710.51(6). Appellant's Br. at 19. This argument, however, ignores two important facts. First, the Legislature's use of the phrase "the custodial parent" in MCL 711.1(7) reflects that it knew how to refer to the parent who had physical custody of the child. But it chose not to use that phrase in MCL 710.51(6) and instead chose only to allow the parent having legal custody of the child to request termination of the other parent's rights. Second, the Legislature's decision to limit standing under MCL 710.51(6) is sensible given the rights at stake. Unlike changing the name of a child, a termination of parental rights involves the permanent and irreversible severance of the parent-child relationship, a far more severe deprivation of a fundamental constitutional right.

in other statutes related to children to discern their meanings. In construing statutes, courts must read all statutes relating to the same subject, or having the same general purpose, as together constituting one law, although enacted at different times, and containing no reference one to the other. *In re MCI Telecommunications Complaint, supra; Michigan Oil Co v National Resources Com, supra; Rathbun, supra.* This rule is "but a logical extension of the principle that individual sections of a single statute should be construed together, for it necessarily assumes that whenever [a legislature] passes a new statute, it acts aware of all previous statutes on the same subject." *Erlenbaugh v United States,* 409 US 239, 243-244; 93 S Ct 477; 34 L Ed 2d 446 (1972) (citations omitted). Thus, even a later-enacted statute can be regarded as a legislative interpretation of an earlier act in the sense that it aids in ascertaining the meaning of the words as used in their contemporary setting. *Id;* see also *Rathbun, supra* ("With this purpose in view, therefore it is proper to consider, not only acts passed at the same session of the legislature, but also acts passed at prior and subsequent sessions.").

Analyzing Michigan statutes affecting children, it is apparent that the Legislature intended for the phrases "legal custody" and "physical custody" to have distinct meanings. In *Grange, supra,* this Court succinctly explained the difference: "[L]egal custody is understood to mean decision-making authority as to important decisions affecting the child's welfare" whereas "physical custody pertains to where the child shall physically 'reside'."[7] *Id.* at 512. See also MCL 722.1102(n) (defining physical

[7] The Appellants seem to suggest that the informal definition of legal custody that has emerged is "shared decisionmaking." Appellant's Br. at 21. This is incorrect. What the

custody as "the physical care and supervision of a child"); *Dailey v Kloenhamer*, 291 Mich App 660, 670; 811 NW2d 501 (2011); *Pierron v Pierron*, 486 Mich 81, 85; 782 NW2d 480 (2010) (both noting the differences between "legal custody" and "physical custody").[8]

Importantly, the statute that this Court construed in *Grange*, MCL 722.26a, which differentiates between the rights associated with legal and physical custody,[9] was enacted in the same legislative session as MCL 710.51(6). This further suggests that the Legislature was well aware of the differences between legal and physical custody at the time MCL 710.51(6) was passed. See *Dailey, supra* (noting that MCL 722.26a permits courts to award physical custody to both parents but legal custody to only one).

And since the enactment of MCL 710.51(6), the Legislature's understanding of the differences between legal and physical custody has only become clearer. It has enacted at least ten statutory provisions involving children that include both phrases, including three provisions within the Adoption Code itself. See MCL 330.1498c(a); MCL 330.1748(5)(c); MCL 710.23a(1); MCL 710.23b(3); MCL 710.23d(1); MCL 712.15(a); MCL 722.861; MCL 722.1209(1)(c); MCL 722.1102(m); MCL 750.136c(1)(2).[10] The

---

Appellants are referring to is joint or shared legal custody. But legal custody, which has always meant the right to make decisions on important issues affecting a child, see *Grange, supra* at 512, can be in the form of sole legal custody or shared legal custody. Thus, the list of statutes that the Appellants contend would not make sense if this Court failed to adopt their definition of legal custody actually make sense if the definition of legal custody provided in *Grange* is applied. See Appellant's Br. at 21-24.

[8] The Appellants incorrectly assert that the Legislature has never defined "physical custody." Appellant's Br. at 21. As noted above, that phrase is defined in MCL 722.1102(n).

[9] In *Grange, supra*, this Court noted that MCL 722.26a recognizes the distinction between legal and physical custody. *Id.* at 511 n 75.

[10] See also MCL 710.51(7) (granting prospective adoptive parents who have already

provisions in the Adoption Code that reference both legal and physical custody were adopted in 1994. Notably, when adding these provisions, the Legislature did not amend MCL 710.51(6) to define legal custody any differently.

Had the Legislature intended for "legal custody" and "physical custody" to have the same meanings, as the Appellant suggests, then its inclusion of both phrases within each of these statutory provisions would be redundant. Courts, however, must presume that every word of a statute has some meaning and must avoid any interpretation that would render any part of a statute surplusage or nugatory. *Whitman v City of Burton*, 493 Mich 303, 311-312; 831 NW2d 223 (2013).

In addition to the statutory provisions reflecting a clear distinction between legal and physical custody, case law dating back to 1912 has recognized the distinction as well. See *Ford Motor Co v City of Woodhaven*, 475 Mich 425, 439-440; 716 NW2d 247 (2006) (noting that courts must presume that the Legislature is aware of judicial interpretations of existing law). In these decisions, appellate courts have described trial court orders distinguishing between legal and physical custody. See, e.g., *Carpenter v Carpenter*, 171 Mich 572, 573; 137 NW 250 (1912) (recognizing that although the trial court gave legal custody of the child to the father, it awarded the mother physical custody of the child during the school year); *Burkhardt v Burkhardt*, 286 Mich 526, 531;

---

been given the legal right to physical custody with the separate right to make decisions for the child); MCL 330.1260 (defining "person in loco parentis" to mean an individual who is not the parent or guardian of a child or minor but who has legal custody of the child or minor and is providing support and care for the child or minor") (emphasis added). These provisions are additional examples of how the Legislature has differentiated between legal custody and the legal right to physical custody.

282 NW 231 (1938) (observing that the trial court awarded legal custody to the mother but ordered that the children remain in the physical custody of third parties); *Foxall v Foxall*, 319 Mich 459, 460; 29 NW2d 912 (1947) (noting that the trial court had awarded legal custody of children to the Friend of the Court but physical custody to the father); *Bowler v Bowler*, 355 Mich 686, 689, 693; 96 NW2d 129 (1959) (affirming trial court's decision granting a father both legal and physical custody of the child); *Potter v Potter*, 372 Mich 637, 643; 127 NW2d 320 (1963) (affirming trial court's order granting legal custody to the father but physical custody to the grandparents); *In re Brown*, 22 Mich App 459, 461; 177 NW2d 732(1970) (noting proposed stipulation of the parties regarding the physical and legal custody of the children); *Lustig v Lustig*, 99 Mich App 716, 719; 299 NW2d 375 (1980) (describing that the trial court had ordered that the parents have joint legal custody of the child with physical custody alternating between both parents).[11]

Even the Black's Law Dictionary definition of "custody" included in its fifth edition published in 1979, recognized that custody has two different elements: legal and physical custody. Black's Law Dictionary 347 (5th Ed.). The fifth edition also defined "legal custody" to mean "restraint of or responsibility for a person," but did not define the phrase to mean the legal right to physical custody of the child.[12] *Id.* at 804.

---

[11] Judicial understanding that legal and physical custody mean different things has continued. For example, in *Hunter v Hunter*, 484 Mich 247; 771 NW2d 694 (2009), this Court noted that the plaintiffs had sought both legal and physical custody of the children, which the trial court granted. *Id.* at 253, 256.

[12] The fifth edition of Black's Law Dictionary did not include a definition of physical custody. The ninth edition defines legal custody to mean "[t]he authority to make

Contrary to the Appellant's assertions, the differences between "legal custody" and "physical custody" were well understood prior to the enactment of 710.51(6).

Adopting the Appellants' arguments would create unnecessary confusion because it would create two different definitions of "legal custody" within related statutory schemes affecting the care of children. Instead, this Court should define "legal custody" in MCL 710.51(6) in the same way it has been commonly understood by courts for over a century and the way it was defined by this Court in *Grange, supra* – "decision-making authority as to important decisions affecting the child's welfare." *Id.* at 512. Because the trial court's judgment of divorce granted Mr. Roustan shared legal custody over his son, the trial court was precluded from terminating his rights pursuant to MCL 710.51(6).

D. Parents Sharing Legal Custody Have Two Options If They Wish To Terminate The Rights Of The Other Parent - Modify Their Custody Order And Seek Termination Under MCL 710.51(6) Or File A Petition To Terminate Under The Juvenile Code.

Contrary to the Appellants' assertions, a parent who shares legal custody with the other parent has two options if she wishes to terminate the other parent's rights. She can file a motion to modify the custody order to obtain sole legal custody over the child and if successful, can then file a stepparent adoption petition pursuant to MCL 710.51(6). Or she can file a private juvenile court petition pursuant to MCL 712A.2(b) requesting that the court assume jurisdiction over the child and terminate the rights of

---

significant decisions on a child's behalf" and physical custody to mean "the right to have the child live with the person awarded custody." Black's Law Dictionary 442, 1263 (9th Ed.).

the other parent. Both of these options, which are discussed below, further the goals of the Adoption Code by protecting the rights of parents while allowing children to transition into permanent homes where parents are truly unfit and have been stripped of the right to make decisions for their child. See MCL 710.21a(b) (noting that a goal of the Adoption Code is to protect the rights of the parties); *In re Newton, supra* (recognizing that the "the clear purpose" of the step-parent adoption statute "is to allow the creation of a two-parent family where one did not exist before, not to break up an existing parent-child relationship").

When a court enters a custody order, it can either grant a parent sole legal custody or grant shared or joint custody to both parents based on its determination of the best interests of the child. MCL 722.26a; see, e.g., *In re AP*, 283 Mich App 574; 77 NW2d 403 (2009) (describing how trial court granted sole legal and physical custody of a child to the father). Despite this initial order, a party can always file a motion requesting a modification of the initial custody order based on a change in circumstances. MCL 722.27(1)(c). After considering such a motion, a custody court could modify the initial order to grant one parent sole legal custody over the child if it finds that there was a change in circumstances and the modification was in the child's best interests. *Id.* Once a parent obtains sole legal custody, she could then file a stepparent adoption petition under MCL 710.51(6). Case law from the Court of Appeals details numerous situations in which parents with sole legal custody have properly sought to terminate the other parent's rights pursuant to MCL 710.51(6). See, e.g., *Colon v Rodriguez*, 144 Mich App 805; 377 NW2d 321 (1985); *In re Martyn*, 161 Mich App 474;

411 NW2d 743 (1987); *In re SNT*, unpublished decision per curiam of the Court of Appeals issued on February 16, 2012 (Docket No. 305155), Attachment A; *In re Reminga*, unpublished decision per curiam of the Court of Appeals issued on April 7, 2005 (Docket No. 258011), Attachment B; *In re SRS*, unpublished decision per curiam of the Court of Appeals issued on September 17, 2009 (Docket No. 291231), Attachment C (all affirming TPRs initiated by mothers who had sole legal custody of children in their care).

A parent with joint legal custody can also file a petition requesting jurisdiction and termination of the other parent's rights under the Juvenile Code. See MCL 712A.11 (allowing "a person" to file a juvenile court petition). To do so, the parent would have to file a petition alleging facts sufficient for the court to assume jurisdiction of the child under MCL 712A.2(b). MCL 712A.11; MCR 3.961. Then, that parent would have to prove those facts at an adjudication trial before a judge, jury or referee. MCR 3.972. If that parent prevailed, the case would proceed to the dispositional hearing at which the parent could request that the juvenile court immediately terminate the rights of the other parent. MCR 3.977(E). If the court determined that clear and convincing evidence existed to terminate the other parent's rights under MCL 712A.19b(3) and that termination was in the child's best interests, then it could issue such an order and permanently terminate the rights of the other parent. MCR 3.977(E)(3).[13]

[13] The procedural protections available to parents under the Juvenile Code are far more robust than those available under MCL 710.51(6). These include the right to counsel, the right to a jury trial and the right to reunification services. MCR 3.911; MCR 3.912; MCL 712A.19a(2). Because of the fundamental rights at stake, the significant disparity

Thus, even if this Court enforces the plain language of MCL 710.51(6) and limits its applicability to cases in which one parent has sole legal custody over a child, parents who share legal custody still have options should they wish to terminate the rights of the other parent. And if those parents are dissatisfied with these statutory options, then their recourse is to work with the Legislature to amend the statute, not to ask this Court to rewrite the law as written, as the Appellants request in this case.

---

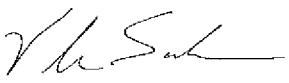
in procedural protections raises serious constitutional concerns. Mr. Roustan raised these concerns in his brief to the Court of Appeals but the Court of the Appeals did not address them because it reversed the trial court's order on different grounds.

CONCLUSION

If MCL 710.51(6) permitted "a parent having the legal right to physical custody" to seek the termination of the other parent's rights, then the Appellants would be correct that they had the legal authority to seek termination of Mr. Roustan's parental rights. But the statute does not say that. Instead, it limits the applicability of that provision to "the parent having legal custody" of the child. Since here, Mr. Roustan shared legal custody of Aidan with Mrs. Merrill, the Court of Appeals' decision should be affirmed.

If this Court determines that the phrase "the parent having legal custody" has the same meaning as the phrase "a parent having the legal right to physical custody" and that Mrs. Merrill did have the statutory authority to proceed with her petition, then this matter should be remanded to the Court of Appeals so that it may address the other arguments that Mr. Roustan raised in his brief to the Court of Appeals.

Respectfully submitted,



Vivek S. Sankaran (P68538)
Attorney for Respondent-Appellee

Trish Oleksa Haas (P65863)
Attorney for Respondent-Appellee

Dated: January 31, 2014

STATE OF MICHIGAN

COURT OF APPEALS

UNPUBLISHED
February 16, 2012

In the Matter of SNT, Minor.

No. 305155
Kalamazoo Probate Court
Juvenile Division
LC No. 2010-000089-AY

Before: SAWYER, P.J., and O'CONNELL and RONAYNE KRAUSE, JJ.

PER CURIAM.

Respondent appeals as of right the order of the trial court terminating his parental rights to his minor child pursuant to MCL 710.51(6). We affirm.

The child in this case was born in November 2003 to petitioner mother. Though respondent was not married to petitioner mother, he claimed paternity of the child in July 2004. The trial court awarded petitioner mother sole legal and physical custody of the child and awarded respondent reasonable visitation. Respondent was incarcerated in the county jail at that time and was later sentenced to approximately eight years in federal prison.

During the first approximately one year of the child's life, petitioner mother facilitated communication between the child and respondent, but thereafter stopped. For the following three to four years, respondent made little or no attempt to communicate with the child. Thereafter, respondent made sporadic attempts to contact the child by mail, and in October 2008, respondent moved that the trial court permit him telephone parenting time with the child. The trial court denied respondent's motion, stating that it was not reasonable to order a five-year-old child to have regular telephone contact with a person unknown to the child. The trial court further stated that the prior order of reasonable parenting time was still in effect and that it might become appropriate in the future to reintegrate respondent into the child's life.

In 2009, petitioner mother married. Shortly thereafter, respondent mailed to petitioner mother two certificates, one indicating that respondent had completed a substance abuse class and another indicating that respondent had completed a parenting class while in prison; the certificates were sent to petitioner mother with no accompanying correspondence. In July 2010, petitioner mother sent a letter to respondent asking him to voluntarily terminate his parental rights to the child to enable petitioner and her husband to adopt the child. In August 2010, respondent sent petitioner mother a denial of her request. In September 2010, petitioner mother and her husband petitioned the trial court for stepparent adoption of the child and termination of respondent's parental rights under the Adoption Code. At the conclusion of the trial on the

petition, the trial court found that petitioners had met the statutory burden and that termination of respondent's parental rights was warranted and in the best interests of the child.

Respondent contends on appeal that the trial court clearly erred in finding that he had failed to contact or communicate with the child and that termination was therefore not warranted under MCL 710.51(6). We disagree. This Court reviews for clear error the trial court's findings of fact regarding a petition to terminate under the Adoption Code. *In re ALZ*, 247 Mich App 264, 271; 636 NW2d 284 (2001). A finding is clearly erroneous if, although there is evidence to support it, the reviewing court on the entire record is left with a definite and firm conviction that a mistake has been made. *Id.* at 271-272; *In re Hill*, 221 Mich App 683, 691-692; 562 NW2d 254 (1997).

Respondent's parental rights were terminated pursuant to 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 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. [MCL 710.51(6).]

Under this section, petitioners have the burden of proving by clear and convincing evidence that termination is warranted. *In re ALZ*, 247 Mich App at 272. To terminate parental rights under this section, the trial court must find that the requirements of both subsections (a) and (b) of section 51(6) are met. *Id.* Upon a finding that both subsections have been met, it is discretionary with the trial court whether to terminate the respondent's parental rights or whether termination would be contrary to the best interest of the child. *Id.* at 272-273.

In this case, respondent does not challenge the trial court's finding under subsection 51(6)(a), and the record supports the trial court's finding. Similarly, respondent does not challenge the trial court's ultimate finding that termination was in the best interest of the child, and we observe no basis for such a challenge. Rather, respondent argues that under subsection 51(6)(b), it cannot be said that he failed or neglected to visit, contact, or communicate with the child because it was petitioner mother's actions that prevented him from contacting or communicating with the child. In 2007 and early 2008, respondent attempted to contact the child sporadically by sending gifts of shoes and a Teddy bear, both of which petitioner mother returned. It was disputed before the trial court whether petitioner mother had also returned other

earlier correspondence, but petitioner mother agreed that she had opposed respondent having telephone contact with the child and had discouraged respondent's mother from contacting the child.

Respondent does not dispute that he had no contact with the child in the approximate two years leading up to the filing of the petition seeking termination. In fact, respondent concedes that he did not even attempt to contact the child directly during this two-year period. Instead, respondent argues that his lack of attempt to contact the child is the fault of petitioner mother because she had successfully discouraged him in the past. But, given that respondent had been awarded reasonable visitation by the trial court, respondent's failure to exercise that visitation simply because petitioner mother attempted to discourage him by previously returning some mailed items is an inadequate excuse. See, e.g., *In re SMNE*, 264 Mich App 49, 51; 689 NW2d 235 (2004) (a parent was not exempted from the provisions of subsection 51(6)(b) where she had the legal right to visit with the child but failed to do so because she believed that the other parent would impair the visits). In *SMNE*, this Court stated that where the noncustodial parent believed that the custodial parent was unjustly and improperly impairing the visits, the noncustodial parent should have sought the assistance of the Friend of the Court. *Id.*

The statutory language of subsection 51(6)(b) refers to a parent who has the ability to visit, contact, or communicate with the child. Respondent demonstrated that he had the ability to communicate by mail with his mother. In addition, respondent had mailed two certificates to petitioner mother as recently as 2009, and petitioner had not returned them. Given that respondent had the ability to mail items, he could have attempted to mail items to the child directly or could have sought assistance through the Friend of the Court if he believed that petitioner mother presented a barrier to communication. *In re SMNE*, 264 Mich App at 51. Given the clear and convincing record support for the trial court's determination, we hold that the trial court did not clearly err in terminating respondent's parental rights.

Affirmed.

/s/ David H. Sawyer
/s/ Peter D. O'Connell
/s/ Amy Ronayne Krause

STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of SABRINA RACHEL VERA REMINGA, a/k/a SABRINA RACHEL DRAKE, Minor.

CAROLYN VERA DRAKE and KEVIN WILSON DRAKE,

Petitioners-Appellants,

v

THOMAS REMINGA,

Respondent-Appellee.

UNPUBLISHED
April 7, 2005

No. 258011
Kent Circuit Court
Family Division
LC No. 03-020399-AY

Before: Kelly. P.J., and Sawyer and Wilder, JJ.

MEMORANDUM.

Petitioners appeal as of right from the trial court's order denying their petition for termination of respondent's parental rights under MCL 710.51(6). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Carolyn Drake and respondent divorced, and Carolyn Drake was awarded legal and physical custody of their child (DOB 3-3-97). Carolyn Drake married Kevin Drake, and they filed a petition seeking to terminate respondent's parental rights to the child and to allow Kevin Drake to adopt the child. The trial court denied the petition, finding that petitioners had not established by clear and convincing evidence that termination of respondent's parental rights was warranted. The trial court found that the evidence showed that within the period of two years before the petition was filed, respondent attempted to maintain contact with the child by attending visitation, sending letters to the child and to his mother for the child, and by working with the court to establish his right to have contact with the child. The trial court did not make a definitive finding as to whether respondent had the ability to provide regular and substantial support for the child but failed to do so.

If the parents of a child are divorced and 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 parental rights of the other parent if: (1) 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 two or more years before the filing of the petition; and (2) 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 two years or more before the filing of the petition. MCL 710.51(6). To terminate parental rights, the court must find both a failure to provide support and a failure of contact with the child. *In re ALZ*, 247 Mich App 264, 272; 636 NW2d 284 (2001).

In a termination of parental rights proceeding under MCL 710.51(6), the petitioner has the burden of proving by clear and convincing evidence that termination of the noncustodial parent's rights is warranted. We review the lower court's findings of fact under the clearly erroneous standard. Upon a showing of the requisite proofs, termination of parental rights under MCL 710.51(6) is permissive rather than mandatory. The court need not grant termination if it finds that doing so would not be in the child's best interest. *Id.* at 271-273.

While the issue is close, we hold that the trial court did not clearly err in concluding that petitioners did not establish by clear and convincing evidence that termination of respondent's parental rights was not warranted under MCL 710.51(6). The trial court made no definitive finding as to whether respondent had the ability but failed to provide regular and substantial support for the child; nevertheless, the trial court's decision may be affirmed on the ground that the trial court did not clearly err in concluding that petitioners failed to show by clear and convincing evidence that respondent regularly and substantially failed to maintain contact with the child. Evidence that respondent visited the child regularly for only a few months in the two years prior to the filing of the petition, standing alone, could have supported a finding that respondent did not maintain regular and substantial contact with the child. See, e.g., *In re Colon*, 144 Mich App 805, 814; 377 NW2d 321 (1985). However, the evidence also showed that respondent sent an undetermined number of letters and cards both directly to the child and to his mother to give to the child. Carolyn Drake acknowledged that she did not give respondent's letters to the child. Thus, the totality of the evidence permitted the trial court to conclude that respondent made regular and substantial efforts to contact the child. *ALZ, supra* at 274.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ David H. Sawyer
/s/ Kurtis T. Wilder

STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of S.R.S., Minor.

HAROLD C. SEXTON and SUZZANNE M. SEXTON,

Petitioners-Appellees,

v

BRANDY S. JOHNSTON,

Respondent-Appellant.

UNPUBLISHED
September 17, 2009

No. 291231
St. Clair Circuit Court
Family Division
LC No. 07-000573-AY

Before: Donofrio, P.J., and Wilder and Owens, JJ.

PER CURIAM.

Respondent, Brandy S. Johnston, appeals as of right from a circuit court order terminating her parental rights to the minor child pursuant to § 51(6) of the adoption Code, MCL 710.51(6). Because the trial court clearly erred in terminating respondent's parental rights because petitioners failed to prove, and the evidence as a whole did not clearly establish, that respondent had the ability to pay child support, we reverse.

Petitioner Harold Sexton and respondent are the parents of SRS, who was born in December 2001. Petitioner and respondent separated in 2002. Two years later, Sexton was awarded sole legal and physical custody of SRS. In October 2008, Sexton and his new wife filed a petition to terminate respondent's parental rights, which the trial court granted after an evidentiary hearing.

The trial court's findings of fact are reviewed for clear error. *In re Hill,* 221 Mich App 683, 691-692; 562 NW2d 254 (1997). "A finding of fact is clearly erroneous if the reviewing court has a definite and firm conviction that a mistake has been committed, giving due regard to the trial court's special opportunity to observe the witnesses." *In re BZ,* 264 Mich App 286, 296-297; 690 NW2d 505 (2004).

The trial court terminated respondent's parental rights under MCL 710.51(6), which provides, in pertinent part:

> If the parents of a child . . . 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.

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, supra* at 691.

Section 51(6)(a) considers whether the respondent provided support if she had the ability to do so or, if an order of support had been entered, whether the respondent substantially complied with the order. MCL 710.51(6)(a). There is no dispute that a support order had not been entered against respondent and, therefore, the trial court was required to consider whether respondent, having the ability to do so, regularly and substantially supported the child under the first clause of § 51(6)(a).

The evidence presented at the hearing showed that respondent never paid support. However, petitioners failed to present any evidence regarding respondent's ability to pay support. The trial court nonetheless determined that respondent had the ability to pay support because respondent had testified, "If they wanted support I would have paid it[.]" While this statement suggested that respondent had the ability to pay support, it was countered by other evidence that respondent lacked sufficient funds to pay for court-ordered supervised visitation and to pay legal expenses associated with seeking relief from the order for supervised visitation. Thus, while there was some evidence that respondent might have been able to pay support, petitioners did not clearly and convincingly show that respondent actually had the ability to pay support. Accordingly, the trial court clearly erred in finding that § 51(6)(a) was proven by clear and convincing evidence. Because petitioners failed to prove one of the two necessary elements for termination, the trial court clearly erred in terminating respondent's parental rights.

In light of our conclusion that the evidence failed to establish that subsection (a) of § 51(6) was satisfied, it is unnecessary to address subsection (b).

Reversed.

/s/ Pat M. Donofrio
/s/ Kurtis T. Wilder
/s/ Donald S. Owens