STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

SHAYEANN GENSLER,
Petitioner

v

File No. 93-11427-AV
HON. PHILIP E. RODGERS, JR.

BOBBY NIX, JR.,
Respondent.

Katherine Ryder Box
Attorney for Petitioner

Bobby Nix, Jr.
Respondent in Pro Per

DECISION AND ORDER

This matter, which arises from Petitioner's step-parent adoption proceedings in the Probate Court's File No. 92-1927-AD, is an appeal of the denial of the petition to terminate the parental rights of Respondent Bobby Nix, Jr.. MCL 600.863(1); MSA 27A.863(1).1 Petitioner filed a Claim of Appeal of this matter

Footnote l: This Court takes judicial notice that although this appeal is brought by Petitioner ShayeAnn Gensler, her husband, Kerry Gensler, is required by the applicable statute to be the petitioner in a step-parent adoption. The Court of Appeals in In re Stowe, 162 Mich App 27, 30; 412 NW2d 655 (1987) discussed the proper "parties in step-parent adoption actions as follows:

> MCL 710.51(6); MSA 27.3178(555.51)(6) provides in part:
>
> If the parents of a child are divorced . . . and if the parent having legal custody of the child subsequently marries and that Parent’s spouse petitions to adopt the

in the Court of Appeals; the Court of Appeals, in an Order dated l July 15, 1993, transferred the appeal to this Court. MCR l 5.993(B)(1) and (C)(1). Two Status Conferences were held, on September 3, 1993 and November 12, 1993. 2 On May 13, 1994,

Footnote 1: Cont.: child, the court upon notice and hearing may issue an

order terminating the rights of the other parent. . . .
[Emphasis added.]

Thus, the above portion of the statute clearly indicates that the petitioner is to be the stepparent. Nothing in the statute indicates that the custodial natural parent must join in the petition. ... [W]e conclude that a natural, custodial parent is not a necessary party to a stepparent's adoption petition filed pursuant to MCL 710.51(6); MSA 27.3178(555.51)(6).

A review of the Probate Court file shows that Shayeann Gensler and Kerry Gensler were initially petitioners in this matter. Throughout the Probate Court file, papers entered by the Court and counsel showed only ShayeAnn Gensler as Petitioner in many instances. This Court issues this Decision and Order with the assumption that Kerry Gensler, ShayeAnn Gensler's husband, was the Petitioner as required by the foregoing statute and as the matter was originally filed in the Probate Court. If he is no longer a petitioner, the action should be dismissed for want of a necessary party.

Footnote 2: This Court's Order Regarding Appointment of Counsel, entered on December 27, 1993, reads, in pertinent part, as follows:

[T]his Court held a status conference to advise Respondent-Appellee of his right to counsel and the manner in which he could obtain same by court appointment. Respondent-Appellee was present at said conference and was so advised. After a reasonable time, during which Respondent-Appellee failed to obtain counsel, this Court caused a second status conference to be held, at which Respondent-Appellee failed to appear.

... It is Ordered ... that Respondent-Appellee, Bobby Nix, Jr., shall obtain counsel by court-appointment or otherwise within the next thirty (30) days, and if Respondent-Appellee fails to do so, his right to counsel will be deemed waived...

Respondent's right to obtain court-appointed counsel has been waived as a result of Respondent's failure to comply with the provisions of the foregoing Order.

Petitioner filed her Brief on Appeal. Respondent failed to respond

to this Court's Order to Respond dated May 20, 1994.
In reaching its decision in this matter, this Court was guided by the following discussion from In re Simon, 171 Mich App 443, 448-449; 431 NW2d 71 (1988):

A petitioner in an adoption proceeding must prove by clear and convincing evidence that termination of parental rights is warranted. In re Colon, 144 Mich App 805, 813; 377 NW2d 321 (1985). The standard of review in termination of parental rights cases is the "clearly erroneous" standard. In re Cornet, 422 Mich 274; 373 NW2d 536 (1985). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court, after examining all of the evidence, is left with a definite and firm conviction that a mistake has been made. In re Riffe, 147 Mich App 658; 382 NW2d 842 (1985), lv den 424 Mich 904 (1986).

This Court affirms the Probate Court's denial of the petition to terminate the parental rights of Bobby Nix, Jr. based on the following analysis.

The applicable statute, MCL 710.51(6); MSA 27.3178(555.51)(6) reads as follows:

(6) If the parents of a child are divorced, or if the parents are unmarried but the father has acknowledged paternity or is the putative father who meets the conditions in section 39(2) of this chapter, [Footnote omitted.] 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 pertinent facts and chronology of events were set forth, as follows, in Petitioner's Brief on Appeal:

The Petitioner, ShayeAnn Gensler, and the Respondent, Bobby Nix, Jr., are the natural parents of Marcel Lynn Gensler, although they were never married. The child was born on April 29, 1990, and the Respondent acknowledged paternity on April 30, 1990. The Respondent and the Petitioner, ShayeAnn Gensler, lived together with the child until on or about December 22, 1990, at which time they separated. The Petitioners, ShayeAnn and Kerry Gensler, were married on July 6, 1991.

The Petitioners sought to have the Petitioner Kerry Gensler adopt Marcel Lynn Gensler by filing a Petition to Adopt and a Supplemental Petition and Affidavit to Terminate Parental Rights of Non-Custodial Parent on December 29, 1992.

On January 26, 1993, the Probate Court granted the Petition to Terminate the Rights of the Non-Custodial Parent. The record reflects that at the time, the Probate Court found that Bobby Nix, Jr. had both failed to provide regular and substantial support for the child and failed to regularly and substantially visit, contact, or communicate with the child for a period of two years before the filing of the petition. On February 4, 1993, sua sponte, the probate Court reversed its ruling on the issue of visitation.

The Probate Court held a hearing on May 18, 1993 on Petitioner's Motion for Relief from Order Upon Rehearing of Order Terminating Non-Custodial Parent. Petitioner ShayeAnn Gensler was present at the rehearing and represented by Katherine Ryder Box; Respondent Bobby Nix, Jr. was present and not represented by counsel. At the rehearing, the Probate Court affirmed of the denial of termination of the natural father's parental rights. The transcript of that rehearing includes a discussion of the frequency of the father's visits with the child and relevant case law. This Court will now address the facts as they appear in the record and pertinent case law.

As shown above, MCL 710.51(6) requires that the Court consider the non-custodial parent's visitation, contact or communication with the minor child(ren) during the two years which precede the filing of the petition for termination of parental rights. The petition having been filed on December 29, 1992, the Court must

consider visitation, contact and communication between Respondent Bobby Nix, Jr. and his son, Marcel Gensler, during the years 1991 and 1992. The record is replete with dates and length (in hours) of Mr. Nix' visits with his son; the record does not reflect contact or communication other than or separate from visits.

Three appellate cases provide data for objective analysis of the adequacy of the number of visits during the requisite two year period. The following synopsis is provided in In re Simon, supra at page 449,

> A parent who makes only two visits and one telephone call to his child in two years has "substantially failed" to visit, contact, or communicate with the child despite the ability to do so within the meaning of the statute. In re Martyn, 161 Mich App 474,482; 411 NW2d 743 (1987). In Colon supra, this Court held that eight to eleven visits in two years was a substantial failure to visit, contact or communicate, but the Colon Court apparently treated the issue as one of fact.

The In re Simon Court upheld the termination of respondent's parental rights; the respondent did not have any contact with the child (his daughter) for a three-year period preceding the filing of the petition to terminate respondent's parental rights. In re Simon, supra at p 447. The In re Martyn Court also stated that,

> We also express some doubt that the phrase can be reduced to a specific number of visits within two years. We would, for instance, be less likely to consider a specific number of visits late in the two-year period to be "substantial failure".

In re Martyn, supra at p 482.

Exhibit A, attached to Petitioner's brief on appeal, provides a summary of the dates that Mr. Nix exercised his right to visitation with his child during the relevant time period.3 That uncontroverted record shows that Mr. Nix exercised his right to visitation eighteen (18) times during 1991 and 1992. Petitioner's summary shows that during the first six months of the two year

Footnote 3: Also shown on the listings of 1991 and 1992 visits is information as to whether each listed visit was "complete" or whether Mr. Nix picked the child up on time or late and returned the child on time or early.

period, Mr. Nix had no visits with his son. In October, 1991, the father did not exercise his right to visitation.

The listing of Respondent's visits in 1992 shows that Mr. Nix did not visit his son in February, August, September, October, November or December.4 The Court of Appeals noted in the In re Martyn decision that trial courts should "be less likely to consider a specific number of visits late in the two-year period to be a 'substantial failure'". Based upon this statement, Petitioner argued that,

> [T]he Respondent exercised no visitation from July through December of 1992. (Parenthetical sentences omitted.) Thus based upon the statement in In re Martyn, supra, that a specific number of visits late in the two-year period would be less likely to be considered a substantial failure to visit, it seems obvious that the opposite must also be true; where a respondent has not maintained regular and substantial contact with the child, and has had no contact at all late in the two-year period, the statutory prerequisites for termination of parental right have been met.

Petitioner's Brief on Appeal, pp 10-11. In the absence of an appellate decision extending the In re Martyn ruling as Petitioner has argued, this Court finds no clear error in the trial court's conclusion that Mr. Nix' failure to visit with his son during the final months of 1992 did not fulfill the statutory requirements for "substantial failure" finding.

Acknowledging that the total number of visits during the two year period exceeds, by a considerable margin, the numbers of visits identified in the cases discussed above, this Court cannot find evidence which leads to a definite and firm conviction that a mistake was made and that Mr. Nix parental rights should be terminated. In re Colon, supra; and in re Riffe, supra.

Footnote 4: The visitation schedule for the instant parties is maintained through File No. 91-8618-DS. A review of that file and the Friend of the Court records reveals that during recent months, from April through early July, 1994, following reimplementation of the visitation schedule outlined in the Court's Order dated May 24,

1993, Mr. Nix has visited with his son on every occasion allowed by the Order.

Petitioner's appeal is denied. No costs are awarded.

IT IS SO ORDERED.

HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge
Dated: 8/19/94