STATE OF MICHIGAN

COURT OF APPEALS

FOR PUBLICATION
April 18, 2013
9:20 a.m.

In the Matter of AJR, Minor.

No. 312100
Kent Circuit Court
Family Division
LC No. 12-024817-AY

Before: WILDER, P.J., and METER and RIORDAN, JJ.

WILDER, P.J.

Respondent appeals as of right an order that terminated his parental rights to the minor child, AJR, under the stepparent adoption statute, MCL 710.51(6). The order also allowed petitioner-stepfather, who is married to AJR's mother, to adopt AJR. Because respondent had joint legal custody over the child, MCL 710.51(6) did not apply, and we reverse.

I.

Respondent and petitioner-mother were married and had one child, AJR, during their marriage. The two later divorced, and in the judgment of divorce, the mother was given sole physical custody of the child, with both parents sharing joint legal custody. The judgment of divorce also provided that respondent would be given reasonable visitation with AJR.

Years later, the mother married petitioner-stepfather. Approximately two years into their marriage, petitioner-stepfather and petitioner-mother filed a petition for the termination of respondent's parental rights to allow petitioner-stepfather to adopt AJR. Petitioners alleged that respondent failed to comply with a child-support order and failed or neglected to visit, contact, and communicate with AJR during the previous two years.

After conducting a two-day evidentiary hearing on the matter, the trial court terminated respondent's parental rights under MCL 710.51(6), finding that (1) respondent substantially failed to provide support for AJR for the two years preceding the filing of the petition and (2) respondent substantially failed to visit or communicate with AJR during this two-year period.

II.

This case involves issues of statutory interpretation, which are questions of law that we review de novo. *Douglas v Allstate Ins Co*, 492 Mich 241, 256; 821 NW2d 472 (2012). When

interpreting a statute, our primary goal is to ascertain and to give effect to the intent of the Legislature. *Mich Ed Ass'n v Secretary 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 we assume that the Legislature intended its plain meaning and the statute is enforced as written." *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002). "We 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. As far as possible, effect should be given to every sentence, phrase, clause, and word." *Mich Farm Bureau v Dep't of Environmental Quality*, 292 Mich App 106, 132; 807 NW2d 866 (2011) (internal citation omitted). Additionally, this Court 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. *Farrington v Total Petroleum, Inc*, 442 Mich 201, 210; 501 NW2d 76 (1993).

III.

Respondent argues that the statute under which his parental rights were terminated was not applicable to him. Specifically, respondent maintains that because he and the mother had joint legal custody over the child, and the statute only acts to terminate the rights of those parents who do not have legal custody, his rights were improperly terminated. We agree.

Respondent did not raise this issue at the trial court, thus failing to preserve the issue for appellate review. *In re VanDalen*, 293 Mich App 120, 135; 809 NW2d (2011). However, "[t]his Court may overlook preservation requirements if the failure to consider the issue would result in manifest injustice, if consideration is necessary for a proper determination of the case, or if the issue involves a question of law and the facts necessary for its resolution have been presented." *Nuculovic v Hill*, 287 Mich App 58, 63; 783 NW2d 124 (2010). Here, the issue presented is strictly an issue of law–statutory interpretation–and all of the requisite facts have been presented. Thus, in the interests of justice, we will review the issue.

The statute at issue is MCL 710.51(6), which allows for the termination of the rights of a noncustodial parent during a stepparent adoption. MCL 710.51(6) provides as follows:

> 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 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. (Emphasis added).

Thus, in order to terminate parental rights under MCL 710.51(6), the trial court must determine that both subsection (a) and subsection (b) are satisfied, *In re Hill*, 221 Mich App 683, 692; 562 NW2d 254 (1997), as well as conclude that the conditions set out in the preceding paragraph have been satisfied. See *ISB Sales Co v Dave's Cakes*, 258 Mich App 520, 529; 672 NW2d 181 (2003) (noting that phrases starting with "if" are provisos that restrict the operative effect of statutory language).

We conclude and hold that the statute's use in the preceding paragraph of the language, "if *the* parent having legal custody of the child," is to be read as requiring the parent initiating termination proceedings to be *the only parent* having legal custody. The rights of a parent who maintains joint legal custody are not properly terminated under MCL 710.51(6).

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 our Supreme Court has explained, the terms "the" and "a" have different functions:

> "The" and "a" have different meanings. "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). . . ." *Random House Webster's College Dictionary*, p 1382. [*Massey v Mandell*, 462 Mich 375, 382 n 5; 614 NW2d 70 (2000).]

Indeed, if the Legislature wants to refer to something particular, not general, it uses the word "the," rather than "a" or "an." *Johnson v Detroit Edison Co*, 288 Mich App 688, 699; 795 NW2d 161 (2010). Here, the Legislature's use in MCL 710.51(6) of "the" refers to *the particular* parent having legal custody. Necessarily, this requires the particular parent to have sole legal custody. As such, the Legislature's use of the word "the" rather than "a" controls the question before us.

Our interpretation is supported by *Paige v City of Sterling Heights*, 476 Mich 495; 720 NW2d 219 (2006), where our Supreme Court interpreted the use of "the" in the phrase "the proximate cause" found in MCL 418.375(2).[1] The *Paige* Court held that "*the* proximate cause" refers to "the *sole* proximate cause." *Id.* at 510 (emphasis added). The *Paige* Court adopted the reasoning of the Court in *Robinson v Detroit*, 462 Mich 439, 462; 613 NW2d 307 (2000), which held that it was "clear that the phrase 'the proximate cause' contemplates *one* cause." *Id.* at 508. Similarly, we conclude that the Legislature's use of "the parent having legal custody," with "the" being a definite article and "parent" being a singular noun, contemplates only *one* parent having legal custody.

[1] MCL 418.375(2) of the Workers' Disability Compensation Act, MCL 418.101 *et seq.*, states the following: "If the injury received by such employee was *the proximate cause* of his or her death . . . ." (Emphasis added.)

Our interpretation of MCL 710.51(6) is further strengthened by the rules of statutory construction that every word and phrase in a statute is to be given effect, if possible, and that this Court should not ignore the omission of a term from one section of a statute when that term is used in another section of the statute. See *Farrington*, 442 Mich at 210. Notably, the preceding section in the statute, MCL 710.51(5), uses the phrase "*a* parent" to refer to whom that particular section applies. Contrastingly, MCL 710.51(6) refers to "*the* parent." We presume that the Legislature intended to use the more general phrase "*a* parent" to refer to either of the child's parents in MCL 710.51(5) and that the omission of such a general article in MCL 710.51(6) was intentional. *Id.*; see also *Robinson*, 486 Mich at 14 n 13, quoting MCL 8.3a (reviewing courts "must follow these distinctions between 'a' and 'the' because the Legislature has directed that '[a]ll words and phrases shall be construed and understood according to the common and approved usage of the language . . . .").

It is undisputed that when respondent and AJR's mother divorced, the judgment of divorce provided that the mother was awarded physical custody of the child, but both parents would maintain joint legal custody. Thus, because the mother did not have sole legal custody, the trial court erred when it terminated respondent's rights under MCL 710.51(6), regardless of the fact that it found that both of the conditions in subsections (a) and (b) were satisfied. Because we are reversing on this ground, respondent's other arguments are moot, and we need not address them. *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998).

Reversed.

/s/ Kurtis T. Wilder
/s/ Patrick M. Meter
/s/ Michael J. Riordan