

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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In re LEON GALLARDO, Minor

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OFELIA SHIELDS and HOMER E. SHIELDS, JR.,

UNPUBLISHED  
November 19, 1996

Petitioners-Appellees,

v

No. 191358  
LC No. 00002960-AD

MICHAEL LOZANO,

Respondent-Appellant,

and

LINDA GALLARDO,

Respondent.

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Before: Bandstra, P.J., and Neff and M. E. Dodge,\* JJ.

PER CURIAM.

Respondent Michael Lozano appeals as of right from the December 6, 1995, order of the Monroe County Probate Court terminating his parental rights to the minor child under the Michigan Adoption Code, MCL 710.21 *et seq.*; MSA 27.3178(555.21) *et seq.* We reverse.

I

The petition to terminate respondent's parental rights arose in the context of the child's mother's attempt to allow her sister to adopt the child. With the exception of the one-year period between October 1993 to October 1994, respondent has spent most of the child's life in prison, although the record reflects that the respondent supported the mother during the pregnancy.

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\* Circuit judge, sitting on the Court of Appeals by assignment.

In 1994, when the instant petition was filed, defendant sent a notice to the trial court requesting a court appointed attorney. That request was denied.

At the hearing on the matter, the trial court determined that, pursuant to MCL 710.51(6); MSA 27.3178(555.51)(6),<sup>1</sup> respondent's parental rights should be terminated. It is from this order that defendant appeals as of right.

## II

First, contrary to respondent's argument, we are not persuaded that the probate court abused its discretion in refusing to appoint counsel, *In re Sanchez*, 422 Mich 758; 375 NW2d 353 (1985); *In re Fernandez*, 155 Mich App 108; 399 NW2d 459 (1986). This matter was not overly complex, nor did the trial court appear biased, as did the trial court in *Fernandez*. Also, the trial court ordered counsel to be appointed to protect defendant's rights on appeal. Accordingly, we find no abuse of discretion in the trial court's ruling.

## III

Respondent next argues that the trial court improperly terminated his parental rights under MCL 710.51(6); MSA 27.3178(555.51)(6), which provides

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.

Because the statute requires that both requirements be met, we reluctantly agree that the trial court erred in terminating respondent's parental rights.

## A

Initially, we disagree that on this record, the trial court clearly erred in finding emotional neglect under MCL 710.51(6)(b); MSA 27.3178(555.51)(6)(b). The record demonstrates that respondent has seldom visited or contacted the child throughout the child's life. Although respondent offered

excuses for his failures, we agree with the trial court that these excuses do not justify respondent's conduct.

B

After a careful review of the record, however, we hold that the probate court erred in finding clear and convincing evidence that respondent failed or neglected to provide regular and substantial support for a period of two years or more before the filing of the petition.

We find this Court's recent opinion in *In re Halbert*, 217 Mich App 607; 552 NW2d 528 (1996), to control the outcome in this case. In *Halbert*, the respondent, who was under a court order to pay child support, was imprisoned the two years prior to the filing of the petition to terminate his rights. The respondent failed to pay support for the two-year period, claiming he had no assets with which to make the payments as a result of his imprisonment. This Court reversed the order terminating the respondent's parental rights, concluding that because of the respondent's imprisonment, it could not be determined whether he was unable, rather than unwilling, to make the support payments. *Id.* at 615-616. This Court held that the respondent's inability to earn a living and acquire the wherewithal to provide support for his child took him outside the intended scope of MCL 710.51(6); MSA 27.3178(555.51)(6), which is to terminate the parental rights and allow the adoption of children whose parents have essentially abandoned them, or who have refused to, or are unable to, consent to the adoption. *Id.*

Here, respondent was imprisoned for one of the two years prior to the filing of the petition to terminate his parental rights. Accordingly, for at least one of the two required years, it could not be determined whether respondent intended to withhold payment, or simply could not make the payments. In other words, because of defendant's imprisonment and concomitant lack of financial wherewithal it cannot be determined whether respondent has intended to abandon his child such that his parental rights must be terminated. See also, *Pierce v Pierce*, 162 Mich App 367, 370; 421 NW2d 291 (1987) (Where a noncustodial parent is imprisoned for a crime other than nonsupport, that parent is not liable for child support while incarcerated unless it is affirmatively shown that he or she has income or other assets to make such payments).

Accordingly, we conclude that defendant's failure to provide support under § 51(6)(a) was not proven and the order terminating respondent's parental rights is reversed.

/s/ Richard A. Bandstra

/s/ Janet T. Neff

/s/ Michael E. Dodge

<sup>1</sup> Although this case does not involve the adoption of the minor by a stepparent, MCL 710.51(6); MSA 27.3178(555.51)(6) applies here pursuant to MCL 710.31(1); MSA 27.3178(555.31)(1) and MCL 710.39(2); MSA 27.3178(555.39)(2).