STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of STEPHEN RANDALL PROCK, Minor.

FAMILY INDEPENDENCE AGENCY, WALTER OLSICK, and LOIS OLSICK,

Petitioners-Appellees,

v

JUAN FLORES,

Respondent-Appellant.

UNPUBLISHED
August 31, 1999

No. 214515
Genesee Circuit Court
Family Division
LC No. 97-013691

Before: Hoekstra, P.J., and O'Connell and R.J. Danhof,* JJ.

PER CURIAM.

Respondent appeals as of right from a family court order terminating his parental rights to the minor child. We affirm.

On November 29, 1989, Nancy Prock gave birth to a child out of wedlock, Stephen Randall Prock. Immediately following Nancy Prock's death in 1992, petitioners Walter and Lois Olsick, neighbors of Nancy Prock, filed a petition in the probate court seeking appointment as Stephen's guardians. Following a hearing, the probate judge entered an order, pursuant to MCL 700.424(2)(a); MSA 27.5424(2)(a), finding that Stephen was in need of a guardian because his mother's parental rights had been terminated by death, and his father's parental rights had been terminated by disappearance. The order further appointed the Olsicks as Stephen's full guardians.

In 1998, the Olsicks sought authorization from the court to execute a release of the child so they could adopt him. During the hearing, counsel appeared on behalf of respondent Juan Flores, who was serving a prison sentence in New York, and indicated that, although respondent had not acknowledged or established paternity, respondent believed he was the child's biological father. Counsel for the

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

Olsicks indicated that the Olsicks denied any knowledge of respondent and had never talked to him or seen him. The Olsicks further noted that Stephen has a conservatorship account from a malpractice suit filed after his mother's death and that respondent surfaced only after becoming aware of the child's inheritance.

Following an adjournment to allow counsel to speak to respondent, respondent's counsel informed the court that respondent had lived with Nancy Prock for a year and then separated. After respondent moved to New York, Prock informed him that she was pregnant, but did not tell him that he was the father. Respondent alleged that he first became aware that he was the child's father when he received a letter in August 1994 from a friend of Nancy's indicating that Nancy had died and that he was the child's father. The letter allegedly stated that the mother had been trying to contact respondent so that he could establish paternity prior to her death. Counsel stated that respondent also had a letter from the Genesee County Prosecutor, who had attempted to locate him to obtain an order of child support.

Counsel further informed the court that respondent had been sentenced in July 1993 for a manslaughter conviction, and that he had been denied parole in June 1998 and would not be eligible for parole again until May 2000. Counsel indicated that respondent had a criminal history that included misdemeanor convictions for "street fights" or disorderly conduct. Counsel stated that respondent wanted to establish paternity and allow the Olsicks to continue as guardians until he is released from prison, at which time he would establish a relationship with the child. Respondent informed counsel that, if the child chose to be adopted by the Olsicks after talking with him, he would step aside.

The court found that respondent had established no rights to the child, given that he had not established paternity and that the 1992 order appointing the Olsicks as full guardians had determined at that time that respondent's rights were terminated based on his disappearance, his address being unknown. Respondent's counsel then added that respondent had informed him that he visited the mother and child in 1990, providing diapers, milk, and clothes to the child. The court deemed this information to be legally irrelevant because respondent's rights were already terminated under the previous guardianship order and agreed with the FIA's representative that such a consideration would only be relevant if there was a petition for a hearing to identify the father of a child born out of wedlock and to determine or terminate his rights.[1] The court then interjected that it was making a "finding that it's [in] the best interest of the child that there be the adoption. . . ." After respondent's counsel inquired as to the statutory basis for termination of respondent's parental rights, the court indicated that the Olsicks, as full guardians, had the legal authority to consent to the adoption, and that, "for the record," it was going to enter an order terminating respondent's parental rights. This appeal followed.

On appeal, the parties would apparently agree that the lower court terminated respondent's rights to the minor child pursuant to § 39 of the Adoption Code, MCL 710.39; MSA 27.3178(555.39), notwithstanding the court's failure to cite any specific statutory provision on the record or in its order. Having carefully reviewed the record, we agree that respondent's rights to the child were terminated, in particular, pursuant to subsection 39(1) of the Adoption Code.[2] The statute provides:

> (1) If the putative father does not come within the provisions of subsection (2), and if the putative father appears at the hearing and requests custody of the child, the court shall inquire into his fitness and his ability to properly care for the child and shall determine whether the best interests of the child will be served by granting custody to him. If the court finds that it would not be in the best interests of the child to grant custody to the putative father, the court shall terminate his rights to the child.
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> (2) If the putative father has established a custodial relationship with the child or has provided support or care for the mother during pregnancy or for either mother or child after the child's birth during the 90 days before notice of the hearing was served upon him, the rights of the putative father shall not be terminated except by proceedings in accordance with section 51(6) of this chapter or section 2 of chapter XIIA. [MCL 710.39; MSA 27.3178(555.39).]

On appeal, respondent argues that, because he alleged that he had provided support for the minor child prior to the mother's death, he came within the provisions of subsection 39(2), thereby entitling him to the more rigorous procedures for termination of his rights under MCL 710.51(6); MSA 27.3178(555.51)(6).[3] We disagree. Respondent asserted that he provided diapers, milk, and clothes for the child during visits with the mother and child in 1990, when the child was less than one year old. The hearing on the Olsicks' petition to adopt the child was held in 1998, and respondent has not alleged that he provided any care or support whatsoever during those intervening eight years. As such, he clearly did not satisfy the requirement of subsection § 39(2) of "provid[ing] support or care for the mother during pregnancy or for either mother or child after the child's birth *during the 90 days before notice of the hearing was served upon him*." We expressly reject respondent's assertion that his incarceration prevented him from providing any care or support to the minor child. See *In re Caldwell*, 228 Mich App 116, 123-124; 576 NW2d 724 (1998).

Because respondent does not fall within the provisions of subsection 39(2), we turn to subsection 39(1), which provides that the lower court "shall inquire into his [the putative father's] fitness and his ability to properly care for the child and shall determine whether the best interests of the child will be served by granting custody to him. If the court finds that it would not be in the best interests of the child to grant custody to the putative father, the court shall terminate his rights to the child." This Court has recently held that, for purposes of termination under § 39, the best interests factors in the Adoption Code are to be evaluated as to the putative father alone, not in comparison with the prospective adoptive parents. *In re Dawson*, 232 Mich App 690, 697-699; 591 NW2d 433 (1998). Here, although it appears that the lower court made a cursory determination that it would not be in the best interests of the child to grant custody to respondent, we are persuaded that the court was fully aware of the relevant circumstances and that a remand for a detailed examination of the best interests factors set forth in MCL 710.22(f); MSA 27.3178(555.22)(f) would neither change the outcome of the proceeding nor would it facilitate our review of this matter. The undisputed facts are that respondent is currently serving a prison sentence in New York for manslaughter, that he has provided no financial support for the child during the previous eight years, that he has not communicated with the child by telephone or letter during this period, and that, until recently, he has avoided or failed to pursue any

attempt to establish paternity.[4] Accordingly, in order "to give the adoptee permanence at the earliest possible date," see § 22(f), we conclude that the lower court did not err in terminating respondent's rights to the child, if indeed he had any, pursuant to subsection 39(1) of the Adoption Code.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Peter D. O'Connell
/s/ Robert J. Danhof

[1] See MCL 710.24a(2); MSA 27.3178(555.24a)(2) and MCL 710.36; MSA 27.3178(555.36).

[2] To the extent that the 1992 order appointing the Olsicks as the child's guardians can be read as "terminating" respondent's parental rights on grounds of "disappearance," the order is vacated. Given the circumstances at that time, respondent's rights to the child, if any, were subject only to suspension, not termination. See MCL 700.424(2)(a); MSA 27.5424(2)(a).

[3] We note, in passing, that in 1998 the Legislature amended subsection 39(2) by substituting "substantial and regular support or care in accordance with the putative father's ability to provide such support or care" for "support or care." 1998 PA 94.

[4] Respondent could have filed a complaint under the paternity act, MCL 722.711 *et seq.*; MSA 25.491 *et seq.*, seeking to establish his paternity of the minor child. See *Afshar v Zamarron*, 209 Mich App 86, 89-90; 530 NW2d 490 (1995).