

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of HONESTY LYNN KELLER, Minor.

KITTY LYNN HOOVER and KENNETH
MICHAEL HOOVER,

UNPUBLISHED
October 20, 2000

Petitioners-Appellees,

v

RAYMOND EARL KELLER,

Respondent-Appellant.

No. 224341
Emmet Circuit Court
Family Division
LC No. 98-000915-AD

Before: Fitzgerald, P.J., and Hood and McDonald, JJ.

PER CURIAM.

Respondent appeals as of right from a family court order terminating his parental rights pursuant to § 51(6) of the adoption code, MCL 710.51.(6); MSA 27.3178(555.51). We reverse.

It was improper as a matter of law for the trial court to inquire into respondent's ability to pay support for purposes of § 51(6)(a) where there was an existing support order. *In re Newton*, 238 Mich App 486, 491-493; 606 NW2d 34 (1999). Although the support order expressly reserved the question of child support until further order of the court because respondent was incarcerated, the order nevertheless constituted a judicial determination that respondent lacked the ability to pay support. Any inquiry into respondent's ability to pay under these circumstances would essentially allow a collateral attack of the support order. *Id.* Thus, the trial court erred in finding that § 51(6)(a) was satisfied on the basis that respondent had the ability to provide support and failed to do so. Accordingly, reversal is required.

We also conclude that reversal is required because the trial court failed to appoint counsel for respondent upon request. In a letter dated July 15, 1999, respondent was advised that his written request for the appointment of counsel was denied because "[t]here is no provision for the probate [sic] court to appoint counsel for parties in a stepparent adoption." However, in a stepparent adoption proceeding under § 51(6), the court has discretion to appoint counsel for an indigent, nonconsenting

parent in order to assure that the parent has the ability to present a case properly. *In re Sanchez*, 422 Mich 758, 770-771; 375 NW2d 353 (1985); *In re Fernandez*, 155 Mich App 108, 115; 399 NW2d 459 (1986). Here, not only does it appear that the trial court erroneously believed that it did not have the discretion to appoint counsel but, under the circumstances of this case, we believe a proper exercise of discretion warranted the appointment of counsel in order to protect respondent's rights. *Id.*

In light of our resolution of the foregoing issues, we need not address respondent's final issue.

Reversed.

/s/ E. Thomas Fitzgerald

/s/ Harold Hood

/s/ Gary R. McDonald