STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of BRITTON, Minors.

UNPUBLISHED
July 31, 2014

No. 319497
Mecosta Circuit Court
Family Division
LC No. 07-005180-NA

Before: FITZGERALD, P.J., and SAWYER and SHAPIRO, JJ.

PER CURIAM.

Respondent mother appeals as of right from the trial court's order terminating her parental rights to two of her children under MCL 712A.19b(3)(c)(*i*) and (g). We affirm.

Respondent first argues that her procedural due process rights were violated when she was permitted to participate in the termination hearing by way of videoconferencing, rather than by securing her personal presence at the hearing, when she was incarcerated in a nearby jail. Because respondent did not object to the videoconferencing procedure, our review of this issue is limited to plain error affecting substantial rights. *In re Frey*, 297 Mich App 242, 247; 824 NW2d 569 (2012), and review is limited to determining whether a plain error affected respondent's substantial rights. *In re Utrera*, 281 Mich App 1, 8; 761 NW2d 253 (2008).[1]

MCR 3.923(E) provides that a court "may allow the use of closed-circuit television, speaker telephone, or other similar electronic equipment to facilitate hearings or to protect the parties." While this rule could be read as allowing videoconferencing to facilitate a termination of parental rights hearing, it does not address whether videoconferencing would violate a respondent's procedural due process rights at such a hearing, which is the issue presented here.

In *In re Vasquez*, 199 Mich App 44; 501 NW2d 231 (1993), the respondent was not present at his termination hearing because he was incarcerated in Texas. This Court determined

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[1] We note that during the course of the proceeding respondent elected not to continue participating. While voluntarily being absent can constitute a waiver of the right to be present, *People v Buie*, 298 Mich App 50, 57; 825 NW2d 361 (2012), there is no evidence that respondent was specifically apprised of her right to be present and, accordingly, there can be no finding that she knowingly and understandingly waived that right. *Id*. at 58.

that "he was well-represented by counsel and that his presence would have changed nothing, and that the financial and administrative burden of bringing him from Texas to attend the hearing would have been significant." *Id*. at 48. Moreover, this Court did "not believe that an incarcerated parent is entitled as a matter of absolute right to be present at the dispositional hearing of a proceeding to terminate parental rights" and stated:

> In light of present-day telecommunications, other means that fall short of securing the physical presence of a parent are available to ensure that an incarcerated prisoner receives due process at a dispositional hearing. Had respondent wanted to provide evidence concerning his fitness and efforts to provide a fit home for his children, he could have been deposed by telephone or by videotape. Although respondent had the right to be deposed, he made no request. Even during the hearing, respondent's attorney could have conferred with his client by telephone concerning the progress of the case in order to allow respondent to assist his counsel in his defense. The availability of such means of communication militates against securing the physical presence of an incarcerated parent at a dispositional hearing as a matter of due process.
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> What due process requires is the application of the three-part balancing test set forth in *Mathews* [*v Eldridge*, 424 US 319, 335; 96 S Ct 893; 47 L Ed 2d 18 (1976)]. It is this test that determines whether a probate court has to secure the physical presence of an incarcerated parent at a termination hearing. Where, as in [*In re Render*, 145 Mich App 344; 377 NW2d 421 (1985)], the balancing test weighs in favor of the physical presence of an incarcerated parent at the hearing,[2] the probate court must secure the parent's presence at the termination hearing. Where, as in this case, the balancing test weighs against the incarcerated parent, there is no such requirement. Thus, it is the *Mathews* balancing test that is critical in determining whether the probate court must secure the physical presence of an incarcerated parent at a termination hearing as a matter of due process. To hold otherwise would be to say that there is never a requirement of producing incarcerated parents at trial even if they are in a nearby jail and the court finds that their physical presence is essential either to assist counsel or to resolve crucial factual disputes. [*In re Vasquez*, 199 Mich App at 48-50 (emphasis added).]

What *In re Vasquez* clearly states is that application of the *Mathews* analysis will determine the issue. See also *In re Brock*, 442 Mich 101, 111; 499 NW2d 752 (1993), and *In re Moss*, 301 Mich App 76, 85; 836 NW2d 182 (2013).

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[2] In *In re Render*, 145 Mich App 344, the Court found a due process violation when a respondent was not brought from a county jail for a termination of parental rights hearing. However, in *In re Vasquez*, 199 Mich App 44, this Court noted that at the time *In re Render* was decided, MCL 712A.19 required a parent's presence at such a hearing, whereas now only notice is required. Moreover, attendance by way of videoconferencing was not at issue in *In re Render*.

Regarding the private interests affected, *In re Vasquez*, 199 Mich App at 48, recognizes that the interest in parental rights is compelling, whereas *In re Moss*, 301 Mich App at 86, notes the child's interest in a normal family home. Regarding "the risk of an erroneous deprivation of such interest" and "the probable value" "of additional or substitute procedural safeguards," respondent argues that she could have conferred with counsel to advise when witnesses were lying and provided information not recognized as important until trial. However, the videoconferencing allowed respondent to hear everything that was being said and, because there was two-way communication, respondent presumably could have asked to confer with her counsel. Respondent has not indicated that witnesses said anything that counsel would not have anticipated, and respondent has not identified any additional information that she would have provided to counsel. Presumably, counsel could have requested a recess to confer with her client before cross-examining a witness if any testimony was unexpected. Respondent's physical presence at the hearing may have been more practical and, if she had established that her interests were in fact compromised, this factor would weigh in favor of finding a due process violation. Regarding the government's interest, because there was no objection, the government was not called on to justify the procedure. However, there does not appear to be any inherent compelling burden on the government that would militate in favor of videoconferencing when the jail is nearby.

Given the compelling interest, if there is a failure to show that the government would be unduly burdened by bringing someone from a nearby jail and there is a showing that hindering communication between client and counsel might compromise the proceedings, due process would require that a parent be brought to a termination of parental rights hearing. Because the risk cannot be easily ascertained ahead of time, the better practice would be to allow for actual presence. Here, however, it is not clear that there was actual error because the absence of an objection did not call for an assessment of whether respondent's interests were adequately protected or whether the government would have been unduly burdened. While an error *may* have occurred, it cannot be said that any error was plain. Moreover, respondent has not established that the error affected the outcome of the lower-court proceedings; she argues only that it is unclear what would have happened with more involved participation. Accordingly, we conclude that respondent is not entitled to relief.

Respondent next argues that the trial court clearly erred in finding that grounds for termination under MCL 712A.19b(3)(c)(*i*) and (g) were established by clear and convincing evidence. See *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010). Respondent's argument regarding subsection (c)(*i*) is not clear. She notes that her therapist and Dr. Byron David Barnes, a licensed psychologist, came up with different diagnoses for respondent, and she suggests that perhaps she did not need therapy for borderline personality disorder because Dr. Barnes did not make this diagnosis. Moreover, she acknowledges the progress of the children's father in getting his life together, but points out that, unlike respondent, he did not have a mental illness or post-traumatic stress disorder. Even if these points are accurate, they do not undercut the trial court's decision regarding subsection (c)(*i*). The evidence indicated that respondent had not complied with recommended treatment for her substance abuse, still needed substantial services for her emotional problems, and was currently incarcerated and did not otherwise have suitable housing. Accordingly, the trial court did not clearly err in determining that the conditions that led to adjudication—respondent's homelessness, emotional instability, substance abuse, and

criminality—continued to exist, that there had been no progress, and that change within a reasonable time was unlikely.

Regarding subsection (g), respondent maintains that the children were living with their father and therefore had proper care and custody. She claims that she placed the children with her sister and apparently her other children and these children with their fathers, and that they were never without food, shelter, or other necessities. However, the original petition alleged that respondent was at a shelter, that she left the children overnight with a woman from the shelter who she did not know well and without advising where she was going, and that when she returned she tested positive for marijuana. The petition further alleged that respondent was then asked to leave the shelter "and agreed to allow the boys to reside with their father in lieu of court involvement." Thus, it appears that respondent did not place the children with their father, but acquiesced to the placement. Moreover, at the plea hearing to allow the court to take jurisdiction over the children, respondent admitted that she was sanctioned for Cash Assistance violations, that she did not have the financial means to secure appropriate housing, that she currently had housing through her sister who did not have enough bedrooms for the children to live there, and that she was unable to provide housing due to incarceration. This established that she failed to provide proper care and custody. The trial court did not clearly err in finding that no progress had been made to remedy this situation and that there was no reasonable likelihood that respondent would be able to provide proper care and custody within a reasonable time.

Finally, respondent argues that terminating her parental rights was not in the children's best interests. Whether termination is in a child's best interests is determined by a preponderance of the evidence. *In re Moss*, 301 Mich App at 90. The best interests determination is reviewed for clear error. *In re Olive/Metts*, 297 Mich App 35, 41; 823 NW2d 144 (2012). Respondent argues that termination was premature because she had a bond with her children, a stable parent was involved, and there were viable alternatives to termination. While Dr. Barnes indicated that respondent had good parenting skills when she was sober and that she was bonded with the children, he noted that "she doesn't seem to be doing anything to adjust her substance dependence and the level of violence that's occurring despite being offered lots and lots of opportunities to try to address those concerns." Further, he noted that she was getting worse, that she was "so violent when she's using," that she was out of control, and that because she could not consistently get her life together she was missing visits, which was detrimental to the children. Moreover, while care by relatives weighs against termination and must be affirmatively considered in a best interests analysis, *In re Mason*, 486 Mich 142, 164; 782 NW2d 747 (2010), the court did not clearly err in determining that the alternative of supervised parenting time was not viable. The evidence indicated that the five individuals who respondent proposed for supervision were unsuitable. One had been assaulted by respondent's mother and was no longer available, whereas others had histories of domestic or other violence, and another made disparaging comments about the father's fiancé, who cared for the children. Respondent rejected two aunts who had been suggested by the children's father as possibilities. Respondent suggests that the Friend of the Court could have provided a supervisor, but it is not clear that this service was provided in Mecosta County, and respondent has not cited any authority suggesting that either the Friend of the Court or the Department of Human Services in a given county must provide such services. Because supervised visitation could not be facilitated and unsupervised parenting time was not a viable option given respondent's current issues with substances and

violence, we find no clear error in the trial court's finding that termination of respondent's parental rights was in the children's best interests.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ David H. Sawyer
/s/ Douglas B. Shapiro