

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of ANDREW MICHAEL JASON
HAAMEN, Minor.

JENNIFER LYNN PATRU and JEFFREY ALAN
PATRU,

UNPUBLISHED
January 2, 2001

Petitioners-Appellees,

v

ANDREW JASON HAAMEN,

Respondent-Appellant.

No. 228064
Macomb Circuit Court
Family Division
LC No. 00-015622

Before: Sawyer, P.J., and Jansen and Gage, JJ.

PER CURIAM.

Petitioners Jennifer Lynn Patru and Jeffrey Alan Patru are the involved minor's biological mother and stepfather, respectively. In 1999, petitioners sought the stepfather's adoption of the minor and the termination of the parental rights of respondent, the minor's biological father. Respondent appeals as of right from a family court order terminating his parental rights pursuant to MCL 710.51(6); MSA 21.3178(555.51)(6). We affirm.

Respondent first contends that the family court erroneously found grounds for terminating his parental rights under MCL 710.51(6); MSA 21.3178(555.51)(6). A petitioner in an adoption proceeding must prove by clear and convincing evidence that termination of parental rights is warranted. This Court reviews the family court's findings of fact under the clearly erroneous standard. A finding is clearly erroneous if, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake was made. *In re Hill*, 221 Mich App 683, 691-692; 562 NW2d 254 (1997).

After reviewing the record, we detect no error in the family court's finding by clear and convincing evidence that respondent failed to support the minor. MCL 710.51(6)(a); MSA 21.3178(555.51)(6)(a). Uncontradicted evidence demonstrated that within the two-year period before the mother and stepfather filed their petition for adoption, respondent neither before or after his November 1998 incarceration voluntarily made any payments toward the minor's support or child care expenses, as a 1995 divorce order required. *In re Caldwell*, 228 Mich App

116, 122; 576 NW2d 724 (1998) (noting that under subsection 51(6)(a) “the petitioner need not prove that the respondent had the ability to support the child where the court has previously entered a support order. The petitioner need only prove that the respondent has failed to comply substantially with the support order for the statutory period.”). Respondent’s failure to comply with the support order extended beyond the two-year period. *In re Hill, supra* at 692-693 (“circumstances beyond the applicable two-year statutory period may be considered”). Contrary to respondent’s suggestion, the mere fact of his incarceration does not shield him from termination of his parental rights under MCL 710.51(6); MSA 21.3178(555.51)(6). *In re Caldwell, supra* at 120-121 (noting that subsection 51(6) contains no “incarcerated parent” exception).

With respect to subsection 51(6)(b), we cannot characterize as clearly erroneous the family court’s determinations that respondent substantially failed to contact or communicate with the minor.¹ Before his incarceration, respondent, who in 1996 moved to Kentucky, made minimal contact with the minor: from 1996 through November 1998 respondent visited the minor twice, made a “few” phone calls and mailed the minor no cards or letters. After his incarceration, during the period from November 1998 until the May 2000 hearing date, respondent apparently sent the minor approximately one letter per month, including a February 2000 birthday card, and made collect telephone calls to the minor approximately once per month. Respondent’s recent, more frequent contacts with the minor, although commendable, do not satisfy subsection 51(6)(b). See *In re Caldwell, supra* at 122 (noting that infrequent contacts do not satisfy the statute). While some evidence indicated that petitioners’ privacy manager telephone call screener frustrated an unspecified number of respondent’s attempted calls to the minor, no explanation for respondent’s lack of more frequent written communications appears in the record.

Considering respondent’s most recent letters and phone calls in context with (1) the very minimal contacts that occurred during the remainder of the relevant two-year period (and beyond), (2) the minor’s apparent availability to communication and visitation during this period, and (3) respondent’s decision during that time to reside far from the minor and not take advantage of available weekend visits with the minor or even contact the minor regularly, we are not left with a definite conviction that the family court mistakenly concluded that during the two-year period respondent substantially failed to maintain contact with the minor despite having the ability to do so.

¹ Because the evidence showed that during the last eight months of the statutory two-year period respondent was imprisoned in Kentucky, petitioners were precluded from establishing that during the two-year period respondent substantially failed to visit the minor while maintaining the ability to do so. Because subsection 51(6)(b) utilizes the conjunction “or”, however, a petitioner merely need “prove that [the] respondent had the ability to perform any one of the acts [visit, contact or communicate] and substantially failed or neglected to do so for two or more years preceding the filing of the petition.” *In re Hill, supra* at 694.

Respondent next argues that the family court violated his due process rights when it declined a request to secure respondent's attendance at the termination hearing. We review constitutional issues de novo. *In re Hawley*, 238 Mich App 509, 511; 606 NW2d 50 (1999).

"It is well established that parents have a significant interest in the companionship, care, custody, and management of their children. This interest has been characterized as an element of 'liberty' to be protected by due process." *In re Brock*, 442 Mich 101, 109; 499 NW2d 752 (1993).

Generally, three factors will be considered to determine what is required by due process:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. [*Id.* at 111, quoting *Mathews v Eldridge*, 424 US 319, 335; 96 S Ct 893; 47 L Ed 2d 18 (1976).]

"[I]t 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." *In re Vasquez*, 199 Mich App 44, 50; 501 NW2d 231 (1993).

With respect to the first interest considered in the due process balancing analysis, respondent possessed a compelling interest in his parental rights. *Vasquez*, *supra* at 47, 48. Regarding the second consideration, we detect in this case minimal "risk of an erroneous deprivation of [respondent's] interest" merely because respondent did not attend the May 3, 2000 hearing. *Brock*, *supra*, quoting *Mathews*, *supra*. In this case, as in *Vasquez*, "respondent's presence at the side of his counsel would have changed nothing." *Id.* at 48. At the commencement of the termination hearing, respondent's counsel repeatedly asserted his preparedness for the hearing. Respondent's counsel questioned the witnesses regarding the extent of respondent's contacts with the minor, elicited from the mother that petitioners' privacy manager frustrated some of respondent's attempts to communicate with the minor, called respondent's mother as a witness, and suggested that since his incarceration respondent had communicated with the minor to the extent possible. Respondent in his brief on appeal suggested no further, specific facts he would have elicited or revealed had he personally participated in the hearing. Furthermore, most of the facts presented at the termination hearing concerning the number of respondent's contacts with the minor appeared to be undisputed, and respondent's mother testified regarding respondent's love for and desire to establish a relationship with the minor.

Concerning the third factor balanced, this case also involves, like *Vasquez*, a substantial financial and administrative burden to bring respondent from his out of state confinement to attend the hearing.² *Id.* at 48. Moreover, this case involved what would have been the additional

² Although respondent's counsel apparently sought unsuccessfully to arrange during the hearing a telephone call to the imprisoned respondent, respondent never sought to be deposed, to provide
(continued...)

burden of a fourth adjournment of the termination hearing because of respondent's untimely request to be present. Despite respondent's awareness since January 2000 of several scheduled hearings, respondent did not until days before the May 3, 2000 hearing seek to attend. Respondent's counsel at the beginning of the May 3, 2000 hearing requested an adjournment, indicating that four days before this hearing he received a letter from respondent expressing his desire to attend the termination hearing. As the family court noted, however, "the Court itself has not received any communication from the father indicating his desire to be present; as a matter of fact, his actions . . . indicate[] that he was not going to be present and was attempting to make arrangements for his mother to represent him in his absence."

We conclude that no due process violation occurred in this case because despite respondent's compelling interest in protecting his parental rights, respondent's testimony at the termination hearing was not essential and petitioners and the court would have been substantially burdened by adjourning the hearing a fourth time and securing respondent's presence.³ *Brock, supra; Vasquez, supra.*

Affirmed.

/s/ David H. Sawyer
/s/ Kathleen Jansen
/s/ Hilda R. Gage

(...continued)

videotaped testimony or to arrange a collect call to the family court. See *Vasquez, supra* at 48-49 (discussing available means of ensuring that an incarcerated parent receives due process, other than securing the incarcerated parent's physical presence).

³ Although the family court did not explicitly balance the three due process considerations, we affirm because the family court reached the correct result. *Taylor v Laban*, 241 Mich App 449, 458; 616 NW2d 229 (2000).