

STATE OF MICHIGAN
COURT OF APPEALS

UNPUBLISHED

June 17, 2010

In the Matter of G. F. HOLMES and D. M.
HOLMES, Minors.

No. 295427

Ingham Circuit Court

Family Division

LC No. 09-001471-NA

09-001472-NA

Before: K. F. KELLY, P.J., and WILDER and GLEICHER, JJ.

PER CURIAM.

Respondent G. L. Holmes (“respondent”) appeals as of right from the trial court’s orders terminating his parental rights to the minor children pursuant to MCL 712A.19b(3)(g) and (h). We reverse and remand for further proceedings. This appeal has been decided without oral argument pursuant to MCR 7.214 (E).

In August 2009, petitioner, the children’s guardian, filed a petition requesting termination of respondents’ parental rights. The petition alleged that petitioner had been the children’s guardian since 2001, during which time the children had not had any contact with their parents. The petition further alleged that respondent was incarcerated in prison and was not expected to be released until 2050.

After receiving notice of the proceedings, respondent, who was incarcerated in Illinois, sent the trial court a letter requesting that he be allowed to attend the hearing. The trial court denied respondent’s request, but appointed counsel to represent him. Respondent later sent a second letter requesting that he be allowed to participate in the hearing by telephone. The trial court took no action on that request. Before the start of the termination hearing, the court allowed respondent’s counsel to withdraw. No new attorney was appointed, leaving respondent without representation at the termination hearing. After hearing testimony from petitioner, the trial court terminated respondent’s parental rights to the children.¹

¹ At the hearing, petitioner admitted that respondent had sent the children approximately 12 letters in the previous two years, and that the children visited respondent in prison in July 2009. Respondent’s letters to the trial court described a history of more frequent correspondence with his children.

Respondent now argues that the trial court's refusal to allow him to participate in the termination hearing, either personally or by telephone, violated his due process rights. We agree.

"[P]arents 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). "Due process in civil cases generally requires notice of the nature of the proceedings, and an opportunity to be heard in a meaningful time and manner, and an impartial decisionmaker." *In re Juvenile Commitment Costs*, 240 Mich App 420, 440; 613 NW2d 348 (2000). If a respondent is incarcerated, the court may allow him to attend the proceedings through electronic means, such as use of a speaker phone. MCR 3.923(E). The court's failure to secure an incarcerated parent's presence at a child protective proceeding may constitute a denial of due process. *In re Vasquez*, 199 Mich App 44, 49-50; 501 NW2d 231 (1993). To determine whether a respondent has been denied his constitutional due process right to be present at a termination hearing, the courts apply the three-part balancing test set forth in *Mathews v Eldridge*, 424 US 319; 96 S Ct 893; 47 L Ed 2d 18 (1976). *In re Vasquez*, 199 Mich App at 46-47. Those factors are as follows:

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 [third], the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. [*Mathews*, 424 US at 335.]

Respondent's interest in his parental rights is a compelling one. *In re Vasquez*, 199 Mich App at 48. The risk of an erroneous deprivation of that interest is unclear from the record. Although there was some evidence that respondent will remain incarcerated for approximately 40 more years, respondent stated in a letter to the court that he could be released in as little as three years. There was also evidence that respondent had remained in contact with the children during his incarceration, the frequency of which is also unclear. Because the children had been with petitioner for several years, the children were already in their mid-teens when the petition was filed, and respondent was not seeking custody, there was no apparent compelling reason for immediate termination of respondent's parental rights. While the trial court was not required to undertake the expense of having respondent attend the hearing in person, *In re Vasquez*, 199 Mich App at 49-50, it offered no explanation for not allowing respondent to participate by telephone, as respondent had requested, the financial and administrative burden of which would have been minimal. Further, the court discharged respondent's counsel before the hearing, leaving respondent's interests unrepresented at the hearing. Because respondent was not represented at the hearing and was not allowed to participate in the hearing, his due process rights were violated.²

² We also note that our Supreme Court recently held in *In re Mason*, ___ Mich ___; ___ NW2d ___ (Docket No. 139795, issued May 26, 2010), that MCR 2.004 precludes a court from granting relief for a moving party, such as petitioner in this termination of parental rights matter, where
(continued...)

Reversed and remanded for further proceedings not inconsistent with this opinion. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ Kurtis T. Wilder
/s/ Elizabeth L. Gleicher

(...continued)

the moving party and the court have not offered a party incarcerated by the Department of Corrections an opportunity to participate in the proceeding. Respondent does not rely on this court rule because, as he notes, he is incarcerated by the Illinois Department of Corrections, and MCR 2.004 only addresses parties incarcerated under the jurisdiction of the Michigan Department of Corrections. *In re BAD*, 264 Mich App 66, 71; 690 NW2d 287 (2004).