

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of JORDAN BEENEY, Minor.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

MARIO SPEARS,

Respondent-Appellant.

UNPUBLISHED

October 3, 2006

No. 269216

Berrien Circuit Court

Family Division

LC No. 04-000054-NA

Before: Borrello, P.J., and Jansen and Cooper, JJ.

PER CURIAM.

Respondent appeals as of right the order terminating his parental rights to the minor child under MCL 712A.19b(3)(g). We affirm. This appeal is being decided without oral argument. MCR 7.214(E).

Respondent argues on appeal that the lower court denied his due process rights when it failed to request his release or telephone participation from an Indiana jail. MCR 3.973(D)(2) prohibits the trial court from denying a respondent's right to attend the hearing, but does not require the court to secure the respondent's physical presence. *In re Vasquez*, 199 Mich App 44, 49; 501 NW2d 231 (1993). Generally, the court may hold the hearing in the respondent's absence if he received proper notice. MCR 3.973(D)(3). Respondent in the present case does not dispute that he was personally served with notice. However, respondent argues that due process required more because of his incarceration.

Citing *Mathews v Eldridge*, 424 US 319, 334-335; 96 S Ct 893; 47 L Ed 2d 18 (1976), respondent contends that we must balance his compelling interest in custody, the increased risk of erroneous deprivation, and the increased burden on the state. See also *In re Vasquez, supra* at 47-48. We do not dispute that parents have a fundamental liberty interest in the care, custody, and upbringing of their children. *Troxel v Granville*, 530 US 57, 65-66; 120 S Ct 2054; 147 L Ed 2d 49 (2000); *In re Trejo*, 462 Mich 341, 373-374; 612 NW2d 407 (2000). Further, the burden on the state in this case was relatively low because of the short distance between the trial court and the Indiana jail, and the ease of telephone participation. Finally, we note that respondent was not well represented at the hearing, where his attorney failed to make any argument or question any witnesses. As we have observed in the past, "[i]t cannot be doubted that . . . the presence of the very person whose rights the state aims to take away is of some

‘probable value’ to the correctness of the result.” *In re Render*, 145 Mich App 344, 349; 377 NW2d 421 (1985); see also *In re Vasquez, supra* at 47-48. Thus, the facts of the present case are clearly distinguishable from those of *In re Vasquez*, where the respondent was well represented by counsel at the termination hearing and the burden on the state was heightened by respondent’s incarceration in a distant Texas jail. The trial court’s failure in this case to seek respondent’s presence or to allow respondent’s participation by telephone may have amounted to a technical violation of respondent’s due process rights. *In re Render, supra* at 349-350.

However, because any constitutional error in this case was harmless and did not affect the outcome of the proceedings, we affirm the trial court’s decision. It is significant that respondent made no effort to contact his attorney or the trial court until after the termination proceedings had concluded, despite having received proper notice. More importantly, sufficient independent evidence supported the trial court’s termination of respondent’s parental rights, as discussed below. We are convinced that any constitutional error was not decisive to the outcome, and we will not reverse on the basis of harmless error.¹ *In re Gazella*, 264 Mich App 668, 675; 692 NW2d 708 (2005); see also MCR 2.613(A).

Respondent argues that the trial court improperly terminated his parental rights. Respondent does not specifically dispute the court’s finding that the statutory ground for termination was properly established. MCL 712A.19b(3)(g). Instead, he argues that termination was against the minor child’s best interests. Respondent does not claim to have a close bond with his young son, whom he saw only twice during the child’s first year of life and only sporadically since that time. The evidence showed that respondent did not have appropriate housing, independent transportation, or employment, even two years after the child was placed in foster care. Moreover, respondent was incarcerated on charges of domestic assault against his wife. The trial court acted properly when it found that termination was not clearly contrary to the child’s best interests. MCL 712A.19b(5).

Affirmed.

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Jessica R. Cooper

¹ The trial court must order telephone participation in termination proceedings for respondents incarcerated within the custody of “the Department of Corrections.” MCR 2.004. However, this Court has held that because MCR 2.004 is written in terms of “the Department of Corrections,” it applies only to respondents held in the custody of the Michigan department of corrections, and does not apply to respondents incarcerated outside the state. *In re BAD*, 264 Mich App 66, 71; 690 NW2d 287 (2004).