STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of MEGAN BACCA and MICHAEL BACCA, Minors.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

ANTHONY WILLIAMS,

Respondent-Appellant,

and

JAMI BACCA,

Respondent.

UNPUBLISHED
March 22, 2002

No. 234815
Bay Circuit Court
Family Division
LC No. 00-007128-NA

Before: Sawyer, P.J., and O'Connell and Zahra, JJ.

MEMORANDUM.

Respondent-appellant appeals as of right from the trial court order terminating his parental rights to Megan Bacca under MCL 712A.19b(3)(g). We affirm.

I

Respondent-appellant contends that his right to due process was violated when the trial court failed to secure his release from an Indiana prison so that he could attend the termination hearing in person. We disagree. We note that the trial court attempted to grant respondent-appellant's request for a release, only to learn that Indiana authorities would not allow his release for a non-criminal matter. The trial court did not err in proceeding with the hearing in respondent-appellant's absence.

This Court has held that an incarcerated respondent has no absolute right to attend a termination hearing. *In re Vasquez*, 199 Mich App 44; 501 NW2d 231 (1993). Instead, the trial court should apply the three-part balancing test of *Mathews v Eldridge*, 424 US 319, 335; 96 S Ct 893; 47 L Ed 2d 18 (1976). Under this test, the trial court must balance the value of the

private interest at stake, the risk that the respondent will be erroneously deprived of that interest if the court does not implement the requested procedure, and the burden on the government if it does implement the requested procedure. *Vasquez, supra*, pp 47-48; *In re Render*, 145 Mich App 344, 348-349; 377 NW2d 421 (1985).

Here, we are satisfied that these factors weighed in favor of holding the hearing despite respondent-appellant's inability to attend. Respondent-appellant has not shown that he was prejudiced by his inability to attend the hearing in person. His attorney presented favorable evidence regarding the possibility of an early release from prison; there is no apparent reason why he could not have presented any other favorable evidence on respondent-appellant's behalf. Respondent-appellant made no effort to avail himself of long distance communications such as a videotaped deposition. Respondent-appellant's argument that he might have better helped his defense if he had been in the courtroom is sheer speculation. Regarding the third part of the test, the trial court stated that Indiana authorities would not allow respondent-appellant's release, and respondent-appellant has not refuted this finding.

II

Respondent-appellant also argues that the trial court erred in finding sufficient evidence of statutory grounds to terminate his parental rights. This issue is based largely on respondent-appellant's claims of evidentiary errors. However, this issue is not properly presented because he did not raise it in his statement of questions presented. *In re Coe Trusts*, 233 Mich App 525, 536-537; 593 NW2d 190 (1999). In any event, we find no evidentiary error. Respondent-appellant's criminal record was not irrelevant; on the contrary, it was highly relevant to the question of whether he has been and will be able to provide his child with proper care and custody. MRE 401. Respondent-appellant contends that the evidence should have been excluded under MRE 404(b). However, MRE 404(b) is intended to prevent juries in criminal cases from making judgments about a defendant's propensity for criminal conduct based on prior bad acts. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993). It cannot logically apply to termination cases under § 19b(3)(g), where the trial court must make findings of fact not only as to a respondent's past behavior, but also as to his probable future behavior. Finally, respondent-appellant contends that the evidence was inadmissible hearsay under MRE 801. This argument is without merit because MRE 803(22) provides an exception for hearsay "[e]vidence of a final judgment, entered after a trial or upon a plea of guilty . . . adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment . . . ."

III

Finally, the trial court did not clearly err in finding that § 19b(3)(g) was established by clear and convincing evidence. MCR 5.974(I), *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). Petitioner-appellee's evidence established that respondent-appellant had been unavailable as a parent to his child since 1997, and that he failed to provide any support or care for her since being imprisoned. Respondent-appellant had never provided custody or meaningful support for the child, and he was not prepared to assume custody within a reasonable time. Because the evidence did not show that termination of respondent-appellant's parental rights was clearly not in the child's best interests, the trial court did not err in terminating his parental rights. MCL 712A.19b(5); *In re Trejo*, 462 Mich 341, 356-357; 612 NW2d 407 (2000).

Affirmed.

/s/ David H. Sawyer
/s/ Peter D. O'Connell
/s/ Brian K. Zahra