

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of MICHEAL GABRIEL GAIERA
and CHRISTIAN CROSS GAIERA, Minors.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

ROBERT REYES,

Respondent-Appellant.

UNPUBLISHED

July 1, 2008

No. 284047

Cass Circuit Court

Family Division

LC No. 06-000233-NA

Before: Meter, P.J., and Smolenski and Servitto, JJ.

PER CURIAM.

Respondent appeals as of right from the trial court order terminating his parental rights to the minor children pursuant to MCL 712A.19b(3)(c)(g) and (j). We affirm.

On appeal, respondent argues that the trial court violated his due process rights when it proceeded with the termination hearing in his absence and that there was not sufficient evidence to support termination of his parental rights without his testimony. We disagree.

To terminate parental rights, the trial court must find that at least one of the statutory grounds for termination set forth in MCL 712A.19b(3) has been met by clear and convincing evidence. *In re Sours*, 459 Mich 624, 632-633; 593 NW2d 520 (1999). If a statutory ground for termination is established, the trial court must terminate parental rights unless there exists clear evidence, on the whole record, that termination is not in the child's best interests. MCL 712A.19b(5); *In re Trejo Minors*, 462 Mich 341, 353; 612 NW2d 407 (2000). The trial court's decision terminating parental rights is reviewed for clear error. MCR 3.977(J); *Trejo, supra* at 355-357; *Sours, supra* at 632-633. A finding is clearly erroneous if, although there is evidence to support it, this Court is left with a definite and firm conviction that a mistake has been made. *In re JK*, 468 Mich 202, 209-210; 661 NW2d 216 (2003); *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). "[R]egard is to be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." *Id.* at 337.

Although respondent argues that he could have explained his failure to visit his sons and participate in services had he been present at trial, he provides no supportive argument regarding a lack of clear and convincing evidence to terminate his parental rights under statutory grounds.

The evidence shows that respondent was unable to demonstrate parental fitness and thus termination under MCL 712A.19b(3)(g) and (j) was warranted. Respondent's psychological evaluation gave him a poor prognosis and identified several areas of concern, including domestic violence, which respondent never addressed. Respondent also does not have an appropriate home for Micheal and Christian and has two outstanding criminal arrest warrants from the State of Indiana. When respondent had the opportunity to visit his children, he did not partake in visitation and has not seen the children in fifteen months. Respondent missed eleven months of court hearings. He said he wanted to follow through with his treatment plan but he only submitted one drug screen, had not completed parenting classes, and only attended counseling sporadically. The evidence showed that respondent could not provide proper care of his sons and that they would be harmed if returned to his care.

Respondent further argues that his due process rights were violated when the trial court proceeded with the termination hearing in his absence even though he had called to say he would be late for the hearing. Because respondent did not raise this due process issue in the trial court, the issue is not preserved and review is limited to plain error affecting substantial rights. *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000).

At a dispositional hearing, such as a permanent custody hearing, "the respondent has the right to be present or may appear through an attorney," MCR 3.973(D)(2), and the trial court "may proceed in the absence of parties provided that proper notice has been given." MCR 3.973(D)(3). Here, respondent's counsel appeared at the permanent custody hearing, and respondent does not dispute that he received proper notice. The court rule does not require that the court secure the physical presence of a parent, but only implies that the court shall not deny a parent's right to be present at the hearing. *In re Vasquez*, 199 Mich App 44, 49; 501 NW2d 231 (1993). In this case, the court did not deny respondent's right to be present. Respondent missed many hearings throughout the case, did not appear at the appointed time scheduled for the permanent custody hearing, and had not appeared by the conclusion of the proofs over an hour later.

Additionally, there is no absolute right to be physically present at the dispositional hearing of a proceeding to terminate parental rights in Michigan. *Vasquez, supra*. To determine when the court is obligated to assure a parent's presence at a court hearing so as not to violate due process guarantees, this Court applies a three-part balancing test set forth in *Mathews v Eldridge*, 424 US 319, 335; 96 S Ct 893; 47 L Ed 2d 18 (1976). *Vasquez supra*. This test balances the private interest at stake, the risk of an erroneous determination in the absence of the parent's physical presence, and the government's interest in avoiding the burden of physically producing the parent for the termination hearing.

In the instant case, it is unlikely that the risk of an erroneous deprivation was increased by respondent's absence because termination of his parental rights was based on his failure to visit the children for more than a year prior to the filing of the termination petition, his failure to commit to counseling, and his inability to provide suitable housing or demonstrate parental fitness. In light of the evidence, there is little chance that respondent's physical presence at his lawyer's side during the hearing would have changed the result of the hearing. See *Vasquez, supra*. Even assuming a further adjournment for respondent's testimony would not have been an onerous burden on the trial court, when considered in light of the minimal likelihood that such testimony could have altered the outcome of the trial, the denial of respondent's request for an

adjournment did not constitute a denial of due process. Given that respondent received timely notice and was free to attend the hearing, the court was not obligated to secure his presence.

Affirmed.

/s/ Patrick M. Meter

/s/ Michael R. Smolenski

/s/ Deborah A. Servitto