

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of TYREANNA RONASHIA
CLARK, Minor.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

TYRONE CLARK,

Respondent-Appellant,

and

VALERIA RENE GIBBS,

Respondent.

UNPUBLISHED

July 21, 2009

No. 289231

Kent Circuit Court

Family Division

LC No. 07-054650-NA

Before: Davis, P.J., and Murphy and Fort Hood, JJ.

PER CURIAM.

Respondent Tyrone Clark appeals as of right from the trial court's order terminating his parental rights to the minor child pursuant to MCL 712A.19b(3)(h). We affirm.

The minor child was removed from her mother's custody in October 2007, after her mother absconded while on parole for various criminal convictions. Respondent was incarcerated in a federal prison in California at that time and remained incarcerated throughout the pendency of this case. He is not due to be released until 2011 or 2012. The trial court terminated respondent's parental rights to the child following a hearing in October 2008.

In his sole issue on appeal, respondent argues that his constitutional right to due process was violated because no effort was made to ensure that he had proper notice of the proceedings, and because no attempt was made to secure either his presence or participation in the termination hearing. Because respondent, who was represented by counsel, did not raise any due process claim below, this issue is not preserved. We review unpreserved issues for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Respondent correctly observes that MCR 2.004 is not applicable to this case because respondent was incarcerated in a federal prison in California and was not under the jurisdiction of the Michigan Department of Corrections. *In re BAD*, 264 Mich App 66, 71; 690 NW2d 287 (2004). However, respondent is proceeding solely under constitutional due process principles, and due process requires that a parent receive notice of a hearing potentially affecting his liberty interest in a child and that a parent have an opportunity to participate in the hearing, either personally or through counsel. *In re AMB*, 248 Mich App 144, 209-213; 640 NW2d 262 (2001); *In re Vasquez*, 199 Mich App 44, 49-50; 501 NW2d 231 (1993). Further, the extent of a parent's right to be present at or participate in the hearing is determined by the three-part balancing test set forth in *Mathews v Eldridge*, 424 US 319, 335; 96 S Ct 893; 47 L Ed 2d 18 (1976). *In re Vasquez*, *supra* at 47-50.

In this case, the record discloses that petitioner confirmed respondent's imprisonment in California before the initial preliminary hearing and that respondent was served with both the original petition and the supplemental petition requesting termination of respondent's parental rights. In particular, before the initial adjudicatory and dispositional hearing, and again before the termination hearing, orders for alternate service were obtained that allowed petitioner to serve respondent by certified mail at the prison in California. In addition, the lower court record contains: (1) a proof of service by certified mail, dated October 23, 2007, for the summons and original petition, and a signed receipt from the prison dated October 29, 2007; and (2) a proof of service by certified mail, dated August 22, 2008, for the summons and supplemental petition for termination, and a signed receipt from the prison dated August 26, 2008. Moreover, testimony at the hearings and statements by respondent's counsel also reveal that respondent had notice and was fully aware of the proceedings. Thus, there was no due process violation with respect to notice.

With respect to respondent's claim that he should have been offered the opportunity to either appear at the termination hearing or to participate in the hearing by telephone or by other electronic means, this case is similar to *In re Vasquez*, *supra*. There, this Court applied the three-part balancing test from *Mathews*, *supra*, finding no due process violation where the respondent, who was incarcerated in Texas and represented by counsel, was not given the opportunity to appear at a hearing to terminate his parental rights, and where he did not request an opportunity to present evidence at the hearing by some other means. Applying the *Mathews* balancing test to this case, we similarly find no due process violation.

Respondent's interest in his parental rights is a compelling one. As in *In re Vasquez*, however, the risk of an erroneous deprivation of that right was not increased by his absence from the hearing. The record indicates that respondent had never been involved in his child's life, had been incarcerated in California throughout this case and thus did not participate in a treatment plan, and although he had been in contact with the caseworker, he had never expressed a desire to obtain custody of the child or to participate in the child's care after his release. Instead, respondent had expressed that his sister or another relative be investigated for possible placement. That was done, but respondent's relatives were determined not to be appropriate. Considering respondent's lack of involvement in his child's life and his continued incarceration throughout this case, and that he had never expressed an interest in obtaining custody of the child, the risk of an erroneous deprivation was not increased by his lack of participation at the hearing.

Furthermore, as in *In re Vasquez*, the financial and administrative burden on the state would have been great to secure respondent's presence from California. Certainly the burden would have been less to allow respondent to participate by telephone or by some other electronic means. Again, however, like the respondent in *In re Vasquez*, there is no indication that respondent ever requested that he be allowed to participate in the termination hearing, either personally or by other electronic means. Moreover, respondent was represented throughout the case by the same attorney, who advocated for preservation of respondent's parental rights and for relative placement of the child, consistent with respondent's wishes.

Applying the three-part balancing test set forth in *Mathews* to the circumstances of this case, respondent has not established a due process violation.

Affirmed.

/s/ Alton T. Davis
/s/ William B. Murphy
/s/ Karen M. Fort Hood