STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of K. R. J., Minor.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

MYRA WHITE,

Respondent-Appellant,

and

STEVEN WHITE,

Respondent.

UNPUBLISHED
May 15, 2001

No. 229546
Ingham Circuit Court
Family Division
LC No. 00-032901-NA

Before: Griffin, P.J., and Neff and White, JJ.

PER CURIAM.

Respondent-appellant Myra White (respondent) appeals as of right from an order terminating her parental rights to the minor child.[1] We reverse.

The child was adjudicated a temporary ward of the court in June 1999, based on respondent's admissions to allegations that she used crack cocaine and marijuana, both while pregnant with the child and after the child was born, that she used drugs in an attempt to induce a miscarriage because she could not afford an abortion, and that she was on probation for receiving stolen property. A supplemental petition seeking termination of respondent's parental rights was

---

[1] The court terminated the parental rights of both respondent and the child's legal father, Steven White, under MCL 712A.19b(3)(a)(ii), (g), and (j); MSA 27.3178(598.19b)(3)(a)(ii), (g), and (j), but did not specify which grounds were applicable to each respondent. For purposes of the issues raised on appeal, it is not necessary to ascertain which of those statutory grounds were found applicable to respondent.

filed in February 2000. The petition alleged that respondent failed to comply with the terms of the parent/agency agreement.

Respondent did not appear when the termination hearing began on April 29, 2000. Her counsel explained that he had tried contacting respondent, without success, and, accordingly, asked to be discharged. Without further inquiry, the court granted counsel's motion to withdraw and continued the hearing without the attorney's participation. The court noted that, at the pretrial hearing, respondent was given a waiver of notice indicating the trial date. After petitioner presented its proofs, which consisted solely of the testimony of its caseworker, the court took the matter under advisement and adjourned the hearing to provide publication notice to the child's father, who also failed to appear for the trial. The court stated that respondent's parental rights were terminated pending the adjourned hearing on May 22, 2000, and if there was "no appearance by any party, the Court will terminate the rights of both parents . . . ." On May 22, 2000, neither parent appeared and the court terminated their parental rights.[2]

After respondent filed her claim of appeal, the parties stipulated to additional facts for purposes of appeal. Specifically, the parties stipulated that respondent had been incarcerated in the Ingham County jail from April 21, 2000, to July 5, 2000, the period during which the termination hearings transpired. It was also stipulated that none of the parties or the attorneys were aware of respondent's whereabouts on the first date of the termination hearing, but that approximately three or four days after the first hearing date, the caseworker was verbally notified by a relative of respondent's incarceration in the Ingham County jail. The caseworker did not inform the court of respondent's incarceration when the termination hearing resumed on May 22, 2000. The caseworker did not know if respondent was still in jail on that date. The notice concerning the adjourned hearing date was mailed to respondent's last known address in Lansing on May 18, 2000.

On appeal, respondent argues that the failure to secure her presence at the termination hearing deprived her of due process of law. US Const, AM XIV; Const 1963, art 1, § 17. Under these particular circumstances, we agree.

In *In re Render*, 145 Mich App 344, 347; 377 NW2d 421 (1985), this Court, noting that due process requirements "are much greater" in termination cases than in ordinary civil actions, adopted the balancing test set forth in *Mathews v Eldridge*, 424 US 319, 335; 96 S Ct 893; 47 L Ed 2d 18 (1976), to ascertain the requirements of due process in the context of an incarcerated parent's right to be present at a hearing terminating parental rights:

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: 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 finally, the Government's interest,

[2] The child's father, respondent Steven White, has not appealed the termination of his parental rights.

including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. [*Id.* at 348-349.]

In *Render*, the respondent was incarcerated in the county jail on the day of the dispositional hearing and was served with notice at the jail. Her attorney explained to the court that he had only learned of her incarceration on the hearing date. Nevertheless, the probate court held the hearing and terminated her parental rights. On appeal, this Court held that due process required the court to make an affirmative effort to secure the respondent's presence, *id.* at 346-347, and, applying the *Mathews* balancing test,[3] concluded that the probate court erred in proceeding with the dispositional hearing in the respondent's absence:

> [T]he respondent's interest in her parental rights is a compelling one. The risk of an erroneous deprivation is increased in the parent's absence. The Legislature has recognized this by requiring the parent's presence at the hearing. MCL 712A.19. Though respondent had an attorney at the dispositional hearing, it is impossible to determine whether she could have provided the attorney with information helpful to her defense. We are "not in a position to know whether in fact any prejudice resulted." *Florence* [v *Moors Concrete Products Inc*, 35 Mich App 613; 193 NW2d 72 (1971)], *supra*, p 621. It cannot be doubted that, in many parental rights termination hearings, 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. *Mathews*, *supra*. The burden on the state is not a substantial one, at least not in the present case, where it appears the respondent was incarcerated in the county jail.
>
> We hold that, due to the great deference accorded parental rights under Michigan law, the probate court erred in this case by proceeding with the dispositional hearing. The court should have made an effort to bring respondent to the courtroom. We cannot agree with petitioner's waiver argument. There was no waiver. Counsel stated he had not spoken with his client for quite some time. Nor do we believe that respondent waived her right to be present by failing to contact her attorney. Respondent was in jail at the time. She may have thought that she would be brought to the probate court without a special request. Whatever the explanation, reception of a notice of hearing followed by silence is

---

[3] The *Render* Court, *supra* at 349, n 1, cautioned:

> We allude to the *Mathews* analysis only as one framework for consideration of the due process question under both Michigan and federal law, not as the basis for our decision. *Mathews* provides a helpful tool for analysis of such issues . . . . Nevertheless, our decision is neither based solely on *Mathews* nor solely upon our conception of what the Fourteenth Amendment dictates, but on the Michigan due process clause as well. Const 1963, art 1, § 17. See, *Michigan v Long*, 363 US 1032; 103 S Ct 3469; 77 L Ed 2d 1201, 1214-1216 (1983). [Citations omitted.]

> not enough to show a voluntary waiver, when the respondent is in the custody of the state. [*Id*. at 349-350.]

Subsequently, in *In re Vasquez*, 199 Mich App 44; 501 NW2d 231 (1993), this Court again addressed the right of an incarcerated parent to be present at a termination hearing, but with a different result. The respondent in *Vasquez* argued that he was denied due process and equal protection when the probate court failed to secure his presence at the hearing. At the time of the hearing, the respondent was incarcerated in Texas, serving an eight-year sentence for his plea-based conviction of second-degree sexual assault for sexually abusing the oldest daughter involved in the petition to terminate his parental rights. This Court concluded that the respondent had not been denied his right to due process, stating:

> Unlike *Render*, where it was impossible to know whether the respondent could have provided information useful for her defense, we are convinced that respondent's presence at the side of his counsel would have changed nothing. Here, respondent was well represented by his counsel at the termination hearing, and thus no prejudice resulted from his absence. Further, we believe that the financial and administrative burden on the state in order to bring respondent from Texas to attend the hearing would have been far greater than in *Render*, where the parent was incarcerated in a county jail in Michigan. [*Id*. at 48.]

Noting legislative changes that had been made since *Render*,[4] and the fact that "[i]n light of present-day telecommunications, other means that fall short of securing the physical presence of a parent are available to ensure that an incarcerated prisoner receives due process at a dispositional hearing," *id*. at 48-49, the *Vasquez* Court further concluded that "contrary to what *Render* seems to say, we do not believe that an incarcerated parent is entitled as a matter of absolute right to be present at the dispositional hearing of a proceeding to terminate parental rights." *Id*. at 48. The *Vasquez* Court, however, did reiterate that the focal point of the inquiry remains the *Mathews* balancing test:

> What due process requires is the application of the three-part balancing test set forth in *Mathews*. It is this test that determines whether a probate court has to secure the physical presence of an incarcerated parent at a termination

---

[4] The *Vasquez* Court, *supra* at 49, recognized that

> since *Render*, the Legislature has amended MCL 712A.19; MSA 27.3178(598.19), which no longer requires that parents appear before the probate court at a dispositional hearing. MCL 712A.19(4)(b); MSA 27.3178(598.19)(4)(b) now only requires that parents be served with notice of the hearing. Further, pursuant to MCR 5.973(A)(3)(b), a parent has the right to be present at a termination hearing or may appear through legal counsel. The court rule does not require that the probate court secure the physical presence of a parent, but only implies that the probate court shall not deny a parent's right to be present at the hearing.

> hearing. Where, as in *Render*, the balancing test weighs in favor of the physical presence of an incarcerated parent at the hearing, the probate court must secure the parent's presence at the termination hearing. Where, as in this case, the balancing test weighs against the incarcerated parent, there is no such requirement. Thus, it is the *Mathews* balancing test that is critical in determining whether the probate court must secure the physical presence of an incarcerated parent at a termination hearing as a matter of due process. To hold otherwise would be to say that there is never a requirement of producing incarcerated parents at trial even if they are in a nearby jail and the court finds that their physical presence is essential either to assist counsel or to resolve crucial factual disputes. [*Id.* at 50.]

Evaluating the present case pursuant to the *Mathews* balancing test, we conclude that the three queries all weigh in favor of respondent and respondent is therefore entitled to relief. First, as recognized by both the *Render* and *Vasquez* Courts, respondent's parental liberty interest in her child at the final stage of the termination proceedings is without question a compelling one. Second, the government's interest in avoiding the burden that the additional or substitute procedures would carry likewise clearly weighs in respondent's favor. As was the case in *Render*, respondent herein was incarcerated locally and therefore the burden on the state to secure her presence would have been minimal. Third, considering the remaining *Mathews* factor, the incremental risk of an erroneous deprivation of respondent's parental rights in the absence of the procedure demanded, we conclude that it, too, tips the scale in respondent's favor.

In reviewing this latter factor, we note initially that the case at hand differs from *Render* and *Vasquez* in a significant sense -- the court herein was apparently unaware that respondent was incarcerated at the time of the reconvened termination hearing. Thus, the alleged error in failing to secure respondent's presence is not of the trial court's own making. Rather, any fault in this regard lies with petitioner Family Independence Agency which, through its representative (the caseworker), became aware well before the hearing reconvened in May that respondent was incarcerated in the county jail in the same county where the trial court was holding the termination hearing and yet inexplicably failed to disclose this fact to the court. We agree with respondent that under the circumstances, the caseworker's knowledge of respondent's whereabouts and failure to notify the court should be imputed to petitioner and hence the state, the very entity seeking to permanently terminate respondent's parental rights and charged with the legal obligation to prove at least one statutory ground for termination by clear and convincing evidence. *In re Trejo*, 462 Mich 341, 350; 612 NW2d 407 (2000).

We further agree with respondent that the caseworker's failure to notify the court of respondent's whereabouts "directly facilitated a denial of due process through the uninformed court." It is true that the evidence presented on the first day of the termination hearing by the sole witness, the caseworker, was not favorable to respondent. The caseworker testified that respondent failed to comply with virtually all aspects of the parent/agency agreement and tested positive for cocaine twice within a few months of the termination hearings. The caseworker opined that respondent's substance abuse, lack of parenting skills, apparent lack of employment, and uncertain living arrangement with relatives would provide a "grave danger" to the minor child in terms of care and custody. However, unlike *Vasquez*, *supra* at 48, in which this Court, noting that the respondent was "well represented by his counsel at the termination hearing,"

concluded that the "respondent's presence at the side of his counsel would have changed nothing,"[5] the present circumstances do not unequivocally lead to a similar conclusion. Indeed, because respondent's counsel was unable to contact his client (presumably due to her incarceration) and was thus discharged at the beginning of the first hearing,[6] respondent never had an opportunity, either in person or through counsel, to advocate on her own behalf, refute these allegations or present a defense at either the first or second termination hearing. Respondent was therefore prejudiced by the failure of petitioner to inform the court at the reconvened termination hearing that respondent was incarcerated in a nearby county jail and the consequent failure to secure her presence at the second hearing. In sum, we conclude that under the *Mathews* balancing test, respondent's state and federal due process rights were violated. Accordingly, we reverse the order terminating respondent's parental rights and remand so that the trial court can, if necessary, appoint or reinstate counsel, *In re Powers*, 244 Mich App 111, 121; 624 NW2d 472 (2000), and "arrange for respondent's presence and give her an opportunity to present evidence concerning her fitness and efforts, if any, to provide a fit home for the child." *Render, supra* at 350. In light of our disposition of this matter, we need not address respondent's remaining appellate issue.

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

/s/ Richard Allen Griffin
/s/ Janet T. Neff
/s/ Helene N. White

---

[5] According to the *Vasquez* Court, there was clear and convincing evidence that respondent repeatedly physically and sexually abused his children. *Vasquez, supra* at 52.

[6] In this regard, we reiterate the *Render* Court's observation, *supra* at 350:

> Nor to we believe that respondent waived her right to be present by failing to contact her attorney. Respondent was in jail at the time. She may have thought that she would be brought to the probate court without a special request. Whatever the explanation, reception of a notice of hearing followed by silence is not enough to show a voluntary waiver, when the respondent is in the custody of the state.