STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of MICHAELL LA'SHAWN DEVONE WARE, Minor.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

ERIC WILLIAMS,

Respondent-Appellant,

and

RUSSIA CARMILLA WARE,

Respondent.

UNPUBLISHED
April 21, 2009

No. 286747
Kent Circuit Court
Family Division
LC No. 06-055026-NA

Before: Saad, C.J., and Jansen and Hoekstra, JJ.

PER CURIAM.

Respondent-appellant appeals the trial court's order that terminated his parental rights to the minor child under MCL 712A.19b(3)(a)(ii), (c)(i), and (g). For the reasons set forth in this opinion, we affirm.

The trial court did not clearly err by finding that petitioner established by clear and convincing evidence at least one statutory ground for termination of respondent-appellant's parental rights. MCR 3.977(J); *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). Evidence established that respondent-appellant deserted the child for 91 days or more without seeking custody of the child during that period. MCL 712A.19b(3)(a)(ii). Respondent-appellant was personally served with notice of the proceedings and appeared at the adjudication hearing in January 2007, yet for approximately 17 months thereafter, he did not contact any of the workers, the court, or, so far as the record reveals, his attorney. His lone effort to communicate with the child occurred in January 2007 without any communication after that time. Respondent-appellant was again personally served with notice of the termination proceedings but did not communicate with the court or with the agency. We recognize that respondent-appellant was incarcerated for most of these proceedings. Even while incarcerated, respondent-appellant could

have made efforts toward seeking custody of the child, but there is no evidence on this record that he even minimally attempted to do so.

Respondent-appellant argues, however, that termination is improper because the agency failed to make reasonable efforts to locate him, thus precluding the agency from making any efforts toward reunification. This Court has noted that a claim that reasonable efforts toward reunification of the family were not offered ultimately relates to the issue of the sufficiency of the evidence to establish a statutory ground for the termination of parental rights. *In re Fried*, 266 Mich App 535, 541; 702 NW2d 192 (2005). In general, petitioner must make reasonable efforts directed toward reunification of families and to avoid termination of parental rights. *In re LE*, 278 Mich App 1, 18; 747 NW2d 883 (2008). However, while reasonable services are generally required when a child is removed from the parents' home, such services cannot be rendered without the cooperation of the parent. During 17 months of proceedings, respondent-appellant failed to contact the agency and, at the time of the termination trial, had never done so apart from sending a letter for the child to the agency in January 2007, at the outset of this case. The agency did make efforts to contact respondent-appellant, by (1) performing an absent parent search, (2) sending a letter to respondent-appellant's address shown by the federal Bureau of Prisons website, which was returned, (3) further consulting the website, which indicated that respondent-appellant was in transit, (4) consulting OTIS, which indicated that respondent-appellant was on probation, (5) contacting respondent-appellant's probation officer who advised he was again incarcerated, (6) and attempting to contact a federal agent who apparently did not call back. The trial court advised respondent-appellant at the adjudication hearing to keep his attorney apprised of his address and to provide the agency with certificates for any programs completed in prison. Respondent-appellant did not do so and failed to contact the agency at any time throughout the proceedings. Moreover, because respondent-appellant was in federal custody during most of these proceedings (except for a brief release during which he did not contact the agency), it appears that it would not have been feasible for the agency to provide him with rehabilitative services. Under these circumstances, we are persuaded that the petitioner did not fail to make reasonable efforts to locate respondent-appellant and to provide him with reasonable services directed toward reunification.

Respondent-appellant also claims that termination of his parental rights was improper in light of the trial court's failure to terminate those of the mother and of Charles Peoples, who is the father of a half sibling of the child. The record reveals that no action was taken concerning the parental rights of Mr. Peoples because he was not properly notified of the termination hearing. The record further reveals that the mother had been participating in a service plan, to the point that the children had been returned to her care but were again removed when her gas was shut off. In denying termination of the mother's parental rights, the trial court noted that no information had been provided concerning the mother's apparently ongoing therapy and that the rapid turnover of foster care workers had interfered with continuity of services. These considerations do not apply to respondent-appellant, who did not receive a service plan because

of his incarceration, and who failed to contact any of the workers throughout this matter. The trial court's treatment of the parties was not improper.[1]

Under the statute in effect when respondent-appellant's rights were terminated, once the court finds at least one statutory ground for termination is established, the court is obligated to terminate a respondent's parental rights unless the court also finds that termination is clearly not in the child's best interests. MCL 712A.19b(5). This Court has held that the trial court is not required to make a best interests determination where, as in this case, no evidence on the issue is offered during the proceedings. *In re Gazella*, 264 Mich App 668, 678; 692 NW2d 708 (2005). In any event, we are persuaded that termination was not clearly contrary to the best interests of the child in light of evidence that respondent-appellant had no contact with the child from his birth to the beginning of these proceedings, he failed to contact the agency after he received personal service of the original petition and after he attended the adjudication, he failed to communicate with the child except for one letter in January 2007, and he was reincarcerated after a brief release during these proceedings.

Respondent-appellant further argues that reversal is required because he was not physically present at the termination hearing. This issue was first addressed by this Court in *In re Render*, 145 Mich App 344; 377 NW2d 421 (1985). In that case, the parent was incarcerated in the county jail and this Court held that the trial court violated due process by failing to secure her presence at a termination hearing. *Id.* at 349-350. In *In re Vasquez*, 199 Mich App 44, 48; 501 NW2d 231 (1993), however, this Court subsequently held that an incarcerated parent does not have an absolute right to be present at a termination hearing. The Court reasoned 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. In *Vasquez, supra* at 49, the Court noted that statutory law requiring the presence of parents at a dispositional hearing at the time of the proceedings in *Render, supra* at 349, had since been amended and no longer required the parents to be present, and also that pursuant to MCR 5.973(A)(3)(b) [now MCR 3.973(D)(2)], a respondent has the right to be present at a termination hearing or may appear through an attorney. *Vasquez, supra* at 49.

Whether due process requires the court to secure the presence of an incarcerated parent is determined by application of the balancing test set forth in *Mathews v Eldridge*, 424 US 319, 335; 96 S Ct 893; 47 L Ed 2d 18 (1976):

> Identification 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

[1] We do not rely on MCL 712A.19b(3)(c)(i) in affirming the termination of respondent-appellant's parental rights. This statutory subsection was improperly applied to respondent-appellant, as none of the conditions of adjudication related to him. We also do not rely on statutory subsection (g) in affirming the termination of respondent-appellant's parental rights.

> or substitute procedural safeguards, and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute requirement would entail.

It is clear that the interest in caring for one's child is a compelling one. *Vasquez, supra* at 48. However, because respondent-appellant's abandonment of the child was established by clear and convincing evidence, it does not appear that the risk of an erroneous deprivation was increased by his absence from the termination trial. The burden that would be imposed on the court to secure the physical presence of respondent father, who was incarcerated within the federal system, would likely have been significant; the trial court noted that it had not been able to secure the presence of federal prisoners except on one occasion, and then only by telephone. Pursuant to *Vasquez, supra* at 48-49, where it is infeasible or unduly burdensome to obtain the physical presence of an incarcerated parent, reasonable efforts to secure telephonic or other electronic participation may be necessary. However, respondent-appellant in this matter, like the respondent father in *Vasquez, supra* at 49, made no request for testimony by deposition, or for telephonic participation. Given respondent-appellant's failure to request any manner of participation after personal service of the summons and petition for termination, and the clear evidence of abandonment found in this record, we hold that the failure of the trial court to secure his presence did not constitute plain error affecting the outcome of the case. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Affirmed.

/s/ Henry William Saad
/s/ Kathleen Jansen
/s/ Joel P. Hoekstra