

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of M.J.B. and V.E.B., Minors.

REBECCA LYNN SCOTT and TODD OLIVER
SCOTT,

UNPUBLISHED
October 22, 2009

Petitioners-Appellees,

v

RICKEY LEE BALDWIN,

Respondent-Appellant.

No. 291392
Oakland Circuit Court
Family Division
LC Nos. 2008-752007-AY;
2008-752008-AY

Before: Davis, P.J., and Whitbeck and Shapiro, JJ.

PER CURIUM.

Respondent appeals as of right from a circuit court order terminating his parental rights to the minor children pursuant to § 51(6) of the Adoption Code, MCL 710.51(6). We affirm.

Respondent, who was incarcerated in the Ingham County Jail at the time of the termination hearing, first argues that his right to due process was violated when the trial court refused to adjourn the hearing in Oakland County to allow him to be physically present at the hearing. Instead, the court permitted respondent to participate in the hearing by telephone.

In *In re Vasquez*, 199 Mich App 44, 48-49; 501 NW2d 231 (1993), this Court explained that an incarcerated parent does not have an absolute right to be physically present at a termination hearing. Instead, an incarcerated parent's due process right to be present at the hearing is determined by applying the three-part balancing test from *Mathews v Eldridge*, 424 US 319, 335; 96 S Ct 893; 47 L Ed 2d 18 (1976). *In re Vasquez*, *supra* at 50. Under this test, a court must consider (1) the private interest that will be affected; (2) the incremental risk of an erroneous deprivation of such interest in the absence of the procedure demanded; and (3) the government's interest in avoiding the burden the procedure would carry. *Id.* at 47.

We agree that the private interest at stake in this case, respondent's parental rights to his children, is a compelling one. However, the risk of an erroneous deprivation of that interest was not increased by the absence of respondent's physical presence at the hearing. Respondent was represented at the hearing by counsel and there is no indication that he was not able to confer with his attorney. Further, the trial court permitted respondent to participate in the hearing by telephone, and he was permitted to testify. The availability of telecommunications "mitigates

against securing the physical presence of an incarcerated parent at a [termination] hearing as a matter of due process.” *Id.* at 49.

On appeal, respondent asserts that if he had been physically present, he could have assisted in his defense by offering records in support of his testimony. However, respondent admitted that he did not have the records in question and had not attempted to obtain them himself, or ask his attorney to obtain them. Thus, he could not have presented the records even if he had been physically present at the hearing. Furthermore, after hearing respondent’s offer of proof regarding the content of the alleged telephone records, the trial court stated that they would not have affected the outcome of the case.¹ For these reasons, respondent’s absence did not increase the risk of an erroneous deprivation of his parental rights.

In addition, while it may not have been unduly burdensome to transport respondent to Oakland County for the hearing, respondent did not make a timely request that he be allowed to appear in person at the hearing. Further, the court had previously adjourned the hearing to enable respondent to participate. Considering that the hearing had already been adjourned once to accommodate respondent, that respondent did not timely request that arrangements be made to secure his physical presence at the adjourned hearing, and the availability of other means for respondent to participate in the adjourned hearing, another adjournment would have been unduly burdensome. Accordingly, applying the three-part balancing test to this case, the failure to secure respondent’s physical presence for the hearing did not violate respondent’s right to due process.

Respondent next argues that the evidence did not support termination of his parental rights under § 51(6). The petitioner in an adoption proceeding is required to prove by clear and convincing evidence that termination of parental rights is warranted. *In re Hill*, 221 Mich App 683, 691; 562 NW2d 254 (1997). This Court reviews the trial court’s findings of fact for clear error. *Id.* at 692. “A finding is clearly erroneous if, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made.” *Id.*

Respondent argues that the trial court clearly erred in finding that he had the ability to visit, contact, or communicate with his children, and regularly and substantially failed to do so during the two-year period preceding the filing of the petition, as required by § 51(6)(b).² Respondent contends that he did not have the ability to visit, contact, or communicate with his children during the relevant two-year period because they lived in Illinois for part of this period, and because he was incarcerated during portions of this period. We disagree. Section 51(6)(b)

¹ Similarly, although respondent also wanted to produce records showing that much of his income was withheld to pay child support obligations, there was no dispute that he was substantially in arrears in his various support obligations. Thus, the alleged child support records also would not have affected the outcome of the case.

² Respondent does not dispute the trial court’s findings with regard to § 51(6)(a), i.e., that he failed to substantially comply with a support order for a period of two years or more before the filing of the petition.

requires that a respondent have the ability to “visit, contact, *or* communicate with the child.” In *In re Hill*, *supra* at 694, this Court explained:

Because the statute uses the word “or,” petitioner was not required to prove that respondent had the ability to perform all three acts. Rather, petitioner merely had to prove that respondent had the ability to perform any one of the acts and substantially failed or neglected to do so for two or more years preceding the filing of the petition.

Even if respondent was unable to travel to Illinois to visit his children, he was not prevented from maintaining regular and substantial contact with them by telephone, letter, or email. Similarly, there is no incarcerated parent exception to § 51(6)(b). *In re Caldwell*, 228 Mich App 116, 121; 576 NW2d 724 (1998). Thus, an incarcerated parent who is unable to visit his child may still comply with the contact requirements of the statute. *Id.* Respondent admitted that he was able to write letters while in jail. He also had a telephone and email access when he was not incarcerated. Therefore, respondent cannot discount those periods when the children were living out of state or he was incarcerated, even if he lacked the means to visit them personally.

According to the children’s mother, she and respondent had established a schedule whereby respondent would call the children twice a week. By October 2006, respondent was no longer adhering to that schedule and called the children only sporadically. He did not call them around their birthdays, and last contacted them in April 2008. Due to the infrequent contact, the children no longer anticipated calls from respondent. Although respondent claimed that he continued to call the children twice weekly until May 2008, the trial court found that his testimony was not credible. We defer to the trial court’s assessment of respondent’s credibility. *In re Newman*, 189 Mich App 61, 65; 472 NW2d 38 (1991). Contrary to what respondent argues, the trial court did not rule that respondent’s offer of proof regarding his telephone records would establish the frequency of his contact with his children. The court merely noted that the records would show, at most, that calls were placed by respondent, not that there was regular contact or communication with the children.

In sum, there was evidence that respondent had the ability to communicate or contact with his children, even while they lived in Illinois or he was incarcerated, but failed to regularly and substantially do so during the relevant two-year period. Therefore, the trial court did not clearly err in finding that petitioners met their burden under § 51(6)(b). *In re Hill*, *supra* at 691-692.

Affirmed.

/s/ Alton T. Davis
/s/ William C. Whitbeck
/s/ Douglas B. Shapiro