STATE OF MINNESOTA
IN COURT OF APPEALS
A10-428

Barbara A. Sauer, petitioner,
Respondent,

Dale Sauer, petitioner,
Respondent,

vs.

Richard Monroe Scheibe,
Appellant.

Filed October 12, 2010
Affirmed
Lansing, Judge

Chisago County District Court
File No. 13-CV-09-539

Jeffrey P. Hicken, Hicken, Scott, Howard & Anderson, P.A., Anoka, Minnesota; and

Sheridan Hawley, Hawley Law & Mediation, Coon Rapids, Minnesota (for respondents)

Richard M. Scheibe, Bayport, Minnesota (pro se appellant)

Considered and decided by Wright, Presiding Judge; Lansing, Judge; and Collins, Judge [*]

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[*] Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

LANSING, Judge

Following a hearing at which Richard Scheibe, who is incarcerated, did not appear, the district court issued an order restraining Scheibe from any contact with his biological daughter other than the limited contact provided in the district court's previous order accepting Scheibe's consent to adoption and limited contact agreement. Scheibe appeals, arguing that the issuance of the order violated his due process rights because the district court did not arrange for his attendance at the hearing. Because Scheibe did not submit a request to appear for the civil proceeding and because he has not advanced any viable defense to the issuance of the order, we affirm.

F A C T S

Richard Scheibe is the biological father of AMS, who was adopted by her maternal grandparents, respondents Barbara and Dale Sauer, after Scheibe pleaded guilty to first-degree murder and was sentenced to life in prison. AMS's mother is deceased.

When Scheibe began his incarceration, Barbara Sauer, who had already obtained custody of AMS, petitioned the court to terminate Scheibe's parental rights, and the Sauers petitioned to adopt AMS. Consistent with Minn. Stat. § 260C.163, subd. 3(a) (2008), counsel was appointed to represent Scheibe in the termination-of-parental-rights proceedings. Scheibe ultimately consented to the adoption subject to a contact agreement providing, in relevant part, that the Sauers annually would provide to Scheibe a picture of AMS and a copy of her report card and that Scheibe would not be "entitled to seek any additional contact with [AMS] beyond what is granted in this [o]rder, having explicitly

waived any right to do so at the hearing." Scheibe's parental rights were terminated and the adoption was finalized.

Despite the prohibitive language of the provision in the order accepting Scheibe's consent to adoption and restricting Scheibe's contact with AMS, Scheibe began sending AMS cards and gifts. The Sauers petitioned the district court for a harassment restraining order (HRO). The district court entered a temporary HRO, which was served on Scheibe in prison. The temporary order included notice that, if a hearing was scheduled and Scheibe failed to appear, the HRO could still be granted. Scheibe completed and submitted a form requesting a hearing. Scheibe also requested that his counsel from the termination-of-parental-rights proceeding be reappointed to represent him in the HRO proceeding. The district court denied the motion for appointment of counsel, but granted Scheibe's request for a continuance to allow him additional time to conduct legal research and respond to the HRO petition.

Scheibe made no further submissions to the court and did not appear for the HRO hearing. The district court called the case, noted Scheibe's absence, reviewed with the Sauers the facts supporting the petition, and then asked whether anyone representing Scheibe was present in the courtroom. Receiving no response, the district court ordered entry of a final order restraining Scheibe's contact with AMS other than the requirement that the Sauers annually provide him with a picture of AMS and a copy of her report card.

D E C I S I O N

"In general, due process requires notice and a meaningful opportunity to be heard before a fair and impartial decisionmaker." *State ex rel Marlowe v. Fabian*, 755 N.W.2d

792, 794 (Minn. App. 2008). "The requirements of due process are flexible and call for such procedural protections as the particular situation demands." *Baker v. Baker*, 494 N.W.2d 282, 287 (Minn. 1992). The sufficiency of procedure generally is assessed under the balancing test enunciated by the U.S. Supreme Court in *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 903 (1976), which weighs (1) the private interest at stake, (2) the risk of erroneous deprivation of that interest and probable value of additional safeguards, and (3) the governmental interests involved. *Id.*

When the due process issue "revolves around the adequacy of notice," the determination is whether the notice was "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *McShane v. Comm'r of Pub. Safety*, 377 N.W.2d 479, 482-83 (Minn. App. 1985) (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 657 (1950)), *review denied* (Minn. Jan. 23, 1986).

In contrast to criminal proceedings, at which the defendant has a due process right to be present at all critical stages, an inmate has no absolute constitutional right to be present for civil proceedings to which he is a party. *See State v. Martin*, 723 N.W.2d 613, 619 (Minn. 2006) (articulating criminal defendant's due process "right to be present at all critical stages of trial") (quotation omitted); *In re Z.L.T.*, 124 S.W.3d 163, 165 (Tex. 2003) (stating that "an inmate does not have an absolute right to appear in person in every court proceeding" and that "inmate's right of access to the courts must be weighed against the protection of [the] correctional system's integrity"); *St. Claire v. St. Claire*,

675 N.W.2d 175, 177 (N.D. 2004) (recognizing inmate's due process right of "reasonable access to the courts" but stating that "a prisoner's right to appear personally at a civil proceeding is limited"); *cf. Weber v. Hvass*, 626 N.W.2d 426, 435 (Minn. App. 2001) (recognizing, in due process dispute over monies deducted from inmate funds under cost-of-confinement policy, that "[a]n inmate's right and privileges are limited by the considerations of the penal system"), *review denied* (Minn. June 27, 2001).

On receiving an inmate's request to appear, the district court exercises discretion to determine whether the request should be granted and considers factors that include

> the costs and inconvenience of transporting a prisoner from his place of incarceration to the courtroom, any potential danger or security risk which the presence of a particular inmate would pose to the court, the substantiality of the matter at issue, the need for an early determination of the matter, the possibility of delaying trial until the prisoner is released, the probability of success on the merits, the integrity of the correctional system, and the interests of the inmate in presenting his testimony in person rather than by deposition.

In re Welfare of HGB, 306 N.W.2d 821, 826 (Minn. 1981) (quoting *In the Interest of F.H.*, 283 N.W.2d 202, 209 (N.D. 1979)). The Minnesota Supreme Court weighed these factors in *HGB* and concluded that the termination of a mother's parental rights while she was incarcerated out of state did not violate her due process rights. 306 N.W.2d at 825-26. The court reasoned that the mother had never "suggested what she might offer in her defense," that she was represented by counsel, and that "[d]epositions or interrogations could have been submitted." *Id.*

Scheibe asserts that he was denied due process because the district court did not arrange for his attendance at the HRO hearing or advise Scheibe of how to request that he

be allowed to appear at the hearing. Scheibe's argument appears to rely in part on an assumption that he was deprived of a right to have his counsel from the termination-of-parental-rights proceeding reappointed to represent him in the HRO proceeding. Scheibe had a statutory right to appointed counsel in the termination-of-parental-rights proceeding. *See* Minn. Stat. § 260C.163, subd. 3(a) (2008)(providing right to counsel in connection with proceedings in juvenile court). But the HRO statutes provide no comparable right, *see* Minn. Stat. § 609.748 (2008), nor are we able to discern any other basis for appointment of counsel in this civil proceeding. *Cf.* Minn. R. Crim. P. 5.02 (requiring appointment of counsel when individual is charged with felony, gross misdemeanor, or misdemeanor punishable by incarceration); *Cox v. Slama*, 355 N.W.2d 401, 403 (Minn. 1984) (providing for right to counsel in civil contempt proceedings for failure to pay child care at "point in the proceedings . . . that incarceration is a real possibility").

In asserting that he was denied due process by the failure of the district court to provide for his appearance as a defendant in a civil proceeding, Scheibe also relies on the holding of a Pennsylvania intermediate appellate court that an inmate has a right to notice not just of the hearing itself, but also that he "may, if he wishes to attend, request the court by means of a habeas petition and writ to make arrangements for transportation to and presence at the hearing." *Vanaman v. Cowgill*, 526 A.2d 1226, 1227 (Pa. Super. Ct. 1987). In contrast to the *Vanaman* holding, a Florida appellate court, addressing the absence of an inmate at marital-dissolution proceedings, explained that

> [a] prisoner involved in civil litigation (including family law cases) has the right to be heard but must take the initiative to secure the opportunity to appear and present his version of the facts. In other words, the prisoner must bring to the court's attention his desire to appear personally or telephonically at hearing or trial.

Johnson v. Johnson, 992 So. 2d 399, 401 (Fla. DCA 1st 2008).

Both the *Vanaman* and *Johnson* decisions reflect reasoned applications of due process principles. They diverge on whether the incarcerated person must initiate a request to attend the proceedings or respond to notice of his right to attend. It is not necessary that we resolve that issue as it applies to this case because reversal is precluded on a separate basis. Specifically, that Scheibe has not advanced an argument that would support a claim that his appearance at the hearing would have affected the outcome of the case in any way. Scheibe does not dispute that the contact order denies him any contact with AMS other than his annual receipt of a picture of AMS and a copy of her report card. Scheibe does not deny that the cards and gifts that he sent to AMS violated the terms of that order. Instead, Scheibe asserts that, if he had appeared at the hearing, he would have provided testimony of a collateral agreement with the Sauers allowing him to maintain contact with AMS so long as the items he sent were in "good taste."

Minnesota law, however, provides that the agreement Scheibe alleges is not enforceable unless it is reflected in a written court order. Minn. Stat. § 259.58(a) (2008). Thus, even assuming that Scheibe had attended the HRO hearing and submitted credible evidence of a collateral agreement, this evidence would not constitute a viable defense to the HRO. Accordingly, regardless of the alleged denial of process, there is no basis for

this court to reverse the HRO. *See State v. Cannady*, 727 N.W.2d 403, 408-09 (Minn. 2007) (explaining that due process violation does not require reversal if error was harmless); Minn. R. Civ. P. 61 (requiring this court to disregard harmless error).

Because we have concluded that any deficiency in process was harmless error, it is unnecessary to address directly the Sauers' argument that Scheibe did not assert a liberty interest entitled to due process protections. *See, e.g.*, *State v. LeDoux*, 770 N.W.2d 504, 512 (Minn. 2009) (stating that, "[i]n order for a due process violation to exist, a person must suffer a loss of a liberty interest or property right"). We observe, however, that "parents have a constitutionally protected liberty interest in their children." *Lassiter v. Dept. of Social Servs.*, 452 U.S. 18, 27, 101 S. Ct. 2153, 2159 (1981), *cited in In re Child of B.J.-M. & H.W.*, 744 N.W.2d 669, 672 (Minn. 2008); *see also Welfare of HGB*, 306 N.W.2d at 825 (explaining that "the substantial and fundamental rights of parents to the custody and companionship of their children should not be taken from them except for grave and weighty reasons"). The termination of parental rights implicates this interest. *Child of B.J.-M.*, 744 N.W.2d at 672; *see also C.O. v. Doe*, 757 N.W.2d 343, 350 (Minn. 2008) (recognizing biological father's due process interest in contact agreement). In this case, although the termination of Scheibe's parental rights and adoption of AMS were completed in previous proceedings, Scheibe's allegation that he retained certain rights when he consented to the termination of his parental rights and the adoption of AMS likely was sufficient to implicate a protected liberty interest. Because he has failed to show a denial of due process relative to that interest, his claim nevertheless fails.

Affirmed.