

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 10, 2011

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2011AP562

Cir. Ct. No. 2010TP52

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

**IN RE THE TERMINATION OF PARENTAL RIGHTS TO NASYR K. J. M., A PERSON
UNDER THE AGE OF 18:**

KENOSHA COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

AMBER D.,

RESPONDENT,

TIMOTHY M.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Kenosha County:
CHAD G. KERKMAN, Judge. *Affirmed.*

¶1 REILLY, J.¹ Timothy M. appeals from an order of the circuit court terminating his parental rights (TPR). As Timothy was incarcerated in federal prison in Chicago when the TPR petition was filed, the circuit court made accommodations to have Timothy participate in all the proceedings via a telephone setup. Timothy argues that his appearance by telephone violated his due process rights by not allowing him to meaningfully participate in the TPR proceedings. As his argument is not supported by the facts in the record or case law, we affirm the circuit court's order.

FACTS

¶2 On August 11, 2010, the Kenosha County Department of Human Services filed a TPR petition against Timothy. The petition alleged three grounds for terminating Timothy's parental rights to his son: (1) the son was in continuing need of protection or services; (2) Timothy was continually denied periods of placement or visitation with his son; and (3) Timothy had failed to assume parental responsibility. *See* WIS. STAT. § 48.415(2), (4) & (6).

¶3 Timothy was incarcerated in federal prison in Chicago during the entire length of the TPR proceedings.² As Kenosha County did not have the technology to allow Timothy to appear from prison via videoconference, accommodations were made to have him appear by telephone at each hearing. We will briefly describe Timothy's participation at the hearings.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

² Timothy remains in federal prison serving a ten-year sentence. His release date is January 14, 2018.

¶4 At the September 10, 2010 initial appearance, Timothy responded several times to questions from the court. At the September 23, 2010 status conference, Timothy informed the court that he could not reach anyone in the public defender's office as they were not accepting his collect calls. The court then arranged a phone call between Timothy and the public defender's office. When Timothy finished his call and returned to the proceedings via telephone, the circuit court verified that Timothy could hear the proceedings. At the October 5, 2010 status conference, Timothy's attorney asked Timothy if he wanted to request a new judge, and Timothy said "no, sir." Later, Timothy asked the court if he could get his public defender's phone number, and Timothy's lawyer stated that he would contact Timothy. The circuit court repeated what the public defender said, and Timothy indicated that he understood. When the court announced the date of Timothy's TPR trial, Timothy notified the court that he was already scheduled to be sentenced in a separate trial on that date.

¶5 On November 30, 2010, the circuit court held a pretrial conference and permanency plan review hearing. The court began the conference by asking Timothy if he was on the phone, and Timothy replied that he was. When one of the attorneys introduced himself for the record, the circuit court asked the attorney to use a microphone so Timothy could hear properly. After the assistant district attorney outlined the permanency plan for Timothy's son, the circuit court paused to see if Timothy could hear what was going on, and he replied that he could. Timothy later interjected at one point to ask if he could speak with his attorney at the end of the hearing.

¶6 On December 8, 2010, the circuit court granted the County's partial summary judgment motion and determined that Timothy was an unfit parent. Timothy asked why he was not entitled to a jury trial and the court explained to

him that this was a civil case, so a motion for summary judgment could be filed. At the end of the hearing, Timothy asked to speak with his lawyer, and the court accommodated his request.

¶7 Finally, at the December 29, 2010 dispositional hearing, Timothy interrupted the social worker twice during her testimony to refute her statements. Timothy also responded to all of the questions asked of him when he testified. At no point during any of these hearings did Timothy claim that he had trouble hearing or understanding what was going on.

¶8 Timothy subsequently brought a motion to vacate the summary judgment order and the TPR order on the grounds that his appearances by telephone violated his due process rights to meaningfully participate in the TPR proceedings. The circuit court held a hearing on the matter and denied Timothy's motion. The court noted that there was no evidence that Timothy had trouble hearing the proceedings. When the court asked Timothy if there was ever a moment when he wanted to interrupt the proceedings and speak with his attorney but could not, Timothy responded that there were such moments. When asked when those moments were, Timothy replied that he either could not remember what he wanted to ask, or that he did not want to share that information with the court. The circuit court found that Timothy's answers were not credible, and also noted that Timothy interrupted the proceedings three times, an indication that he did not harbor any reservations about speaking up. Timothy appeals, arguing that he was not able to meaningfully participate in the December 8 summary judgment motion hearing or the December 29 dispositional hearing.

STANDARD OF REVIEW

¶9 A parent has a due process right to “meaningfully participate” in TPR proceedings. *Waukesha Cnty. DHHS v. Teodoro E.*, 2008 WI App 16, ¶10, 307 Wis. 2d 372, 745 N.W.2d 701 (Ct. App. 2007). Whether a parent was afforded the opportunity to meaningfully participate is a question of constitutional fact. *Id.* We therefore defer to the circuit court’s factual findings unless they are clearly erroneous, but we apply de novo review to the constitutional due process principles at issue in the case. *Id.*

DISCUSSION

¶10 This court has previously held that a parent’s due process rights in a TPR proceeding are not violated by a telephone setup, so long as the parent was allowed to meaningfully participate in the proceedings. *Rhonda R.D. v. Franklin R.D.*, 191 Wis. 2d 680, 702-03, 530 N.W.2d 34 (Ct. App. 1995). We declined to create a bright-line rule that a parent must always be physically present at TPR proceedings; rather, we held that whether the parent was able to meaningfully participate would depend upon the facts of each case. *Id.* at 701-02. In *Rhonda R.D.*, the mother filed a petition to terminate the father’s parental rights. *Id.* at 690. The father was incarcerated in the state of Washington but wanted to attend the proceedings in Wisconsin. *Id.* The public defender’s office, however, would not pay to transport the father to and from Wisconsin, and the circuit court denied the father’s request to make the mother foot the bill. *Id.* at 691. Therefore, the circuit court arranged for the father to appear at his trial via telephone, over the father’s objections. *Id.* In upholding the telephone setup, we noted that the circuit court repeatedly verified that the telephone system was working and that the father could hear what was going on at the trial. *Id.* at 700-01. The setup also permitted

the father to consult with his attorney. *Id.* at 700-02. The father's due process rights were thus not violated as he was able to meaningfully participate in the TPR trial. *Id.* at 702-03.

¶11 Based on *Rhonda R.D.*, we hold that Timothy was able to meaningfully participate in the TPR proceedings. Timothy argues that the telephone setup prevented him from meaningfully participating in the December 8 and December 29 hearings. While Timothy does not say why these two hearings were problematic and the others were not, our review of the record supports the circuit court's conclusion that Timothy was able to hear what was going on during the December 8 and December 29 hearings. Timothy asked the court questions during the December 8 summary judgment hearing. At the December 29 postdispositional hearing, Timothy interrupted the social worker twice during her testimony to refute her statements. He also responded to all of the questions asked of him during his testimony. Timothy never once complained that he was having trouble hearing or understanding the proceedings. It was not until after his parental rights were terminated that he alleged there was a problem with the telephone setup. At a hearing on Timothy's motion to vacate the summary judgment order and TPR order, the circuit court found that Timothy's post hoc allegations were "not credible." We defer to the circuit court's witness credibility determinations. *See* WIS. STAT. § 805.17(2). Finally, when Timothy asked to speak with his attorney at the December 8 summary judgment hearing, the circuit court accommodated his request. We have noted that private communication with an attorney is a key component of meaningful participation at TPR proceedings. *See Teodoro E.*, 307 Wis. 2d 372, ¶15. Timothy has not met his burden of showing that he was denied meaningful participation at the December 8 and December 29 hearings.

¶12 Timothy argues that his situation is more like that of the father in *State v. Lavelle W.*, 2005 WI App 266, 288 Wis. 2d 504, 708 N.W.2d 698. In *Lavelle W.*, the telephone setup occasionally faded in and out and at one point was interrupted by static. *Id.*, ¶8. We held that the “periodic or sporadic inaudibility” of a telephone setup prevents a party from meaningfully participating in TPR proceedings. *Id.*, ¶9. As there is no evidence that Timothy had trouble hearing or understanding the proceedings, *Lavelle W.* is inapplicable.

CONCLUSION

¶13 At no point in the TPR proceedings was Timothy denied his right to meaningfully participate. The order of the circuit court is affirmed.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

