

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 5, 2012

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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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. 2012AP722

Cir. Ct. No. 2011TP62

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**IN RE THE TERMINATION OF PARENTAL RIGHTS TO SHAIANNE D., A PERSON
UNDER THE AGE OF 18:**

BROWN COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

v.

DAVID D.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Brown County:
KENDALL M. KELLEY, Judge. *Affirmed.*

¶1 HOOVER, P.J.¹ David D. appeals an order terminating his parental rights to his daughter, Shaianne D. He also appeals an order denying postdisposition relief. David argues the court denied his right to meaningful participation in the termination of parental rights proceeding. We affirm.

BACKGROUND

¶2 On June 9, 2011, the Brown County Department of Human Services petitioned to terminate David's parental rights to Shaianne.² As grounds for termination, the petition alleged that Shaianne continued to be a child in need of protection or services, *see* WIS. STAT. § 48.415(2), and that David had failed to assume parental responsibility, *see* § 48.415(6).³

¶3 At the first court appearance on July 6, David appeared by telephone. David told the court that he lives in New Jersey and "it's a challenge" financially to appear in person. The court, however, advised David that if he wanted "to contest this matter, it will be necessary for you to appear in person."

¶4 At the next hearing, David's counsel told the court that David needed time to "put together the money" to travel to Wisconsin for the hearing and requested the court extend the time limits. The court granted David's request and found good cause to extend the time limits.

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

² Shaianne's mother, Diane W., voluntarily terminated her parental rights.

³ The County filed an amended petition at the initial appearance that added the failure to assume parental responsibility ground.

¶5 At the next hearing, David’s counsel inquired whether David could appear telephonically because “one of the issues that confronts [David] is the ability to travel and to maintain a location here during the pendency of the proceedings.” The court responded:

I’ll be very candid. Telephonic testimony is very difficult in terms of accuracy of the record, and in a TP case, the record is very important. As you know, appellate review of these types of cases is frequent, just because of the interests that are involved here and the importance of action by the court, as well as by all of the litigants, so one of the problems will be the ability to get a good record, but beyond that, it’s the court’s observation that telephonic testimony is not very effective generally. You can convey information, sometimes if you have an expert who is giving uncontroverted information, perhaps that’s a worthwhile use of the phone, and I am very aware of the costs and so forth, but the integrity of the process generally requires that people are present. It’s even in the jury instructions, in terms of observing demeanor and so forth. I mean, this is just one of the critical parts of the trial process, and I know that there is an increasing trend to try to save costs by minimizing transportation costs, but again, the integrity of that process would be the court’s primary focus, so we’ll see how things go and see where things go from there.

The court stated David needed to appear in person for the fact-finding hearing and, if he failed to appear, it would allow him to listen to the proceeding telephonically; however, David would not be able to interact during the proceeding.

¶6 The fact-finding hearing was held on October 4, 2011. David failed to appear in person and made his appearance by telephone. When questioned by the court about whether he had looked into travel options to come to the hearing, David testified he was not able to afford a \$190 bus ticket. He also testified he works part time in a bar, smokes cigarettes, occasionally goes to bars to drink alcohol, and has a cell phone plan that costs \$100 to \$150 per month and includes internet and text messaging services. The court advised David that, because he did

not appear in person, he could listen to the proceeding telephonically, but he would not be allowed to testify.

¶7 David's counsel moved for David to be able to testify telephonically.

The court denied counsel's motion, reasoning:

It is not practical or appropriate in terms of the jury exercising its function, and for the other reasons I stated before, the limitations of technology here are such that actually would interfere with the effectiveness of the process and would not ensure that all of the rights of all of the litigants are properly observed.

David's counsel also moved for an adjournment until such time as David could appear in person. The court denied counsel's request, reasoning:

There's been ample time. [David]'s had ample notice to be able to get here, and he has been given notice that it was necessary for him to personally be here.

Nothing in his remarks today under oath suggested to the court that he's making any serious plans, and frankly, the questions appropriately asked by counsel with respect to his preferences in spending would suggest that it is his preference to support other habits and entertainments in his life as opposed to use those resources in order to make himself available here today, so *I'm going to find that there's actually no reason that he could not have been here today had he chosen to do so*, simply by forgoing some of those other items in his life and by making other arrangements.

(Emphasis added.)

¶8 The jury trial went forward as scheduled, and David listened to portions of the trial by telephone. He did not testify. The jury found grounds existed to terminate his parental rights. The court then granted David's request to postpone the dispositional hearing until January 2012 so that he could appear in person. Following a dispositional hearing in which David did not appear—either in person or by telephone, the court terminated his parental rights.

¶9 David filed a postdisposition motion, alleging, in part, that the court denied his right to meaningfully participate in the fact-finding hearing. The court denied this motion following a hearing. David appeals.

DISCUSSION

¶10 “A parent’s rights to his or her children are substantial and are protected by due process.” *Waukesha Cnty. DHHS v. Teodoro E.*, 2008 WI App 16, ¶10, 307 Wis. 2d 372, 745 N.W.2d 698 (citation omitted). “Due process requires that a court ensure the parent’s ability to ‘meaningfully participate’ in the proceedings.” *Id.* (citation omitted). The right to meaningful participation is “the opportunity to be heard at a meaningful time and in a meaningful manner.” *Rhonda R.D. v. Franklin R.D.*, 191 Wis. 2d 680, 701, 530 N.W.2d 34 (Ct. App. 1995) (citing *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)). “Whether a parent has been afforded the opportunity to participate meaningfully is a question of constitutional fact.” *Teodoro*, 307 Wis. 2d 372, ¶10. We defer to the circuit court’s factual findings unless they are clearly erroneous, but we independently apply constitutional principles to those facts. *Id.*

¶11 On appeal, David argues he was denied his due process right to meaningful participation at the fact-finding hearing because, after he advised the circuit court he lacked the financial ability to appear in person, the court failed to make alternative arrangements that would have ensured his meaningful participation. He cites three cases in which alternative arrangements were made for parents who were prevented from appearing in person at the fact-finding hearing. *See id.*, ¶¶5-8 (alternative arrangements for father who was deported and could not reenter country for ten years); *State v. Lavelle W.*, 2005 WI App 266, ¶¶3-4, 288 Wis. 2d 504, 708 N.W.2d 698 (alternative arrangements for father who

could not appear because he was federal prisoner); *Rhonda*, 191 Wis. 2d at 690-91 (alternative arrangements for father who was imprisoned in Washington). David also argues his participation by telephone, without the opportunity to testify, did not constitute meaningful participation, and he never waived his fundamental right to meaningful participation.

¶12 David's arguments, however, suffer from a fatal factual flaw: the circuit court found David had the financial ability to appear in person and simply chose not to attend the hearing. This factual determination is supported by the record and therefore not clearly erroneous. See *Noll v. Dimiceli's, Inc.*, 115 Wis. 2d 641, 643, 340 N.W.2d 575 (Ct. App. 1983). Specifically, the record shows that David requested time extensions so he could "put together the money" to come to Wisconsin, and, when David failed to appear in person at the fact-finding hearing, he testified he buys cigarettes, goes to the bar, and spends \$100 to \$150 per month for his cell phone. It was reasonable for the court to infer that, by granting these extension requests, David believed he would be in a financial position to afford the trip and would appear in person. When he failed to appear and testified about some of his expenditures, it was reasonable for the court to infer that, if David had forgone some of these items in the months leading up to the fact-finding hearing, David would have been able to purchase the \$190 bus ticket and attend the hearing.

¶13 As a result, this case does not present a situation where a parent lacked the financial resources to attend the fact-finding hearing and the court determined due process would nevertheless be satisfied if the parent appeared by telephone and did not testify. Because nothing prevented David from attending the fact-finding hearing, the court did not need to make "alternative arrangements" to ensure his meaningful participation.

¶14 Moreover, the court’s decision to allow David to observe the proceedings telephonically but not testify was not an “alternative arrangement” to in person presence. See *Lavelle*, 288 Wis. 2d 504, ¶¶3, 8 (“Any alternative to a parent’s personal presence at a proceeding to terminate his or her parental rights *must*, unless ... the parent knowingly waives this right[,] ... *be functionally equivalent to personal presence*.”). If that were the case, we would agree with David that this arrangement would not satisfy due process because it was not the functional equivalent of in person presence and David never waived his right to meaningful participation for this arrangement. However, in this case, the court repeatedly stated David needed to appear in person at the fact-finding hearing. Therefore, David’s arguments that the telephone participation was not the functional equivalent of in person presence and that he never waived his right to receive less than the functional equivalent of in person presence are nonstarters because he was always required to appear in person at the fact-finding hearing.⁴

¶15 In short, David was given the opportunity to be heard at a meaningful time and in a meaningful manner. See *Rhonda*, 191 Wis. 2d at 701. He was told he needed to appear in person and was given ample time to facilitate his appearance. That he chose not to attend the proceeding in person does not

⁴ David’s waiver argument also appears to suggest that due process requires that a parent, who is afforded the opportunity to meaningfully participate and simply chooses not to take advantage of that opportunity, must affirmatively and on the record waive his or her right to meaningful participation. David, however, cites no relevant legal authority in support of his proposition that a parent cannot be found to have waived his or her right to meaningful participation by simply failing to appear at the hearing. See *State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

mean he was deprived of his right to meaningfully participate. We conclude David's right to due process was not violated.

¶16 Finally, as a subset of his right to meaningful participation argument, David argues the court erroneously exercised its discretion by refusing to allow him to testify telephonically. "The decision whether to allow telephonic testimony lies within the sound discretion of the circuit court ... using the considerations found in WIS. STAT. § 807.13(2)(c)." *Welytok v. Ziolkowski*, 2008 WI App 67, ¶32, 312 Wis. 2d 435, 752 N.W.2d 359 (citation omitted). "We will not reverse a discretionary determination by the [circuit] court if the record shows that discretion was in fact exercised and we can perceive a reasonable basis for the court's decision." *Miller v. Hanover Ins. Co.*, 2010 WI 75, ¶30, 326 Wis. 2d 640, 656, 785 N.W.2d 493 (quotation omitted). "The circuit court erroneously exercises its discretion when it applies the wrong legal standard or if the facts of record fail to support the circuit court's decision." *Werner v. Hendree*, 2011 WI 10, ¶59, 331 Wis. 2d 511, 795 N.W.2d 423.

¶17 WISCONSIN STAT. § 807.13(2) provides, in relevant part, the court may admit telephonic testimony when:

(c) The proponent shows good cause to the court.
Appropriate considerations are:

1. Whether any undue surprise or prejudice would result;
2. Whether the proponent has been unable, after due diligence, to procure the physical presence of the witness;
3. The convenience of the parties and the proposed witness, and the cost of producing the witness in relation to the importance of the offered testimony;
4. Whether the procedure would allow full effective cross-examination, especially where availability to counsel of documents and exhibits available to the witness would affect such cross-examination;

5. The importance of presenting the testimony of witnesses in open court, where the finder of fact may observe the demeanor of the witness, and where the solemnity of the surroundings will impress upon the witness the duty to testify truthfully;
6. Whether the quality of the communication is sufficient to understand the offered testimony;
7. Whether a physical liberty interest is at stake in the proceeding; and
8. Such other factors as the court may, in each individual case, determine to be relevant.

¶18 In this case, the court reasoned before trial that telephonic testimony would be improper because of technology limitations in the courtroom and because it was important for the integrity of the process for the parties to present live, in person testimony. On the morning of trial, when David appeared by telephone instead of in person, the court reasoned that it could not allow telephonic testimony because the technological limitations in the courtroom “actually would interfere with the effectiveness of the process and would not ensure that all of the rights of all of the litigants are properly observed.” It explained that the technological limitations would not allow for an accurate record. We conclude that it was within the circuit court’s discretion to place emphasis on these considerations and the court’s reasoning shows it did not erroneously exercise its discretion.

By the Court.—Orders affirmed.

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

