State of New Hampshire Supreme Court

NO. 96-775

1997 TERM

OCTOBER SESSION

IN RE BABY BOY K.

RULE 7 APPEAL FROM FINAL DECISION OF PROBATE COURT

BRIEF OF PETITIONER/APPELLEE, DONNA & SVEN RHODES

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SUMMARY OF ARGUMENT

In this termination of parental rights proceeding, the petitioners, Donna and Sven Rhodes, first argue that the respondent, Rodney P. waived his right to be present by failing to ask the court to have him present, and also by failing to ask the court to provide any number of less burdensome alternatives to his presence.

The petitioners then argue that even if he did not waive his right to be present, the lower court correctly found that due process considerations allowed the termination proceedings to go forward without his presence and with the telephone hookup procedure used in this case.

The petitioners then argue that because the Probate Court heard sufficient evidence that could not be refuted even had the respondent testified, any procedural error it made was harmless and its termination of parental rights should stand.

The petitioners next argue that the respondent's argument that his incarceration was not a voluntary waiver of his alleged right to be personally present was not properly preserved. If it was preserved, the petitioners argue, there was sufficient evidence upon which the court properly found that the respondent's criminal action was voluntary especially in the light of his knowledge that he was probably a father.

Finally, the petitioners argue that New Hampshire's constitutional provision allowing litigants to be present in court does not apply to this case, and also that the issue was not preserved below.

ARGUMENT

I. Rodney P. Waived his Right to be Present

A. The Litigation Record

On December 13, 1995, the petitioners filed their Petition to Terminate Parental Rights with the Sullivan County Probate Court. The Court issued its Order of Notice on December 22, 1995. An attorney was appointed to the respondent on December 29, 1995, and on January 10, 1996, Rodney P. was served with the Petition and Order of Notice.

The Court took almost immediate action, and held its first hearing on February 1, 1996. On February 8, 1996, the Court issued an order in which it recognized that all parties were represented by counsel, that all parties have been properly served. The Court scheduled a pre-trial conference on March 28, 1996. It is unclear from the Court record whether that hearing was held.

On February 27, 1996, Rodney P., through his attorney, filed a motion for payment of long-distance telephone expenses because the respondent was incarcerated out-of-state and counsel anticipated frequent long-distance phone calls to adequately represent his client.

The Court then scheduled the pre-hearing conference on May 9, 1996. Prior to and just after the hearing, both side filed pleadings alleging that the other side had not adequately complied with discovery requests. Following the hearing, the Court issued a Pre-Trial Conference Order scheduling a final hearing on September 18, 1996, setting deadlines for discovery and for the GAL's report, noting that the petitioners and an expert planned to testify, and estimating that the hearing would take one day.

Most notable, the Court noted that the Respondent would attend by telephone, and

ordered that "any motion re: defendant's due process attendance issues must be filed by 8/1/96." *Appendix to Brief* at 3.

Thereafter, there court record shows that there were continuing disagreements between the parties concerning discovery, and that the respondent's attorney sought to exceed the fee cap. On July 29, 1996, the respondent filed a Motion for Extension of Court Deadlines because the parties, the respondent noted, were involved in settlement negotiations.

On October 2, 1996, the Respondent filed a Motion to Stay Proceedings. *Appendix to Notice of Appeal* at 6. The final hearing was held on October 16, 1996.

B. Rodney P. Made No Attempt to be Present or to Testify

This chronology shows that the respondent was represented by counsel immediately after the Petition to Terminate Parental Rights was filed. It shows 10 months of litigation on a number of issues. It also shows that no attempt was ever made to present the respondent's testimony or to procure his presence despite the court's order directing the date on which such a request should be made.

The respondent argues on appeal that he should have been present. But he didn't take any action that would ensure his presence, and he didn't take any action that would ensure any of a number of less burdensome options. Because he didn't make such requests, he waived his right to complain that the court erred by not providing the most burdensome option – transportation from the federal penitentiary in Pennsylvania.

At the outset, there is no indication in the record that Rodney P. intended to testify. If he had, he could have presented sworn testimony by affidavit or by deposition. Such procedures are routinely used in termination proceedings when the parent is incarcerated. *See, e.g.*, *People in*

Interest of C.G., 885 P.2d 355 (Colo.Ct. App. 1994) (affidavit and deposition); *In re Adoption of Dale A.*, 683 A.2d 297 (Pa. Super. Ct. 1996) (interrogatories and affidavit); *In re Randy Scott B.*, 511 A.2d 450 (Me. 1986) (deposition). If he felt that a paper record was not sufficient, he could have requested testimony by videotape deposition. *Matter of Adoption of J.W.M.*, 532 N.W.2d 372 (N.D. 1995). If he was concerned that the petitioners would not have an opportunity to cross-examine him, he could have requested a speaker-phone hookup. *See, e.g.*, *In re Juvenile Appeal*, 446 A.2d 808 (Conn. 1982) (testimony by speaker-phone); *In re Interest of L.V.*, 482 N.W.2d 250 (Neb. 1992) (participation in hearing by phone). The Probate Court clearly had the authority to order these things had it been presented with a timely request. *See* PROB. CT. R. 10; SUPER. CT. R. 37, 38, 45, 45-A.

Regardless of his plan to testify or not, the respondent failed to make a timely request to procure his presence. From reading the Probate Court's Pre-Trial Conference Order, one may infer that the matter was discussed at the pre-trial conference. In its Order, the Court specifically gave the respondent the opportunity to file a motion on the due process issue. However, no motion or memo of law was ever filed. It was not until the day of the final hearing on the merits that his attorney suggested that the respondent wished to be there. *Transcript* at 3, 8. His pre-trial motion requested only a continuance, not transportation or any other procedure. Motion to Stay Proceeding, *Notice of Appeal* at 5.

In a California case in which the inmate was a civil plaintiff seeking a personal appearance, the court found that the inmate had numerous alternative remedies.

> "(1) deferral of the action until the prisoner is released; (2) appointment of counsel for the prisoner; (3) transfer of the prisoner to court; (4) utilization of depositions in lieu of personal appearances; (5) holding of trial in prison; (6)

> conduct of status and settlement conferences, hearings on motions and other pretrial proceedings by telephone; (7) propounding of written discovery; (8) use of closed circuit television or other modern electronic media; (9) implementation of other innovative, imaginative procedures."

Wantuch v. Davis, 39 Cal. Rptr. 2d 47, 51-52 (1995) (numerous citations omitted). But the respondent here failed to request any such remedies.

The Probate Court was probably correct in its finding, *Transcript* at 8, that it didn't have authority to order the respondent transported from an out-of-state federal prison to New Hampshire. *See* RSA 516 and 613. However, the respondent clearly had the opportunity to request that the New Hampshire Federal District Court issue a writ of *habeas corpus ad testificandum*. Such a procedure exists for the very purpose of obtaining the presence of federal prisoners in state court proceedings in which they are a witness or a party. 28 U.S.C. § 2241(c)(5). The procedure has long been recognized, *see Ex parte Boolman*, 8 U.S. (4 Cranch.) 75 (1807), and applies to state civil as well as criminal proceedings. *See, e.g., In re Burrell*, 186 B.R. 230 (E.D. Tenn. 1995); *Barber v. Page*, 390 U.S. 719 (1968). The writ reaches prisoners outside of the federal district in which it is filed, *Duncan v. Maine*, 295 F.2d 528 (1st Cir. 1961), *cert. denied*, 368 U.S. 998; *ITEL Capital Corp. v. Dennis Mining Supply & Equip., Inc.,* 651 F.2d 405 (5th Cir. 1981), and has been employed in numerous state court termination proceedings. *See*, *e.g.*, *People in Interest of C.G.*, 885 P.2d 355 (Colo.Ct. App. 1994); *In re Randy Scott B.,* 511 A.2d 450 (Me. 1986); *In re Juvenile Appeal*, 446 A.2d 808 (Conn. 1982). The procedure is so well established that the Supreme Court has held that an out-of-state witness held in federal custody is not "unavailable" for evidentiary purposes in a state proceeding if the writ has not been applied for by the party desiring the witness. *Barber v. Page*, 390 U.S. 719, 724-25 (1968).

Finally, if all other procedures failed him, the respondent could have requested that the termination proceeding be moved to Pennsylvania. *See e.g.,* Uniform Child Custody Jurisdiction Act (UCCJA) § 7 (allowing change of venue when forum inconvenient for parties).

Because the respondent made no timely attempt to present his testimony in such straight-forward ways as filing an affidavit or taking a deposition, and also made no attempt at more creative measures such as a change of venue or application for a writ of *habeas corpus ad testificandum*, he waived his right to complain about the reasonable procedures the Probate Court employed here.

In *State v. Mott*, 692 A.2d 360, 363-64 (Vt. 1997), the Vermont Supreme Court found that meaningful presence in court for an inmate's hearing on his alleged violation of a court-ordered family violence order can be via telephone, through counsel, or through written communications with the court. Moreover, the Court found that because none of the alternatives were requested by the defendant, the trial court was not required to provide additional extraordinary process such as securing the presence of the inmate.

Accordingly, this Court should dismiss this appeal based on Rodney P.'s failure to make a timely request for his presence or for any one of several less burdensome alternatives.

II. Due Process Allows For Termination Proceedings Without The Presence of the Parent, And With the Telephone Hookup Used in This Case

The determination of whether a process must be accorded to an inmate in a termination case is governed by the three-prong due process balancing test set forth in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). *Lassiter v. Dep't of Social Services*, 452 U.S. 18, 27 (1981). *Mathews* mandates the

> "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 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 procedural requirement would entail."

Mathews, 424 U.S. at 335; *see also In re Tracy M.*, 137 N.H. 119 (1993).

A. First Prong – Respondent's Interest

Rodney P.'s parental rights are important constitutional rights. *Lassiter*, 452 U.S. at 18; *In re Jessie E.*, 137 N.H. 336 (1993).

B. Second Prong – Process Afforded

1. Inmates Have Diminished Rights of Due Process and Access to the Courts

The Supreme Court has held that inmates must be afforded meaningful access to the Courts. *Bounds v. Smith*, 430 U.S. 817 (1977); *Lewis v. Casey*, 518 U.S. __, 116 S. Ct. 2174 (1996). However, inmates have diminished rights in virtually all areas of their lives.

Among the rights diminished by incarceration are the right to privacy in one's mail, *Procunier v. Martinez*, 416 U.S. 396 (1974), *Wolff v. McDonnell*, 418 U.S. 539 (1974), to talk to the press, *Pell v. Procunier*, 417 U.S. 817 (1974), to associate to organize a labor union, *Jones v.*

North Carolina Prisoners' Labor Union, 433 U.S. 119 (1977), to read what one wishes, *Thornburgh v. Abbott*, 490 U.S. 401 (1989), *Bell v. Wolfish*, 441 U.S. 520 (1979), to correspond, *Turner v. Safley*, 482 U.S. 78 (1987), to practice one's religion, *O'Lone v. Shabazz*, 482 U.S. 342 (1987), to eat as one wishes, *Ward v. Walsh* (9th Cir. 1993), to wear one's hair as one wishes, *Powell v. Estelle*, 959 F.2d 22 (5th Cir. 1992) (long hair and beards), to change one's name, *Ali v. Dixon*, 912 F.2d 86 (4th Cir. 1990), to be free from searches, *Hudson v. Palmer*, 468 U.S. 517 (1984), *Avery v. Perrin*, 473 F. Supp 90 (D.N.H. 1979), to be private, *Timm v. Gunter*, 917 F.2d 1093 (8th Cir. 1990), to be free from seizures, *Parratt v. Taylor*, 451 U.S. 527 (1981), to refuse medical attention, *Washington v. Harper*, 494 U.S. 210 (1990), to refuse food, *In re Caulk*, 125 N.H. 226 (1984), to be free from assault, *Hudson v. McMillian*, 112 S. Ct. 995 (1992), to vote, *Richardson v. Ramirez*, 418 U.S. 24 (1974), and to have social security and disability benefits, *Davel v. Sullivan*, 902 F.2d 559 (7th Cir. 1990).

Likewise, inmates' due process rights and rights of access to the courts are diminished.

> "Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system. Among those so limited is the otherwise unqualified right given by [28 U.S.C. § 1654] to parties in all courts of the United States to 'plead and manage their own causes personally.'"

Price v. Johnston, 334 U.S. 266 (1948). Thus,

> "the Fourteenth Amendment due process claim based on access to the courts has not been extended by this Court to apply further than protecting the ability of an inmate to prepare a petition or complaint."

Wolff v. McDonnell, 418 U.S. 539, 576 (1974) (citations omitted).

2. Factors for Due Process Consideration

A number of courts have furnished lists of elements which should be considered when determining whether an inmate should be present at her/his civil proceeding.

When an inmate demands access to the courts, a determination is based upon the discretion of the court.

> "[T]his discretion is to be exercised with the best interests of both the prisoner and the government in mind. If it is apparent that the request of the prisoner to argue personally reflects something more than a mere desire to be freed temporarily from the confines of the prison, that he is capable of conducting an intelligent and responsible argument and that his presence in the courtroom may be secured without undue inconvenience or danger, the court would be justified in issuing the writ. But if any of those factors were found to be negative, the court might well decline to order the prisoner to be produced."

Price v. Johnston, 334 U.S. at 284-85. Similarly, a set of questions that may be asked are:

> "How substantial is the matter at issue? How important is an early determination of the matter? Can the trial reasonably be delayed until the prisoner is released? Have possible dispositive questions of law been decided? Has the prisoner shown a probability of success? Is the testimony of the prisoner needed? If needed, will a deposition be reasonably adequate? Is the prisoner requested? If not, is his presence reasonably necessary to present his case?"

Moeck v. Zajackowski (Matter of Warden of Wisconsin State Prison), 541 F.2d 177, 181 (7th Cir. 1976). In *In re Marriage of Allison*, 467 N.E. 310 (Ill. Ct. App. 1984), the court extended the *Moeck* list of questions to family law matters. In *Mancino v. City of Lakewood*, 523 N.E.2d 332 (Ohio App. 1987), the court synthesized various lists of questions and considerations in other cases and produced as comprehensive a method of determination as any court which has visited the issue.

> "Whether a prisoner should be permitted to be brought to trial to argue his case personally depends upon the particular circumstances of each case. We hold that the following criteria are to be weighed in making this determination: (1) whether

> the prisoner's request to be present at trial reflects something more than a desire to be temporarily freed from prison; (2) whether he is capable of conducting an intelligent and responsive argument; (3) the cost and convenience of transporting the prisoner from his place of incarceration to the courthouse; (4) any potential danger or security risk the prisoner's presence might pose; (5) the substantiality of the matter at issue; (6) the need for an early resolution of the matter; (7) the possibility and wisdom of delaying the trial until the prisoner is released; (8) the probability of success on the merits; and (9) the prisoner's interest in presenting his testimony in person rather than by deposition."

Mancino, 523 N.E.2d at 335.

Because Rodney P. did not indicate that he had anything substantive to add to the hearing, one must assume that his desire to attend was motivated in large part by an opportunity for a hiatus from prison life. Because he was represented and did not indicate that he wished to proceed *pro se*, there is no need for him to conduct an argument. The cost of transporting him from Pennsylvania is likely to be considerable. As he is a federal prisoner, maintaining him would be likely to be inconvenient and difficult. Given the need of a small child to have a stable home life, and the need for the petitioners and their family to form and maintain bonds with the child, there was an overwhelming need to have as quick as possible a resolution of the matter, and delaying it until the inmate is released is not reasonable. Because incarceration is a viable element of a termination decision, because of the inmate's demonstrated unwillingness to take care of his *other* children, and because of his lack of attention to the child in this case, his chance of success on the merits were slim. Finally, as Rodney P. made no indication that he intended to testify, there was no reason to have him at the hearing at all.

Based on these considerations, it is apparent that Rodney P. was not deprived of his due process rights by conducting the hearing without his personal presence.

3. The Respondent Got All the Process He Was Due

In the case at hand, Rodney P. got all the process which was due. He was not prosecuting the case *pro se*, and indicated no intention to testify. No party indicated that they wanted to cross-examine him. By being on the telephone with this lawyer, he was able to hear and talk to his lawyer, and was therefore present for all the purposes in which he indicated an interest. That he was not interested in rebutting specific allegations made by the GAL and others in their testimony is made clear by the respondent's failure to make any effort to gain his presence and by his attorney's failure to object to the hearsay which arguably constituted a great portion of the testimony.[1] Allegations that the court was not able to make credibility determinations about the respondent, *Respondent's Brief* at 12, or that the respondent's attorney had to act akin to a stenographer, *Respondent's Brief* at 15, therefore, are not relevant.

Had he been afforded additional process, he could not have made use of it. Had he been present, of course, he would have been able to absorb the goings-on in the courtroom first-hand. But because he indicated no wish to testify or conduct the hearing *pro se*, his presence would not have provided him any additional opportunities to participate in or make a meaningful contributions to the proceeding. *Matter of Murphy*, 414 S.E.2d 396 (N.C. Ct. App. 1992)

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[1]If the respondent wished to contest facts such as whether he had access to money which could have been used to support his child, the petitioners would have been able to prove the matter with reference to the prisoner funds business records held by the institutions in which the respondent was incarcerated. Similarly, if the respondent wished to contest facts such as the location and support of his various children, the petitioners would have been able to prove the matters by the testimony of the various mothers of the children. Proof of these and other matters with non-hearsay evidence would have hurt, rather than helped, the respondent. Thus, in the absence of a provable allegation of ineffective assistance of counsel, the respondent's failure to object on hearsay grounds must be accorded to a strategic decision and not to counsel's inability to effectively try the case with the respondent on the telephone.

(presence of inmate unlikely to lessen risk of error). Any alternative additional process, such as testifying by affidavit or deposition, or obtaining a writ of *habeas corpus ad testificandum*, was in the respondent's own power to pursue. Reducing the risk of error could not have been facilitated by any conceivable additional process that could have been granted by the court.

Because his absence could not have affected the quality or outcome of the determination made by the court and could not have increased the risk of erroneous deprivation, there was no value in any additional process. Thus, there was no violation of Rodney P.'s due process rights caused by the procedures used in this case

C. Third Prong – Other Interests

1. State's Interest

The third prong of the due process analysis is the state's interest. The Probate Court recognized that it had no authority to order the respondent to be there. The state of New Hampshire has an interest in the powers of its Probate Courts as the legislature has seen fit to grant them. The state could have applied for a writ of *habeas corpus ad testificandum*, but it would be a misplaced burden to require the state, rather than the respondent, to go to federal court. (It was clearly not the burden of the petitioner, as the respondent alleges pursuant to RSA 170-C:13, to get the respondent to the court.) Probate courts generally do not have the facilities to handle the security concerns raised by the presence of a federal prisoner. The State should not be required to bear the burden of providing security personnel not generally available in probate courts. Finally, the state has in interest in the expense of transporting and maintaining the prisoner, as well as the cost associated with the security that the prisoner's presence would require.

2. Child's and Petitioners' Interests

In most due process cases, the item about the which litigation is concerned has no independent interest. *See, e.g., Board of Regents v. Roth*, 408 U.S. 564 (1972) (loss of job). In a termination case, however, the item (*res litigiosae)* is a child, and the child himself has an interest not addressed in the *Mathews v. Eldridge* formulation. New Hampshire's termination statute requires that the court act in the best interests of the child. RSA 170-C:1. *In re Kristopher B.*, 125 N.H. 678 (1984); *see also Matter of Guardianship & Custody of A.O.*, 596 N.Y.S.2d 971 (Fam.Ct. 1993) (in due process balancing to determine father's right to be present at custody hearing, interest of child outweigh interest of parent). Moreover, the adopting parents and their family have interests in the emotional life and development of their family. Thus, in addition to the state's pecuniary and security interests, the *Mathews* balancing should also take into account the child's and the adopting family's interests.

D. Numerous Courts Have Found That Inmates Do Not Have A Right to Be Present At Their Termination Proceedings

The Respondent failed to cite a single case in which a court found that an inmate's lack of personal attendance at his termination hearing was a violation of his due process rights. Instead, he cited *Strube v. Strube*, 764 P.2d 731 (Ariz. 1988), which is inapposite. *Strube* is a divorce case in which the inmate was acting *pro se* and was given no opportunity to contest the evidence. In addition, the prisoner was held in-state, and the court found that the state routinely moved prisoners from their place of incarceration to their place of litigation. The court did not enunciate a sweeping right for inmates to be personally present at their civil trials, but instead found that determining whether inmates were to be transported was within the trial court's discretion.

On the other side, there are numerous cases holding that there is no due process violation when an out-of-state inmate is not personally present at her/his termination proceeding. *In re Gary U.*, 186 Cal. Rptr. 316 (Ct. App. 1982); *People in Interest of C.G.*, 885 P.2d 355 (Colo. Ct. App. 1994); *People in Interest of V.M.R.*, 768 P.2d 1268 (Colo. Ct. App. 1989); *In Interest of R.J.P.*, 476 S.E.2d 268 (Ga. Ct. App. 1996); *In Interest of S.R.*, 554 N.W.2d 277 (Iowa Ct. App. 1996) (same-state incarceration); *In Interest of C.J.*, 650 N.E.2d 290 (Ill.App. 1995); *Matter of Welfare of A.Y.-J.*, 558 N.W.2d 757 (Minn. Ct. App. 1997) (incarceration in out-of-state federal facility); *Matter of Welfare of HGB*, 306 N.W.2d 821, 825-26 (Minn 1981) ("Appellant has never, not even now, suggested what she might offer in her defense. Instead, she stands on her inability to attend the hearing because she was in an out-of-state jail. We reject this contention. Appellant was represented by counsel. Depositions or interrogations could have been submitted."); *In re Interest of L.V.*, 482 N.W.2d 250 (Neb. 1992) (inmate was present by phone having been sworn by on-site attorney, and participated in hearing); *Matter of Quevedo*, 419 S.E.2d 158 (N.C. Ct. App. 1992); *Matter of Murphy*, 414 S.E.2d 396 (N.C. App. 1992); *Matter of Adoption of J.S.P.L.*, 532 N.W.2d 653 (N.D. 1995); *Matter of Adoption of J.W.M.*, 532 N.W.2d 372 (N.D. 1995); *In Interest of F.H.*, 283 N.W.2d 202 (N.D. 1979); *Matter of Rich*, 604 P.2d 1248, 1252-53 (Okla. 1979); *In re Adoption of Dale A.*, 683 A.2d 297 (Pa. Super. Ct. 1996); *In re Clark*, 611 P.2d 1343 (1980); *In the Interest of Darrow*, 649 P.2d 858, 861 (1982) ("The right to appear *personally* and defend is not guaranteed by due process so long as the prisoner was afforded an opportunity to defend through counsel and by deposition or similar evidentiary techniques."); *Najar v. Oman*, 624 S.W.2d 385, 387-88 (Tex. Ct. App. 1981) (same-state incarceration).

In *In re Juvenile Appeal*, 446 A.2d 808 (Conn. 1982), a Connecticut court in a termination

proceeding allowed the inmate who was incarcerated in an out-of-state prison to testify via telephone. The court held two hearings. At the first, the principal witness against the inmate testified. The inmate was then allowed to privately review the transcript with his attorney by phone. At the second hearing, the inmate testified by phone, and was cross-examined by the other sides. The Connecticut Supreme Court found that the inmate could not establish what assistance he might have provided his attorney had be been physically present, and that the trial court was able to assess the witness adequately by phone. Accordingly, the Court ruled that the procedure was adequate.

In re Randy Scott B., 511 A.2d 450 (Me. 1986) is a sad case that peripherally involves New Hampshire. When the child was three years old, his father shot and killed his wife, the child's mother, for which he was convicted of manslaughter and served four years in the Maine State Prison. Four years after his release, the father shot and killed his second wife and was convicted of murder in New Hampshire, for which he received a sentence of life without parole. *See State v. Bruneau*, 131 N.H. 104 (1988).

Thereafter, Maine authorities moved to terminate his parental rights. The father, being incarcerated in New Hampshire, was not present at the hearing, but was represented at all times by an attorney. Prior to the hearing, the father moved for a writ of *habeas corpus ad testificandum*, and for an order requiring the father's attendance. The court denied the motions, but upon the attorney's representation that it could be accomplished, allowed a continuance to secure the father's presence. The attorney's plans didn't materialize, and the hearing went on without the father's attendance, but with him still represented by counsel. The court also allowed the father to be deposed after the hearing, and indicated that the hearing could be reopened after the deposition

if necessary. Based on the evidence taken at the hearing, as well as the post-hearing deposition, the father's parental rights were terminated.

Upon the father's claim of a violation of constitutional rights for conducting the termination hearing in his absence, the Maine Supreme Judicial Court applied the *Mathews* due process analysis. It recognized the "extremely important" "liberty interest in maintaining his parental relationship with" the child. *Randy Scott B.*, 511 A.2d at 453. On the second prong, it rejected the father's contention that the court's procedures were likely to lead to an erroneous termination because the father was not present to assist his counsel in cross-examination of the opposing witnesses. The Court found that the father was not prejudiced by his absence because he was at all stages of the proceeding represented by counsel who had full opportunity to cross-examination all witnesses, because the father's full testimony was considered by the court, and because the court gave the father the opportunity (not availed) to re-open the proceedings. Finally, the Court found that the state's interest in the protection of children, the security risk of having the father attend, and the cost and administrative burden of transporting and maintaining custody of the father, were substantial enough to warrant denial of the father's appearance.

There is nothing extraordinary about the case at hand such that New Hampshire should not follow the precedents of Connecticut and Maine and many other states.

Numerous courts have also found that inmates do not have a right to personally appear in a variety of non-termination family law proceedings. *Belser v. Belser*, 575 So. 2d 1139 (Ala. Civ. App. 1991) (divorce); *M.J.F. v. J.W.*, 680 So.2d 302 (Ala. Civ. App. 1996) (inmate action against custodian of child for contempt); *Head v. Head*, 612 So. 2d 1224 (Ala. Civ. App. 1992) (divorce; no right to personally appear even when intend to testify on own behalf); *Strube v. Strube*, 764

P.2d 731 (Ariz. 1988) (divorce); *Quaglino v. Quaglino*, 152 Cal. Rptr. 47 (Cal. App. 1979) (child support and appointment of receiver for inmate's property); *In re Marriage of McGonigle*, 533 N.W.2d 524 (Iowa 1995) (divorce); In *re Marriage of Schmidt*, 609 N.E.2d 345 (Ill. Ct. App. 1993) (divorce); *In re Marriage of Allison*, 467 N.E. 310 (Ill.App. 1984) (divorce, marital property dissolution, custody, and visitation); *Alexander v. Alexander*, 900 S.W.2d 615 (Ky. Ct. App. 1995) (visitation); *State ex rel. Kittrell v. Carr*, 878 S.W.2d 859 (Mo. Ct. App. 1994) (divorce); *In re Marriage of Burnside*, 777 S.W.2d 660 (Mo.App. 1989) (divorce); *Caynor v. Caynor*, 327 N.W. 633 (Neb. 1982) (visitation); *Matter of Guardianship & Custody of A.O.*, 596 N.Y.S.2d 971 (Fam. Ct. 1993 (custody); *Throndset v. Hawkenson*, 532 N.W.2d 394 (N.D. 1995) (paternity and child support); *State ex rel. Vanderlaan v. Pollex*, 644 N.E.2d 1073 (Ohio Ct. App. 1994) (custody); *Sullivan v. Shaw*, 650 A.2d 882 (Pa. Super. Ct. 1994) (visitation); *State v. Mott*, 692 A.2d 360 (Vt. 1997) (violation of court-ordered family violence order); *State ex rel. Taylor v. Dorsey*, 914 P.2d 773 (Wash. Ct. App. 1996) (paternity); *Hall v. Hall*, 341 N.W.2d 206 (1983) (divorce).

Courts have also found that inmates do not have a right to personally appear in variety of non-family civil proceedings. *Latiolais v. Whitley*, 93 F.3d 205 (5th Cir. 1996) (civil rights); *In re Collins*, 73 F.3d 614 (6th Cir. 1995); *Michaud v. Michaud*, 932 F.2d 77 (1st Cir. 1991); *Fruit v. Norris*, 905 F.2d 1147 (8th Cir. 1990) (prison conditions); *Jones v. Hamelman*, 869 F.2d 1023 (7th Cir. 1989) (civil rights); *Poole v. Lambert*, 819 F.2d 1025, 1028 (11th Cir. 1987); *Dorsey v. Edge*, 819 F.2d 1066 (11th Cir. 1987); *Demoran v. Witt*, 781 F.2d 155 (9th Cir. 1986); *Ulmer v. Chancellor*, 691 F.2d 209 (5th Cir. 1982); *Holt v. Pitts*, 619 F.2d 558 (6th Cir. 1980); *Stone v. Morris*, 546 F.2d 730 (7th Cir. 1976); *Moeck v. Zajackowski*, 541 F.2d 177, 181 (7th Cir. 1976);

In re Burrell, 186 B.R. 230 (Bkrtcy, E.D. Tenn. 1995) (bankruptcy); *Lightfoot v. McDonald*, 587 So. 2d 936 (Ala. 1991) (malpractice plaintiff); *Clements v. Moncrief*, 549 So.2d 479 (Ala. 1989) (negligence plaintiff); *Hubbard v. Montgomery*, 372 So. 2d 315 (Ala. 1979) (civil rights plaintiff); *Post v. Duckett*, 672 So.2d 1298 (Ala. Ct. App. 1992) (party alleging errors in administration of estate); *Wantuch v. Davis*, 39 Cal. Rptr. 2d 47 (Cal. Ct. App. 1995) (malpractice plaintiff); *Adkins v. Winkler*, 592 So. 2d 357 (Fla. App. 1992) (tenant suit against landlord); *Brown v. Sheriff of Broward County Jail*, 502 So. 2d 88 (Fla. Ct. App. 1987) (plaintiff); *Myers v. Emke*, 476 N.W.2d 84 (Iowa 1991) (civil rights plaintiff); *Proctor v. Calahan*, 663 So.2d. 110 (La. Ct. App. 1995) (malpractice plaintiff); *Taylor v. Broom*, 526 So. 2d 1367 (La. Ct. App. 1988) (plaintiff in suit against prison); *In re Merrell*, 658 So. 2d 50 (Miss. 1995) (party in action against trustee); *Call v. Heard*, 925 S.W.2d 840 (Mo 1996) (wrongful death defendant); *State ex rel. McCulloch v. Lasky*, 867 S.W.2d 697 (Mo. Ct. App. 1993) (post-conviction civil proceeding); *Callahan v. Marsh*, 717 S.W.2d 260 (Mo.Ct. App. 1986) (civil rights plaintiff); *Wells v. St Vincent's Hosp.*, 605 N.Y.S.2d 12 (N.Y.A.D. 1993) (negligence plaintiff); *Mancino v. City of Lakewood*, 523 N.E.2d 332 (Ohio Ct. App. 1987) (party in enforcement of lien); *Nance v. Nance*, 904 S.W.2d 890 (Tex. Ct. App. 1995) (negligence defendant); *Byrd v. Attorney Gen. of Tex. Crime Victims Compensation Div.*, 877 S.W.2d 566 (Tex. Ct. App. 1994) (plaintiff in suit claiming entitlement to portion of crime victims fund); *Lackey v. Carson*, 886 S.W.2d 232 (Tenn.App. 1994) (perjury plaintiff); *Armstrong v. Randle*, 881 S.W.2d 53 (Tex. Ct. App. 1994) (damages defendant); *Pruske v. Dempsey*, 821 SW2d 687 (Tex. App. 1991) (damages defendant); *Birdo v. Holbrook*, 775 S.W.2d 411 (Tex. Ct. App. 1989) (plaintiff).

Accordingly, this Court should find that Rodney P.'s due process rights were not violated.

III. If the Probate Court Erred, it was Harmless Error

Even if the Probate Court erred in its procedure, the error was harmless.

New Hampshire law allows termination of parental rights when a child is abandoned and termination is in the best interests of the child. The Probate Court determines abandonment as a matter of fact and its decree is not disturbed unless unsupported by the evidence or plainly erroneous. *In re Lisa H.*, 134 N.H. 188 (1991). A child is presumed abandoned when the child is left by the parent in the care and custody of another without any provision for his support, or without communication from the parent for six months. RSA 170-C:5.

Incarceration is viable consideration when determining abandonment. *See, e.g., Murphy v. Vanderver*, 349 N.E.2d 202 (Ind. Ct. App. 1976); *In re Interest of L.V.*, 482 N.W.2d 250 (Neb. 1992); *In re B.A.G., Jr.*, 457 N.W.2d 292, 296 (Neb. 1990); *Casper v. Huber*, 456 P.2d 436 (Nev. 1969), *cert. denied*, 397 U.S. 1012 (1970); *In re Miller*, 179 N.Y.S. 181, 182 (1979); *Matter of Adoption of J.W.M.*, 532 N.W.2d 372 (N.D. 1995); *State ex rel. M.W.H. v. Aguilar*, 794 P.2d 27 (Utah App. Ct. 1990). In fact, incarceration is even a ground for divorce in many states. *See, e.g.*, RSA 458:7; Michael Mushlin, RIGHTS OF PRISONERS § 15.02 at 161 n. 33 (2nd ed. 1993).

The court found, and the evidence was uncontradicted, that the Petitioners Donna and Sven Rhodes, could, would, and have been since Baby K. was eight days old, provide him a bountiful and compassionate home. Termination and adoption is thus in the best interest of the child.

The court found that the respondent was the father, Court Order, *Notice of Appeal* at 7, that the baby was 16 months old at the time of the hearing, had been in the care and custody of the petitioners since Baby K. was eight days old, Petitioner's Request for Findings ¶ 9, *Appendix to*

Petitioner's Brief at 5, and that the respondent will be incarcerated for a significant portion of the child's babyhood. Court Order, *Notice of Appeal* at 8. The Court found that Rodney P. has never contacted the baby, Court Order, *Notice of Appeal* at 7, has never sent cards or presents or any other items, Court Order, *Notice of Appeal* at 8; Petitioner's Request for Findings ¶¶ 16, 17, *Appendix to Petitioner's Brief* at 7, and has never even inquired into the child's well being. Court Order, *Notice of Appeal* at 8. The court further found that the respondent has money to pay for a significant amount of his own food and phone calls in jail, Court Order, *Notice of Appeal* at 7, and did not liquidate his assets to support the child. Court Order, *Notice of Appeal* at 7. Yet, the court found, he neglected to contribute to pre-natal care or to birth expenses, Court Order, *Notice of Appeal* at 7, Petitioner's Request for Findings ¶ 14, *Appendix to Petitioner's Brief* at 6, that he has never provided the baby with any subsistence, Court Order, *Notice of Appeal* at 7; Petitioner's Request for Findings ¶ 15, *Appendix to Petitioner's Brief* at 6-7, and even during the pendency of this suit he failed to propose a plan for future support. Court Order, *Notice of Appeal* at 8. The court also found that the respondent avoided support orders for his two other children, and did not support them. Petitioner's Request for Findings ¶ 17, *Appendix to Petitioner's Brief* at 7-8.

All of these facts were found with record evidence, were independently verifiable, and corroborated by multiple witnesses. None of the facts are susceptible of contention by the respondent had he testified. He never even indicated a wish to testify. Accordingly, the respondent suffered no prejudice from him not being personally present at the termination hearing.

Factually this case is controlled by several New Hampshire cases in which this Court has found that a failure to maintain contact with or provide for the child is sufficient evidence for

termination. *See, e.g., In re Sabrina C.*, 137 N.H. 445 (1993); *In re Sara S.*, 134 N.H. 590 (1991); *In re Jessica B.*, 121 N.H. 291 (1981). Moreover, there are many cases in other jurisdictions where the termination of an *inmate's* parental rights, based on abandonment, has been upheld on facts similar facts to those here.

In *In re Jasmine T.*, 557 N.Y.S.2d 669 (A.D. Dept. 1990), the court found that "[f]ailure to visit or communicate is evidence of an intention to forego parental rights and responsibilities." *Id.* at 670. The could held that the "respondent's incarceration [does not] excuse [the parent's] failure to communicate with the child or [the child's guardian] where, as here, she was free to write letters and make telephone calls. Although [the parent] telephoned others while incarcerated . . . [she] made no effort to contact [the child] or the foster parents." *Id.* at 671.

In *In re Ravon Paul H.*, 555 N.Y.S.2d 49 (A.D. Dept. 1990), the parent made only minimal attempts to contact the child. The court upheld a finding of abandonment "in light of the absence of evidence that [the father] attempted to write, send gifts, telephone or otherwise maintain a relationship with the child, or the agency, during [the father's] period of incarceration." *Id.* at 49-50.

In *In Interest of F.H.*, 283 N.W.2d 202 (N.D. 1979), the court found that the incarcerated father knew about the pregnancy when he engaged in criminal conduct, and that he provided no financial or other care, never inquired into the condition of the child or sent letters or gifts. The could held that an intent to begin or resume parenting at the end of a period of incarceration was not a sufficient interest to overcome the evidence of abandonment, and accordingly terminated the father's parental rights.

In *South Carolina Dep't of Social Servs. v. Phillips*, 391 S.E.2d 584 (S.C.App. 1990), the

court found that "the record supports the trial judge's finding that the purchase of canteen food and cigarettes while in prison were unnecessary expenses and [the father's jail] wages could not have been significantly depleted by the occasional purchase of soap and personal grooming supplies."

In *Hamby v. Hamby*, 216 S.E.2d 536 (S.C. 1975), the court upheld termination based on abandonment because the father's "lack of concern was . . . exhibited in his failure, while in jail, to write or communicate with the child, except on two isolated occasions." *Id.* at 538-39.

In *State ex rel. M.W.H. v. Aguilar*, 794 P.2d 27 (Utah 1990), the court found that although the father "has continually expressed the subjective intent to establish his parental rights and to gain custody of his son[,t]he subjective intent standard often focuses too much attention on the parent's wishful thought and hopes for the child and too little on the more important element of how well the parents have discharged their parental responsibility." *Id.* at 28-29 (internal quotations omitted). The court also found that the father "sent no letters or cards, made no telephone calls, and made no attempt to contact" the child, *id.* at 29, and upheld termination based on abandonment.

Accordingly, the Probate Court in this case appropriately terminated the parental rights of the respondent, and to the extent there was procedural error in so doing, the error was harmless and this court should leave undisturbed the results below.

IV. The Respondent Waived his Right to Be Present by Voluntarily Engaging in Conduct Likely to get him Incarcerated

The respondent argues in his brief that he did not voluntarily waive his right to be personally present at his termination proceeding by getting himself incarcerated. *Respondent's Brief* at 19 *et seq.*

However the respondent failed to preserve this issue below or on appeal, and argues it for the first time in his brief. The question presented in his Notice of Appeal is whether due process guarantees an inmate the right to be personally present at his termination proceeding. *Notice of Appeal* at second page (unnumbered); *Respondent's Brief* at 1. The issue of whether committing a crime that carries a stiff penalty of incarceration is a waiver of those due process rights is a seperate question which cannot be construed as a "subsidiary question fairly comprised" in the question asked. SUP. CT. R. 16. *See State v. Panzera*, 139 N.H. 235 (1994).

If the court reaches the question, however, it should find that criminal activity likely to result in incarceration is a voluntary waiver of his diminished due process right to be personally present at termination proceedings. When, as here, the criminal activity resulting in incarceration was done after the criminal was aware of conception and his probable paternity, waiver is apparent.

Whether a defendant voluntarily absented himself from a criminal proceeding and thereby voluntarily waived his right to be present at trial is a question of fact for the trial court to be established by a preponderance of the evidence. *State v. Lister*, 119 N.H. 713 (1979). Thus, this Court's only role is to determine whether there was competent evidence to support the court's finding.

The Probate Court found that the respondent was incarcerated and that his minimum release date is in September, 1999. Petitioner's Request for Findings ¶ 11, *Appendix to Petitioner's Brief* at 6. The court found that the Baby was born in May 1995, Petitioner's Request for Findings ¶ 1, *Appendix to Petitioner's Brief* at 4, and that the respondent learned that his girlfriend Ms. Kedzierski was pregnant with the baby in December 1994, Petitioner's Request for Findings ¶ 14, *Appendix to Petitioner's Brief* at 6. The GAL testified that, based on conversations with the respondent, "[e]ither he created a child knowing that he was going to go to jail or he created a child and then took activity afterwards that created him [sic] to go to jail." *Transcript* at 66. The court found that the respondent did the crime for which he is incarcerated after he knew the (future) mother was pregnant. Petitioner's Request for Findings ¶ 17f., *Appendix to Petitioner's Brief* at 8

There was no allegation that the respondent was not duly convicted of the crimes for which he was incarcerated, and no allegation that he had a defense such as duress or coercion to show that the crimes were not voluntarily committed. Thus, the court heard evidence sufficient to sustain its finding that the respondent voluntarily committed acts likely to get him incarcerated after he had conceived a child.

Other courts have found similarly. In *In re B.A.G., Jr.*, 457 N.W.2d 292, 296 (Neb. 1990), the court found that "[a]lthough his incarceration . . . was nonvoluntary in a sense of the word, his actions that put him in prison were every bit as voluntary as if he had purchased a ticket for a 6-, 7-, or 8-year trek into Siberia."

In *In re Miller*, 179 N.Y.S. 181, 182 (1979), the court commented that "[h]owever harsh the rule of law may appear to [the incarcerated father] he alone has placed himself beyond the pale

of the law by conduct which has deprived himself of citizenship and of liberty."

In *In Interest of F.H.*, 283 N.W.2d 202, 213 (N.D. 1979), the court found that

> "no evidence was introduced which suggests that [the father] committed the crime to obtain finances or to earn money to help support the child or to obtain food for his own sustenance. He performed the acts which led to his incarceration voluntarily; he was not coerced or under duress to commit those acts; the acts must therefore be deemed to be voluntary. While he may not have committed the act with the specific intent to be incarcerated, nevertheless the reasonable consequence thereof should have been known and accepted."

In *Hamby v. Hamby*, 216 S.E.2d 536, 538 (S.C. 1975), the father "voluntarily pursued a course of lawlessness which resulted in his imprisonment and inability to perform his parental duties." *See also State ex rel. M.W.H. v. Aguilar*, 794 P.2d 27 (Utah 1990).

Even if the Probate Court was mistaken, whether the respondent was incarcerated voluntarily was a superfluous part of its reasoning, and its holding stands without regard to this issue.

The Probate Court's use of the telephone procedure was based on a number of considerations, including the cost and inconvenience to the court, *Transcript* at 8, that the court didn't have authority to move the respondent, *id.*, the best interests of the child, *id.* at 9, and that the respondent's requests for additional procedure were not timely made, *id.* Thus, the court's holding on the voluntariness of the respondent's waiver is, at most, harmless error.

V. Favorable Proofs Clause Applies to Criminal Cases Only

To the extent that the respondent seeks to have this court issue a decision with reference to the New Hampshire Constitution's favorable proofs clause, *Respondent's Brief* at 2, the issue was not preserved. No mention of the clause was made in any pleadings, or in the respondent's Notice of Appeal. It is first cited in his brief. *Respondent's Brief* at 2.

The New Hampshire constitution provides that

> "Every subject shall have a right to produce all proofs that may be favorable to himself; to meet the witnesses against him face to face, and to be fully heard in his defense, by himself, and counsel."

N.H. CONST., Pt. I, Art. 15.

The provision applies only to criminal cases. Each of the sentences of Article 15 refers to the rights of criminals. The Article begins, "No subject shall be held to answer for any crime, or offence . . . " The sentence following the favorable proofs clause begins, "No subject shall be arrested, imprisoned . . ." The next, and final, sentence begins, "Every person held to answer in any crime or offense . . ." Each of the Article's provisions applies specifically to criminal cases. Accordingly, insofar as the Article may be construed to confer a right of personal appearance, that right applies only to criminal cases and is inapposite in this civil termination proceeding.

CONCLUSION

Based on the foregoing, the petitioners request that this court affirm the judgment of the Probate Court without further proceeding.

Respectfully submitted,

Donna & Sven Rhodes
By their Attorney,

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Dated: August 20, 2000

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REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Counsel for Donna & Sven Rhodes requests that Attorney Joshua L. Gordon be allowed 15 minutes for oral argument.

I hereby certify that on October 14, 1997, a copy of the foregoing will be forwarded to Elizabeth Cazden, Esq.; Chris McLaughlin, Esq;, Lanea Witkus, Esq;, Ann Larney,Esq, Assistant Attorney General; and Charles Locke, Esq.

Dated: October 14, 1997

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APPENDIX