

**IN THE COURT OF APPEALS OF IOWA**

No. 6-261 / 06-0280

Filed June 14, 2006

**IN THE INTEREST OF G.P. III, Minor Child,**

**G.P., Jr., Father,**  
Appellant.

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Appeal from the Iowa District Court for Polk County, Joe E. Smith, District Associate Judge.

A father appeals the juvenile court order terminating his parental rights.

**AFFIRMED.**

Tiffany Koenig of Kragnes, Tingle & Koenig, P.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Kathrine S. Miller-Todd, Assistant Attorney General, John Sarcone, County Attorney, and William Sales, Assistant County Attorney, for appellee State.

Brad Schroeder of Hartung & Schroeder, Des Moines, for mother.

James Mefferd of James Mefferd, P.C., Chariton, for legal father.

Deborah K. McKittrick of McKittrick Law Firm, P.C., Ankeny, for intervenors.

Barb Roman, West Des Moines, as guardian ad litem for the minor child.

Considered en banc.

**PER CURIAM*****I. Background Facts & Proceedings***

George Jr. and Brenda are the biological parents of George III, who was born in April 2004.<sup>1</sup> In January 2005, George Jr. was sentenced to three years in prison in Oklahoma on charges of knowingly concealing stolen property. The child was removed from Brenda's care in February 2005 due to her substance abuse problems. He was placed with a maternal aunt.

George III was adjudicated to be a child in need of assistance (CINA) pursuant to Iowa Code sections 232.2(6)(b) (2005) (parent is imminently likely to neglect child), (c)(2) (child is likely to suffer harm due to parent's failure to supervise), and (n) (parent's drug or alcohol abuse results in child not receiving adequate care). George Jr. remained in prison throughout the juvenile court proceedings.

In December 2005 the State filed a petition seeking to terminate the parental rights of George Jr., Brenda, and Edwin. A December 16 order scheduled pretrial conference for January 5, 2006, and scheduled the termination of parental rights hearing for January 25, 2006. At the request of Brenda's attorney the pretrial conference was continued to and held on January 17, 2006. At the pretrial conference the attorney for George Jr. made a motion for George Jr. to appear by telephone at the termination hearing. A note on the bottom of the pretrial conference order of January 17 states, "Father's motion to appear by telephone is denied."

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<sup>1</sup> At the time the child was born, Brenda was married to Edwin, who is thus considered the child's legal father.

The termination hearing was held on January 25, 2006. George Jr.'s attorney made an oral motion for a continuance, stating George Jr. believed he had a due process right to be present in the courtroom by telephone. The State argued there was no reason for the court to delay the proceedings because of George Jr.'s inability to appear. The court overruled the motion to continue. George Jr.'s attorney then asked to have the record kept open so that George Jr. could submit a deposition. The court overruled that motion as well.

The juvenile court terminated George Jr.'s parental rights under sections 232.116(1)(b) (abandonment) and (h) (child is three or younger, CINA, removed for at least six months, and cannot safely be returned home).<sup>2</sup> In the termination order, the juvenile court stated:

As a preliminary matter I would note the father's attorney requested a continuance be granted in order to allow the child's biological father, George Jr., who is in prison in Oklahoma to appear. I denied the father's motion to continue. The father then moved the court to allow his participation by telephone. I denied this motion as well citing the court's antiquated telephone system that would not permit conferences between the father and his attorney.

George Jr. appeals the termination of his parental rights.

## ***II. Standard of Review***

The scope of review in termination cases is de novo. *In re R.E.K.F.*, 698 N.W.2d 147, 149 (Iowa 2005).

## ***III. Merits***

George Jr. contends his due process rights were violated because he was not given the opportunity to participate in the termination hearing. He asserts

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<sup>2</sup> The parental rights of Brenda and Edwin were also terminated. They have not appealed.

that either the juvenile court should have granted his request to permit him to appear by telephone, or the court should have granted his request to submit a deposition.

A parent has a fundamental liberty interest in the care, custody, and control of his or her child. *Troxel v. Granville*, 530 U.S. 57, 65-66, 120 S. Ct. 2054, 2060, 147 L. Ed. 2d 49, 56-57 (2000). In order to terminate a parent's rights, the State must comply with the Due Process Clause. *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 37, 101 S. Ct. 2153, 2165, 68 L. Ed. 2d 640, 656 (1981). "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S. Ct. 2593, 2600, 33 L. Ed. 2d 484, 494 (1972).

In proceedings affecting the parental rights to children, notice of the hearing and an opportunity to be heard appropriate to the nature of the hearing is the most rudimentary demand of due process of law. *In re S.P.*, 672 N.W.2d 842, 845 (Iowa 2003). We have held:

Where a parent receives notice of the petition and hearing, is represented by counsel, counsel is present at the termination hearing, and the parent has an opportunity to present testimony by deposition, we cannot say the parent has been deprived of fundamental fairness.

See *In re J.S.*, 470 N.W.2d 48, 52 (Iowa Ct. App. 1991). Due process does not require that an incarcerated parent be permitted to participate in person. We conclude due process therefore also does not require that an incarcerated parent be permitted to participate by telephone.<sup>3</sup>

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<sup>3</sup> We do note that George Jr. has not cited, and we have not found, a statute or rule authorizing trial participation by telephone or requiring that such be permitted. *Cf. Iowa*

The State argues that George Jr. was not denied the *opportunity* to present his testimony by deposition, and we agree. Nothing in the record suggests that he was unable to present such a deposition at the termination hearing, had he chosen to do so. Instead, however, he chose to seek to participate in the hearing by telephone, and did not make his request to do so until the final pretrial conference which was held eight days before the scheduled termination hearing.

We do not believe due process of law requires a juvenile court, under circumstances such as those in this case, to delay proceedings to allow a party a period of time after the termination hearing to obtain and present the party's deposition. George Jr. had been aware since on or about December 16, 2005, of the pending termination proceeding and the date of the pending termination hearing. Even after his request to participate by telephone had been denied at the pretrial conference he did not proceed to obtain his deposition, but instead waited until the termination hearing and then sought a continuance to obtain and present it. We conclude that under the facts of this case the juvenile court's denial of a continuance did not deny George Jr. due process of law.

We affirm the decision of the juvenile court which terminated the parental rights of George Jr.

**AFFIRMED.** Sackett, C.J., concurs specially.

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R. Civ. P. 1.701(7) (authorizing depositions to be taken by telephonic means). This does not mean, however, that such participation is prohibited. Trial courts should perhaps be reluctant to deny an incarcerated party's request to testify by telephone when such is technologically feasible and the parties agree to it or a party requests it and the other parties do not resist, as testimony by such means may prove to be more efficient, economical, and meaningful than testifying by procuring and presenting the incarcerated party's deposition.

**SACKETT, C.J.** (concur specially)

I concur specially because I believe the grounds for termination have been shown. I write specially because I am disappointed that the juvenile court failed to make a provision for the father to be a part of the proceedings.

The father was denied his request to appear by telephone at the hearing terminating his parental rights to his child. The majority has found his due process rights were not violated because he did not seek to present a deposition at the hearing and only made a request for telephone participation eight days before the scheduled trial date. I believe the request was reasonable and would hope that this decision would not discourage juvenile courts from allowing such participation when requested.

A parent has a constitutionally protected right to his or her child. See *Santosky v. Kramer*, 455 U.S. 745, 753-54, 102 S. Ct. 1388, 1394-95, 71 L. Ed. 2d 599, 606 (1982); *In re S.R.*, 548 N.W.2d 176, 177-78 (Iowa Ct. App. 1996). Terminating one's parental rights to a child is one of the most severe penalties a court can impose with lifetime repercussions to both the parent and the child. Courts are under strict mandates to take swift action to terminate parental rights under the apparent assumption this will assure children permanency, although there is no guarantee that it does and there are many times it does not.

The record supplies no answers on the difficulty and expense of providing the father a telephone hookup to the proceedings. My general knowledge of telephone conferences or hearings convinces me the difficulty and expense

would be insignificant compared to the other costs of a termination proceeding and probably less expensive and more beneficial than a deposition. Additionally there is absolutely no reason why a telephone hookup could not be set up in an eight-day period.

Not making an effort to involve an interested litigant in the court proceedings or foreclosing their desire to participate can be perceived as a sign of unfairness. Furthermore, allowing a party to be involved in the proceeding may provide the juvenile court with, among other things, heretofore unknown information about the child's biological background and the absent parent's ability to assist with the future care and financial support of the child.