

No. 49710-7-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

In re. the welfare of:
D.M.M.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

BRIEF OF APPELLANT

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A. INTRODUCTION

K.M.'s baby, D.M.M., was removed from her at the hospital in part because she was born with prescription pain medication in her system, and because K.M. did not have secure housing.

K.M. is diagnosed with HIV. Though K.M. did not willingly bring this diagnosis to the attention of others, the social worker in her case knew that she suffered from the disease for many years, in addition to other significant health ailments. However, the social worker did not make this important fact known to the various professionals assigned to K.M.'s case, even though K.M.'s health was cited as one of the major impediments to her regularly scheduled visits with D.M.M.

K.M.'s trial was scheduled on a Wednesday. K.M. was present on the scheduled trial date, but her trial was not held that day. Instead, her case was set to an on-call basis, even though it was known that K.M. had sporadic phone access at best. Both parties expected K.M. to testify at trial. The following Monday, the court called K.M.'s attorney first thing in the morning and told her to be at court 20 minutes later for trial. K.M.'s attorney appeared, but she was unable to get a hold of K.M. K.M.'s termination trial was held in her absence over the next

three days in one to two-hour blocks that were set daily according to the court's and attorneys' schedules.

K.M. appeared on the fourth day, while the court was pronouncing its findings. K.M. let the court know she didn't know about court until it was too late, and requested to testify. The court refused her request.

Despite the undisputed bond K.M. shared with her baby, and despite the court's unanswered questions about how K.M.'s illness and homelessness affected her ability to parent, K.M.'s parental rights were terminated.

B. ASSIGNMENTS OF ERROR

1. The termination order violated K.M.'s Fourteenth Amendment right to due process.
2. The trial court erred by adopting Finding of Fact 5 (VIII).¹
3. The trial court erred in adopting Finding of Fact 6. (VIII).
4. In the absence of clear and convincing evidence, the trial court erred in finding "all services reasonably available, capable of

¹ The roman numerals of the section in which the finding is located are included to differentiate the repeating numbers of the findings contained in different sections.

correcting the parental deficiencies within the foreseeable future, have been offered or provided.” (IX).

5. The trial court erred in adopting Finding of Fact 15. (IX).

6. In the absence of clear and convincing evidence, the trial court erred in finding that “there is little likelihood that conditions will be remedied.” (IX)

7. The trial court erred in adopting Finding of Fact 2. (IX part 2).²

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. When the State seeks to terminate parental rights, the parent is entitled to due process, including notice and an opportunity to be heard. Was K.M.’s right to due process violated because she was not given adequate notice of her termination hearing, and she was not permitted to testify? U.S. Const. Art. V, XIV; Const. art. I, § 3.

2. The Department of Health and Social Services has a statutory obligation to offer the parent services necessary to reunite the family. Because the court lacked sufficient evidence that all necessary services capable of correcting K.M.’s parental deficiencies within the foreseeable future have been expressly and

² This is indicated as “part 2” because the numbered findings repeat in the same section.

understandably offered or provided, did the court err in finding that the Department had offered all necessary services?

D. STATEMENT OF THE CASE

The hospital called Child Protective Services when it learned that D.M.M was born with prescription opiates in her system, and her mother, K.M., lacked secure housing. RP 23, 43-44, 72. It was also perceived that K.M. was not forthcoming about where her other children were placed. RP 72.

D.M.M. was placed into the custody of Department of Social and Health Services, and an Order of Dependency as to K.M. was entered about two months later. RP 72; Ex. 2.

K.M.'s Incomplete Medical Information

K.M. had HIV, but did not want people to know about her diagnosis. RP 111. Nonetheless, K.M.'s social worker, Mariah Fabiani, knew of her diagnosis, as well as K.M.'s desire to hide it:

[K.M.] never -- she wanted that record sealed. She did not want people to know about that. The only reason the Department knew of [K.M.'s] HIV status was because of her daughter needing to receive follow-up from the hospital.

RP 111. Ms. Fabiani also knew that K.M. had Hepatitis C. RP 135.

As the social worker in K.M.'s case, Ms. Fabiani makes referrals and incorporates reports from other professionals into her case management. RP 70-71.

Ms. Fabiani did not have a copy of K.M.'s medication list. RP 132. She did not have K.M.'s full medical history in her file. RP 110. She repeatedly requested a release of information for K.M.'s mental health counselor, but did not testify that she made any such request for K.M.'s medical information. RP 84. Ms. Fabiani did not know if there were special services available to people diagnosed with HIV. RP 111.

Though Ms. Fabiani knew that K.M. was diagnosed with a serious disease that required treatment and medication, she did not find out more about K.M.'s medical condition, or convey this key fact to the other professionals she tasked with assessing K.M.'s compliance with her chemical dependency, mental health requirements, or visits between K.M. and her baby, D.M.M. Ex. 22., p.2; RP 45, 64, 146.

Chemical Dependency

K.M. was prescribed fentanyl pain patches and marijuana. RP 60, 65.³ Though she disputed that she needed drug and alcohol

³ The trial court erroneously adopted FF #6 (VIII). K.M. provided prescriptions to the chemical dependency counselor, whose assessment was done under the auspice of the Department's referral for chemical dependency treatment.

treatment, she completed an assessment in May 2015. Ex. 23; RP 58.

The chemical dependency counselor who testified at trial, Nancy Blackman, did not perform K.M.'s actual assessment and either did not know or remember all of K.M.'s health issues. RP 63-64. She had only reviewed K.M.'s assessment and reported "There was no indication that this client had any medical problems." RP 64.

The chemical dependency counselor believed that K.M. might be misusing the fentanyl patches because she didn't believe K.M.'s professed explanation that they were prescribed for her PTSD and anxiety. RP 61. The chemical dependency counselor couldn't remember whether K.M. had reported having arthritis,⁴ but did agree that would have made sense to have pain medication prescribed for that ailment. RP 66. The assessment was incomplete as to K.M.'s medical conditions, but still described use of her prescribed medication as "miss [sic] use." Ex. 23, p.1.

⁴ Many people with HIV have problems of the musculoskeletal system (joints, muscles and bones). HIV infection can lead to rheumatic (joint and muscle) illness, including joint pain, arthritis, muscle pain, weakness and fatigue (feeling very tired). Extra-articular manifestations such as uveitis (eye inflammation) may also occur in HIV patients exhibiting arthritis. American College of Rheumatology, *HIV and Rheumatic Disease: Fast Facts* (June 2015) <https://www.rheumatology.org/I-Am-A/Patient-Caregiver/Diseases-Conditions/HIV-Rheumatic-Diseases> (last visited 5/24/17)

K.M. did not agree with the chemical dependency assessment and continually asserted that she did not have a drug or alcohol problem. RP 85-86. K.M. asked for a second assessment, but the court denied her request. RP 137. She obtained a second evaluation on her own, which recommended mental health counseling and an alcohol and drug information school. RP 137. K.M. completed the class and provided proof to the court. Ex. 31; RP 137-138.

K.M. was also ordered to complete random UAs, which required her to call in daily, and then to report to the facility when her color is called. RP 88. Though K.M. was only able to sporadically attend her UAs, they were consistent with the treatment of pain, showing only marijuana and pain medication. RP 87, 135-136.

Mental Health

K.M. requested a referral for grief counseling at the beginning of the dependency due to the grief of losing her four children to DSHS in 2008, and depression related to not being able to parent her baby, D.M.M. RP 83, 135. She was also grieving from the loss of her husband, who died an unexpected death during her pregnancy with D.M.M., due to a dental-related medical complication. RP 24-25.

The referred psychologist, Dr. Manley, would not do the assessment until K.M. submitted to the random U.A.'s and had documented sobriety. RP 79-80. He finally agreed to do the assessment after K.M.'s random UA showed only marijuana. RP 80. K.M. completed that assessment. Ex. 22; RP 80-81.

Dr. Manley's assessment indicates that Ms. Fabiani provided him with a referral letter for K.M. Ex. 22, p. 1. This letter included information about K.M.'s current and previous dependency, as well as statements from K.M. about her need for pain medication. Ex. 22, p.2. In the letter, Ms. Fabiani professes ignorance about K.M.'s medical issues, noting K.M. "will not disclose her medical issues." Ex. 22, p.2. Thus, despite Ms. Fabiani's knowledge about K.M.'s specific medical condition, this was not conveyed to Dr. Manley.

Dr. Manley concluded that K.M. has a "positive prognosis for keeping [D.M.M.] safe and meeting her developmental needs." Ex. 22, p. 11. However, he noted the problems of "consistency with her services," and the "chronic mental health symptoms that impact her daily functioning." Ex. 22, p. 11.

Dr. Manley collected information from K.M. about her medical condition in his assessment. Ex. 22, p. 6. Despite knowing from Ms.

Fabiani's report that she was "extremely guarded" and would not readily disclose her actual medical conditions, he did not request or obtain her medical records. Ex. 22, p. 2, 6. Nor did he appear to pursue the source of her reported chronic pain, nausea, osteoarthritis, hip dysplasia, and stenosis to determine the source or severity of her medical conditions and how they might have impacted her mental health, need for pain medication, or daily functioning.⁵ Ex. 22, p. 6.

Visitation

Michelle Delano took over from another guardian ad litem over one year into D.M.M.'s dependency, in November of 2015. RP 19. Ms. Delano had minimal contact with K.M. during her short time on the case, even though K.M. was present at various staffings and reviews. RP 25-26.

Even though the guardian ad litem had hardly met K.M., she did know that she had significant health problems that made it difficult her

⁵ "[W]omen who are HIV-positive have special mental health needs." Connie M. Mayer, *Unique Mental Health Needs of HIV-Infected Women Inmates: What Services Are Required Under the Constitution and the Americans with Disabilities Act?* 6 Wm. & Mary J. Women & L. 215, 220 (1999) ("Neuropsychological disorders associated with HIV may respond to medication and/or other interventions; thus the first step towards adequate treatment is rapid and accurate diagnosis").

to attend her visits. RP 31.⁶ Right before she acquired the case, K.M. had broken her wrist at work. RP 31. K.M. reported struggling at that time, and missed her scheduled visits with her baby. RP 31. The guardian ad litem knew K.M. had arthritis, but couldn't otherwise recall her specific health issues. RP 45.

Ms. Delano attributed K.M.'s significant health problems as the reason K.M. missed visits. RP 31. When her health would improve, K.M. would ask for a new visitation referral. RP 31-32. She knew that K.M. had a health issue that required on-going case management for pain medication, but she had no more information about the underlying health issue. RP 41.

K.M. attended 29 visits but missed 37 scheduled visits. RP 96. K.M.'s visits were positive according to the accounts of everyone who witnessed K.M. and D.M.M. together. The guardian ad litem reported, "[a]ll the visitation reports I have reviewed, yes, are very positive. She is responsive to her child. She's attentive to her child." RP 44.

The social worker, Ms. Fabiani, reported, "[T]he reports indicate the visits go well. [D.M.M.] is an extremely well-adjusted child." RP

⁶ The trial court erroneously found that there was no evidence that K.M.'s medical condition affected her ability to parent in FF # 15 (VIII); however Ms. Delano

111. Though Ms. Fabiani's testimony at trial was that K.M. and D.M.M. were not bonded, she ultimately agreed that her report from the visit observations indicated that D.M.M. "is bonded and comfortable with her mother." RP 123-124.

Dr. Manley's observations confirmed that K.M. was "very attentive to her daughter" and "interacted easily and naturally with [D.M.M.]." When reading and playing with D.M.M., she was both "attentive and protective" of her child. Ex. 22, p. 9-10.

K.M. was however, faulted for not bringing the required diapers and other supplies for D.M.M. to the visits. RP 44. 115.

Ms. Fabiani's file indicated that K.M. needed the afternoon visits to accommodate her work schedule and her reported health needs. RP 113. Despite Ms. Fabiani's knowledge of K.M.'s serious health diagnosis of HIV, her report limited these stated health needs as related to insomnia and depression. RP 113.

Additional Services

Even though K.M. completed domestic violence services through her last dependency, she was ordered to do them again. RP 99-100. She did not complete them. RP 115. She was also ordered to do

testified her medical issues affected K.M.'s visitation.

parenting classes, and was referred to a class that she reported enjoying.⁷ RP 103. However, the requirements of regular visitation attendance resulted in K.M. being dropped from the program. RP 102. It was known that K.M. was homeless and lacked adequate housing the entire time the guardian ad litem was on the case. RP 47. Ms. Fabiani also expressed concern about K.M. having “no appropriate housing” in her referral letter to Dr. Manley. Ex. 22, p.2. However, she was not offered any assistance with housing, because she reportedly never asked for it. RP 45, 114.

Communication

Though K.M. was faulted for not requesting certain services or making her health needs known, Ms. Fabiani characterized K.M. as “disrespectful” and someone who “would demand things” from her. RP 103. She perceived a “disrespectful tone” in K.M.’s e-mails. RP 124. At trial, K.M.’s attorney presented e-mails in which K.M. expresses her concern that she is being “set up for failure” and feels like she has “no voice.” Ex. 34; RP 127-128. In another e-mail she requests a visit, with “please” written in all caps. Ex. 36. Though Ms. Fabiani denied that

⁷ The trial court erroneously found in Finding of Fact #5 (VIII) that K.M. did not successfully complete *any* of the parenting classes.

these were the disrespectful e-mails, she agreed they conveyed the typical tone of K.M.'s e-mails. RP 127-128.

The Termination Trial

K.M. was in court for the scheduled termination trial on Wednesday, September 21. RP 7. The trial was apparently not held because of lack of available courtrooms. RP 162. A new trial date was not set at that time; rather, her case was "trailing" from that date. RP 4, 162. The record does not contain an order that was entered with a new trial date or an order on that hearing.

When K.M. called her attorney at 4:30 the Friday following her scheduled trial date, she was told that her trial had not been set yet. RP 163-164.

On Monday September 26, K.M.'s attorney received a phone call at 9:10 A.M. telling her to be at court that same day at 9:30. RP 165. She tried calling K.M. but was unable to get a hold of her. RP 165. The trial began later that day despite her attorney's expectation that K.M. would be there. RP 4, 9. The termination trial was pieced together in one to two hour increments at different times over three days. RP 162. K.M.'s attorney expressed surprise and concern that K.M. was not there because she had been in close touch with her the previous week.

RP 51. Her attorney sent her e-mails and called, but K.M. did not get her messages until after the third day of trial. RP 164-165. K.M. appeared on the fourth day, as the trial court was pronouncing its ruling. RP 158. K.M. let the court know that she did not know about the trial, and wanted to testify. RP 161. The court declined to reopen her case to let her testify, and terminated her parental rights to D.M.M. CP 89-90; RP 165.

E. ARGUMENT

- 1. K.M.'s right to due process was violated where she was given entirely insufficient notice of the proceeding, and when she did appear, her request to testify was denied, even though the court had not yet entered its findings of fact and conclusions of law.**

Parents have a fundamental liberty and property interest in the care and custody of their children. U.S. Const. amends. V, XIV; Const. art. I, § 3; *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982). “When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.” *Id.* at 753–54. Due process in the termination context requires that parents have notice, an opportunity to be heard and defend, and the right to be represented by counsel. *In re Welfare of*

L.R., 180 Wn. App. 717, 723, 324 P.3d 737 (2014) (citing *In re Welfare of S.E.*, 63 Wn. App. 244, 250, 820 P.2d 47 (1991)).

Courts apply de novo review to determine whether a proceeding violated constitutional due process. *In re Welfare of S.I.*, 184 Wn. App. 531, 541, 337 P.3d 1114 (2014).

a. A phone call 20 minutes ahead of trial is not adequate notice.

Due process protections afford parents notice and an opportunity for a hearing appropriate to the nature of the case. *In re Dependency of C.R.B.*, 62 Wn. App. 608, 614, 814 P.2d 1197 (1991). The right to be heard “ordinarily includes the right to be present.” *In re Welfare of Houts*, 7 Wn. App. 476, 481, 499 P.2d 1276 (1972).

“The notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance.” *Young v. Thomas*, 193 Wn. App. 427, 440, 378 P.3d 183 (2016) (citing *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950) (citations omitted)).

Courts balance three factors when examining the adequacy of process: (1) the private interest at stake, (2) the risk that the procedure

used will result in error, and (3) the State's interest in retaining the procedure used and the fiscal or administrative burden if additional safeguards were provided. *In re Dependency of A.G.*, 93 Wn. App. 268, 278–79, 968 P.2d 424 (1998); *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

Here, there is no question that K.M. has “a vital interest in preventing the irretrievable destruction of [her] family life.” *Santosky*, 455 U.S. 745 at 753. Given this vital interest at stake, the procedure used to inform K.M. of her termination hearing entailed an intolerably high risk of error.

K.M.’s termination trial was “trailing,” a procedure not defined in any court rule. She was given 20-minute notice in the form of a phone call on Monday morning, despite the known fact of her limited phone and e-mail access. Both D.M.M.’s guardian ad litem and the social worker on the case confirmed that K.M. did not have reliable access to a phone. RP 76. Specifically, Ms. Delano, D.M.M.’s guardian ad litem, reported that K.M. has always said e-mail is the best way to get in contact with her. “Her phone is sporadic. Hit and miss.” RP 27. However, K.M.’s e-mail was also known to be unreliable—there were periods of time that she would be locked out of her e-mail. RP 27.

On Monday, September 26, her attorney got a call at 9:10 A.M. telling her to be in court that morning for trial at 9:30 A.M. RP 165. The last contact K.M. had with her attorney was that previous Friday at 4:30, when K.M. learned that her trial had not been set. RP 164.

When her attorney tried to call K.M. Monday morning of the 26th, K.M. didn't answer. Her attorney left her a message about court. RP 6. The court recessed until the afternoon for the attorney's doctor appointment, and for her to be in touch with her client. RP 6, 7. Court reconvened that afternoon. K.M. was not there. RP 8. Trial was held from about 1:30 to 2:45. CP 57.

The next day, K.M.'s counsel expressed concern that she had been unable to reach her client: "I was just concerned because she was calling every day. Since yesterday, nothing." RP 51. Nevertheless, trial proceeded on September 27, lasting from 9:24 A.M. to 11:28 A.M. CP 58. On day three of the trial, court reconvened for about an hour to finish with testimony and closing argument by the State and K.M.'s attorney. CP 58-59.

The court needed time to review the evidence presented at trial before ruling, and the parties agreed to reconvene on October 3, 2016 at 9:00 A.M. RP 151.

Termination of parental rights involves a fundamental right that far exceed the property interests typically at stake in a civil dispute. *See Santosky*, 455 U.S. 745 at 755. (When the individual interests are both “particularly important” and more substantial than “mere loss of money,” an intermediate standard of proof is required). Yet even the bare minimum of notice required in a civil case was not met for K.M.’s termination trial. Under CR 6 (d), written notice of a hearing is required, and must it must be served no later than five days before the time specified for the hearing, unless a different period is fixed by the court.

A phone call 20 minutes before trial to a person known to have limited phone access cannot be construed as a method calculated to “reasonably ... convey the required information.” *Young*, 193 Wn. App. 427 at 440 (citing *Mullane*, 339 U.S. 306 at 314). The fact that K.M.’s attorney was given the opportunity to contact her client by phone and e-mail each day of trial does not mitigate the inadequacy of the notice provided, because K.M. was required to appear on an on-call basis. A phone call or e-mail on the day of trial requiring the person’s presence that day is anathema to the very principle of notice and due process

because it does not provide “a reasonable time for those interested to make their appearance.” *Id.*

The importance of K.M.’s right and the high risk of erroneous deprivation of these rights far outweighs any interest the State may have “in retaining the procedure used and the fiscal or administrative burden.” *A.G.*, 93 Wn. App. 268, 278–79. Written notice is a basic feature of a court system and can under no circumstances be an undue fiscal or administrative burden.

Holding K.M.’s termination trial on an on-call basis, in which she was not provided with advance, written notice of when her trial was to be held, fails to provide notice commensurate with the rights at stake in a termination hearing. The inadequacy of notice to K.M. resulted in a risk of erroneous deprivation of her fundamental rights that presented no meaningful burden to the State. The court’s order terminating K.M.’s parental rights should therefore be reversed.

b. The court further violated K.M.’s right to due process by not allowing her to testify.

Because of the fundamental constitutional rights at stake in termination hearings, “due process requires that parents have the ability to present all relevant evidence for the juvenile court to consider prior

to terminating a parent’s rights.” *In re Welfare of R.H.*, 176 Wn. App. 419, 425–26, 309 P.3d 620, 623 (2013) (citing *In re Welfare of Shantay C.J.*, 121 Wn. App. 926, 940, 91 P.3d 909 (2004)).

Due process in the termination context requires that parents have notice and “an **opportunity to be heard and defend...**” *L.R.*, 180 Wn. App. at 723 (emphasis added).

To this end, RCW 13.34.180 (6) requires that a parent be served with notice that she has the right to speak at the termination hearing: “you have the right to speak on your own behalf, to introduce evidence, to examine witnesses, and to receive a decision based solely on the evidence presented to the judge.”

L.R. acknowledges that the risk of error may be less where the absent parent is represented by counsel and has the opportunity to be heard. 180 Wn. App. at 725 (the parent appeared telephonically). Such was not the case here, where K.M.’s testimony was needed and anticipated by her attorney and the State, but she was not allowed to be heard. Prior to trial, the State noted that it anticipated calling K.M. as a

witness. RP 8.⁸ The prosecution expected K.M.'s testimony to last about half a day. RP 5. K.M.'s counsel also noted that K.M.'s testimony was central to the case: "Your Honor, I have no witnesses except for my client." RP 5.

Due to the Department's ignorance and lack of concern for K.M.'s medical needs, there was insufficient evidence about whether the necessary and proper services were offered to K.M, a concern raised by K.M.'s attorney in cross-examination and closing, but which remained unanswered absent K.M.'s testimony. RP 110, 146, 147, 149.

On October 3, the court was ruling on K.M.'s case when K.M. appeared. RP 158. K.M. explained that she did not know her trial was being held. RP 161. Since the trial hadn't been scheduled the Friday she last spoke to her attorney, she presumed it was not going to be held the next court day. RP 161.

K.M.'s attorney had provided proof of K.M.'s recent offer of employment with Dollar Tree to the court. Ex. 32; RP 122. K.M. explained that when on Friday she was told there was no trial scheduled, she was focused on getting ready for her job and did not

⁸ The defense objected to the lack of notice that the State was going to call her client to testify. The court declined to rule on the issue because K.M. was not present in

check in or get the message until after court was held. RP 162. She did not get an e-mail until the day of court, and by the time she showed up, court was over. RP 161. When she received her attorney's voice mail about trial being over and the court ruling on her case on October 3, she immediately came down to the court house. RP 164.

K.M. echoed both her attorney's and the State's expectation that she would be testifying and clearly stated that she wanted to testify. RP 161, 162. The court declined to reopen the case and let her testify despite the fact that K.M. was not provided with meaningful notice of the hearing. RP 165.

The State has a compelling interest in not delaying the proceedings. *See L.R.*, 180 Wn. App. at 727 (DSHS had a strong interest in proceeding where it was unknown if the parent could be transported on a continued trial date, and the termination trial had already been continued three times, leading the court to conclude, "this trial is doomed to float if we don't get it going now.") In K.M.'s case, the reopening of her case to take her testimony could have been done that day, and so required no such burdensome continuance. The court's Findings of Fact and Conclusions of law had not been written or

court yet. RP 8.

entered. RP 160 (The court orders the Department to prepare Findings of Fact and Conclusions of Law consistent with the Court's decision). K.M.'s testimony could easily have been added to the court's oral findings without any delay in preparing the Order that was entered one month later. CP 74 (Findings of Fact and Conclusions of Law entered on November 4, 2016).

K.M. and her attorney clearly requested that she be able to testify, and K.M.'s attorney voiced concern about her client not being able to appear at trial; thus K.M. contends the due process violations are preserved error. RP 4, 5, 51, 121, 161. Should this court find the issues are not preserved, constitutional error may be raised for the first time on appeal, particularly where the error affects "fundamental aspects of due process." *State v. Lively*, 130 Wn.2d 1, 19, 921 P.2d 1035 (1996); RAP 2.5 (3). (A party may raise, for the first time on appeal, a manifest error affecting a constitutional right).

Here, the *Mathews v. Eldridge* balancing factors do not support the means of notice given to K.M., and do not support the court's subsequent denial of K.M.'s request to testify before the court had entered its findings of fact and conclusions of law. The risk of error in K.M.'s case was high, where her testimony was both expected and

needed by both the defense and the State. The court noted that there were questions that remained unanswered due to the Department's ignorance of K.M.'s significant health issues and life circumstances—issues that were raised by K.M.'s attorney on cross-examination of the Department's witnesses, and which should have been answered by K.M.'s testimony.

Because K.M.'s right to due process was violated, reversal of the termination order is required.

2. The State failed to meet its burden of proof that K.M. had been offered or provided all necessary services, because the professionals in her case either ignored or didn't know about K.M.'s HIV status or homelessness.

Before a court can terminate a parent's rights, the State must prove six statutory elements by clear, cogent, and convincing evidence.

Matter of B.P. v. H.O., 186 Wn.2d 292, 312, 376 P.3d 350 (2016).

At issue in K.H.'s case are sections (d) and (e):

(d) That the services ordered under RCW 13.34.136 have been expressly and understandably offered or provided **and all necessary services, reasonably available, capable of correcting the parental deficiencies within the foreseeable future have been expressly and understandably offered or provided;**

(e) That there is little likelihood that conditions will be remedied so that the child can be returned to the parent in the near future. . . .

RCW 13.34.180 (1)(d), (e) (emphasis added). The services offered must be individually tailored to a parent's specific needs. *In re Dependency of D.A.*, 124 Wn. App. 644, 651, 102 P.3d 847 (2004). A service is necessary within the meaning of the statute if it is needed to address a condition that precludes reunification of the parent and child. *In re Welfare of C.S.*, 168 Wn.2d 51, 56 n. 3, 225 P.3d 953 (2010). “When a ‘condition’ precludes reunion of parent and child, as here, regardless of whether it can be labeled a ‘parental deficiency,’ the State must provide any necessary services to address that condition as set forth in RCW 13.34.180(1)(d).” *Matter of K.M.M.*, 186 Wn.2d 466, 480, 379 P.3d 75 (2016) (citing *C.S.*, 168 Wn.2d at 56 n.3). Absent a showing that services would be futile, the parent must have the opportunity to benefit from all services available to address a barrier to family reunification. *B.P.*, 186 Wn.2d at 316. A trial court’s findings will be reversed if not supported by substantial evidence in the record. *Id* at 313.

K.M.’s attorney was able to elicit the basic fact of K.M.’s HIV status and other health issues through the State’s witnesses. RP 45, 110, 135. However, K.M.’s significant health issues, though known to Ms.

Fabiani, were not addressed through the services offered to K.M. RP 157. Nor was housing, despite the fact that it was known throughout the D.M.M.'s dependency that she was homeless. RP 149.

Because K.M.'s significant health diagnoses remained largely ignored or unknown by the professionals in her case, the court highlighted the lack of information as to how this affected K.M.'s ability to parent:

[K.M.'s] medical diagnosis was apparently known to the Department, but there was no evidence of how those medical conditions, other than substance abuse and her mental health issues, impacted her ability to parent [D.M.M].

Likewise, the trial court acknowledged "the issue of homelessness," but faulted K.M. for not providing the Department with "much information regarding that issue." RP 157.

Because the Department maintained ignorance about K.M.'s significant health and housing needs and K.M. was not permitted to address the court regarding the health issues raised by her attorney on cross-examination and at closing, the prosecution failed to meet its burden that K.M. was offered or provided all reasonably available services.

Further, because the professionals in K.M.'s case were either unresponsive or ignorant about her specific and significant health needs, it cannot be argued that the provision of required services that should have been tailored to K.M.'s specific needs would be futile. *See Matter of I.M.-M.*, 196 Wn. App. 914, 924-925, 385 P.3d 268, 273 (2016) (Where no one working with the parent knew of her cognitive impairment, none of the trial witnesses were able to offer competent testimony about whether integrated mental health and chemical dependency services would have been beneficial).

Absent K.M.'s testimony about her health and housing needs, the State failed to meet its burden of proof, and the court had an insufficient basis from which to conclude that "necessary services have been expressly and understandably offered or provided" CP 76; RP 158, 165. The court's ruling was thus not based on "substantial evidence" and must be reversed.

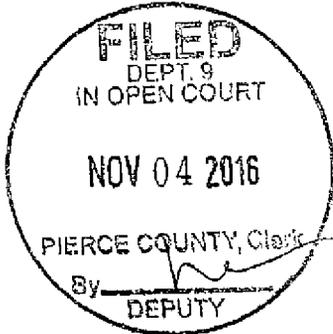
F. CONCLUSION.

For the foregoing reasons, K.M. respectfully asks this court to reverse the trial court's decision terminating K.M.'s parental rights.

DATED this 30th day of May 2017.

Respectfully submitted,

s/ KATE BENWARD (43651)
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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE
JUVENILE DEPARTMENT

In Re the Welfare of:

NO. 15-7-01866-7

DARRELL HANNAH
MCDANIEL MUHAMMAD,

FINDINGS OF FACT
AND CONCLUSIONS OF LAW
AS TO KAUTHAR MUHAMMAD,
MOTHER

DOB ~~09/14/11~~
9/9/2014

THIS MATTER having come on regularly for hearing for a termination of parental rights before the undersigned HONORABLE EDMUND MURPHY of the above-entitled court on September 26 through to September 28, 2016; the mother of the above-named child, KAUTHAR MUHAMMAD, was served notice hereof by personally and did not appear personally and was represented by counsel, CHRISHENDRA TUCKER; the Washington State Department of Social and Health Services Social Worker, MARIAH FABIANI, was personally present and represented through attorneys, ROBERT W. FERGUSON, Attorney General, and HOLLY L. HAYES, Assistant Attorney General; MICHELLE DELANO, appeared as Guardian ad Litem for the minor child; and the court having considered the files and records herein, and listened to all the evidence presented by all parties, the arguments of counsel, and the court being in all matters fully advised, NOW, THEREFORE, makes and enters the following:

FINDINGS OF FACT

I.

DARRELL HANNAH MCDANIEL MUHAMMAD was born on ~~September 14, 2011~~
September 9, 2014

FINDINGS OF FACT AND
CONCLUSIONS OF LAW
AS TO MOTHER

OFFICE OF THE ATTORNEY GENERAL
1250 Pacific Avenue, Suite 105
PO Box 2317
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1 II.

2 A petition setting forth allegations for the termination of parental rights relative to the
3 aforesaid child, who is within or resides within PIERCE County, has been filed.

4 III.

5 The parents of the above child are KAUTHAR MUHAMMAD, the mother, and JOHN
6 DOE, natural father.

7 IV.

8 DARRELL'HANNAH MCDANIEL'MUHAMMAD was originally found dependent on
9 November 14, 2014, pursuant to RCW 13.34.030(6), and on that date the court entered a
10 dispositional order as the child has no parent, guardian or custodian capable of adequately caring for
11 the child such that the child is in circumstances which constitute a danger of substantial damage to
12 the child's psychological or physical development.

13 V.

14 Since being found to be a dependent child, the PIERCE County Juvenile Court has
15 continued to find DARRELL'HANNAH MCDANIEL'MUHAMMAD to be a dependent child and
16 temporary ward of the court.

17 VI.

18 DARRELL'HANNAH MCDANIEL'MUHAMMAD was placed in the custody of the
19 Department of Social and Health Services for foster care on September 8, 2014, and has remained in
20 foster care continuously since at least that time with regular review hearings and court orders
21 entered on January 5, 2015, April 6, 2015, June 1, 2015, September 9, 2015, December 16, 2015,
22 March 16, 2016 and June 22, 2016.

23 VII.

24 The services ordered pursuant to the aforesaid dependency orders have been expressly and
25 understandably offered or provided to KAUTHAR MUHAMMAD, including: casework services, a
26 drug and alcohol evaluation and any recommended treatment, random urinalysis testing, a

1 psychological evaluation with a parenting assessment and follow treatment recommendations,
2 parenting classes such as promoting first relationships parenting class, hands-on parenting
3 instruction, individual counseling and domestic violence victim's support group.
4

5 VIII.

6 The mother has failed to effectively avail herself of the services ordered pursuant to the
7 aforesaid dependency orders. During the entire time period relevant to these proceedings, the
8 aforementioned services were available if the mother had chosen to avail herself of such services.

- 9 1. The mother completed a psychological evaluation with a parenting component with Dr.
10 Manley in May 2015.
- 11 2. The mother was offered random urinalysis testing which she did not successfully complete.
- 12 3. The mother attended individual counseling sessions with Freda Haines in January and
13 February of 2016.
- 14 4. The mother completed a drug and alcohol evaluation, however she denied any need for
15 treatment and did not complete any recommended treatment, *by Pioneer.* 
- 16 5. The mother did not successfully complete any of the parenting classes or parenting
17 education courses offered.
- 18 6. The mother did not provide documentation to the social worker or the Department that
19 would provide additional information as to the need for the medical marijuana.
- 20 7. The mother did not attend over fifty (50%) percent of the available visits with the child.
- 21 8. The mother did not successfully engage in domestic violence survivor groups.
- 22 9. *Mother completed a second Drug and Alcohol evaluation, not court
23 ordered nor Department approved, and complied with ~~those~~ the
24 Drug and Alcohol class.* IX. 

25 All services reasonably available, capable of correcting the parental deficiencies within the
26 foreseeable future, have been offered or provided.

1. The mother attended a psychological evaluation with Dr. Manley in March 2015. She did not follow through with any of the treatment recommendations from the evaluation.
2. The mother was referred several times for urinalyses testing however, she did not consistently participate in random urinalyses testing.
3. The mother completed a chemical dependency assessment at Pioneer with Nancy Blackman. Nancy Blackman testified that the mother was clear that she denied any need for chemical dependency treatment. The drug and alcohol evaluation completed by Ms. Blackman recommended that the mother engage in intensive outpatient treatment and individual counseling. The mother did not complete any intensive outpatient treatment.
4. The mother provided a certificate of completion of an alcohol/drug information program for a class that was completed the month of the termination of parental rights trial.
5. The mother was offered Incredible years parenting classes. She did not complete the twelve (12) week program.
6. The mother began attending individual counseling sessions with Freda Haines in January 2016, to February 2016. However she did not attend any other individual counseling sessions after May 2016 and did not meaningfully complete this service.
7. The mother was referred to the YWCA for domestic violence survivors groups, however, she did not engage in any of domestic violence survivors groups.
8. Blair Lessor, with Youth For Christ who provided visit supervision for the visits, testified that the mother has attended twenty-nine (29) visits with Darrell-Hannah and missed thirty-seven (37) visits. The mother has missed more than fifty percent (50%) of the visits.
9. The mother was offered the Promoting First Relationships parenting education programs. Though the parenting class was offered more than once the mother did not successfully complete this program.
10. Darrell Hannah was in the Best for Babies Program that provided additional support for the mother and the child. The mother did not ^{complete}~~participate in~~ this program. 

1 11. The mother was offered hands on parenting or the alternative of Triple P, Parent education
2 classes and she did not successfully complete any of the parenting classes.

3 12. The mother was offered grief counseling with Good Sam in Puyallup. The mother did not
4 attend that service.

5 13. The mother was offered and provided bus passes and an ORCA card for transportation to
6 services and visits.

7 14. The mother did not maintain regular contact with the social work or the Department
8 throughout the dependency.

9 15. *The mothers medical condition was known to the Department, but
10 there was no evidence of how those medical conditions, other than
11 substance abuse and mental health affected her ability to parent.*
There is little likelihood that conditions will be remedied so that the above-named child can

be returned to either parent in the near future.

12 1. The mother did not complete the treatment recommendations from the drug and alcohol
13 assessment. She denied there were any substance abuse issues and did not engage in any
14 substance abuse treatment.

15 2. The mother did not complete any of the parenting education resources or classes that were
16 offered that could have provided support toward reunification.

17 3. The mother did not attend a significant amount of visits for Darrel Hannah.

18 4. The mother did not complete individual counseling or grief and loss counseling.

19 5. The mother did not regularly participate in the random urinalyses testing. *The mother did not
20 say homelessness was an issue.*

20 6. *The mother provided addresses to the Department and ways to contact her.*
The mother has not made progress in improving her parental abilities and is not in the position to

21 attend to the needs of the child. The mother has not successfully engaged in the court ordered
22 services and has not corrected her parenting deficiencies. The mother is currently unfit to parent.

23 XI.

24 DARRELL HANNAH MCDANIEL MUHAMMAD is not an Indian child as defined by the
25 Indian Child Welfare Act, 25 U.S.C. §1901, et. seq.

XII.

The Service member's Civil Relief Act of 2003, 50 U.S.C. §501, et. seq., does not apply to this proceeding.

XIII.

Continuance of the parent-child relationship clearly diminishes the child's prospects for early integration into a stable and permanent home. The child has been a dependent child for the past two (2) years. The mother has missed a significant number of visits. She has not successfully engaged in parenting classes or individual counseling. The mother has not completed an outpatient drug and alcohol substance abuse treatment program. The mother has not corrected the parental deficiencies that brought Darrell Hannah into care. She was provided an opportunity to address the parental deficiencies through this dependency and she has not done so. The mother is not able to offer the child a stable and permanent home. The child may not be adopted so long as the parental rights between the mother and child remain. Continuation of the parent child relationship clearly diminish the child's prospects for early integration into a permanent and stable home.

XIV.

An order terminating all parental rights is in the best interests of the aforesaid minor child. The mother has not been successful in completing the court ordered services that could have corrected her parenting deficits. The mother has not attended all visitations that were available. The mother has not completed outpatient treatment for substance abuse. The mother has not successfully completed the parenting education classes that were offered. The mother has not corrected her parenting deficits such that the child could be returned home. It is in the child's best interest that the parental rights be terminated so that she may be adopted.

XV.

The Guardian ad Litem, MICHELLE DELANO, appeared at the hearing and recommended that the parental rights of the parents be permanently terminated.

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XVI.

The child has the following siblings: Destynee Chambers-Muhammad, Harmonyee McDaniel-Muhammad, Jamyee McDaniel-Muhammad, and Jazmynee Williams-Muhammad.

The child's siblings are all legally-free and have been adopted. There has not been any ongoing relationship between the siblings.

FROM THE FOREGOING FINDINGS OF FACT, THE COURT NOW MAKES AND ENTERS THE FOLLOWING:

CONCLUSIONS OF LAW

I.

That this court has jurisdiction of the person of said minor child, of KAUTHAR MUHAMMAD, and of the subject matter of this case.

II.

That it would be in the best interest of the aforesaid minor child, including the child's health and safety, that the parent-child relationship between the above-named child and KAUTHAR MUHAMMAD be terminated and that the child be placed in the permanent custody of the Washington State Department of Social and Health Services for placement as best suits the needs of said child. The Department of Social and Health Services has the authority to consent to the adoption of said child and to place said child in temporary care and authorize any needed medical care, dental care or evaluations of said child until the adoption is finalized.

III.

That all the allegations contained in the termination petition, as provided in RCW 13.34.180(1)(a) through (f), have been established by clear, cogent and convincing evidence.

///

IV.

That an order terminating the parent and child relationship between DARRELL'HANNAH MCDANIEL'MUHAMMAD and KAUTHAR MUHAMMAD is in the best interests of the child.

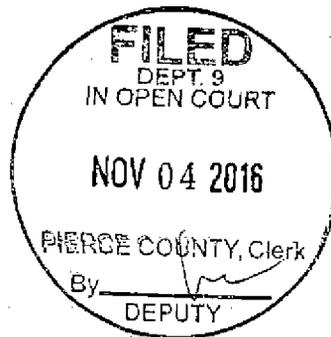
DONE IN OPEN COURT this 4th day of November, 2016.

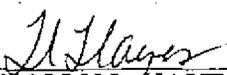


HONORABLE EDMUND MURPHY

Presented by:

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MICHELLE DELANO
Guardian ad Litem

WASHINGTON APPELLATE PROJECT

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