

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

1. K.M.'s due process rights were violated by the lack of advance notice of her trial date.

- a. A parent cannot “waive” a due process right without the court first establishing that the parent was provided adequate due process.

The State relies on *In re. L.R.* to argue that the parent’s right to be heard “is not self-executing” and that a parent can waive her right to appear at trial. BOR at 13-14 citing *In re. Welfare of L.R. and A.H.*, 180 Wn. App 717, 723, 324 P.3d 737 (2014). However, nowhere does *L.R.* allow the court to find that a person can “waive” a due process right without establishing that the parent received adequate due process in the first place. Thus this court should reject the State’s argument that K.M. “waived” her right to appear as a means of avoiding analysis under the *Mathews v. Eldridge*¹ balancing test. BOR at 14.

- b. The adequacy of the notice provided to K.M. of her trial date simply fails under the *Mathews v. Eldridge* balancing test.

The State does not dispute the strength of the mother’s right under *Mathews*’ first factor; thus the question is whether K.M.’s fundamental right is outweighed by (i) the risk that the procedures used will lead to

erroneous deprivation; and (ii) the government's interest in maintaining the procedures. BOR at 14.

i. There were inadequate procedural safeguards.

Courts may not speculate upon the existence of facts that do not appear in the record. *State v. Blight*, 89 Wn.2d 38, 46, 569 P.2d 1129 (1977). The State attempts to imply that there was some sort of advance notice given to the parties about the trial date, claiming that the “the case was assigned to Judge Murphy, Dept. 09, to begin September 26, 2016.” BOR at 8. In a footnote, the State acknowledges that the “record is silent as to when this assignment occurred, but the attorneys were notified by phone of the assignment.” BOR at 8.

This implication that the trial was scheduled ahead of time is belied by the record on appeal. The record is very clear that the parties were given notice of the trial less than 30 minutes before they were expected to appear. K.M.'s attorney states clearly that “I was called at 9:10 and told to be in court at 9:30.” RP 165. And the mother describes calling her attorney the Friday before the trial that began on Monday, and learned it had not yet been set. RP 163-164.

¹ *Mathews v. Eldridge*, 424 U.S. 319, 96 S. CT. 893, 47 L. Ed. 2d 18 (1976).

The State argues that because K.M.'s attorney was able to appear on-call, this provided an adequate procedural safeguard against the risk of error. The State curiously compares the facts of this case to *J.W.*, where the representation by an attorney in the parent's absence did not violate due process "because the issues were purely legal and the relevant facts were not in dispute." *In re Dependency of J.W.*, 90 Wn. App. 417, 428, 953 P.2d 104 (1998). There was no "purely legal" issue in K.M.'s case; the trial was held to resolve disputed facts. And K.M.'s anticipated testimony was a factual aspect missing from the proceedings, where both parties intended to call K.M. as a witness. RP 5, 8. Additionally, as the subject of the proceedings, she had first-hand knowledge of the factual allegations made against her. Thus, where K.M.'s presence was necessary as a fact witness, and as the person with first-hand knowledge of the disputed facts introduced by the State, the risk of error entailed by her absence from the proceedings was not remedied by her attorney's representation in court.

Nor did the fact that the trial was held in one to two hour increments over three days provide an adequate procedural protection as suggested by the State. BOR at 17. This ad hoc scheduling that was determined day by day would have it made especially difficult for K.M.

to arrange transportation and set her work schedule in advance of her randomly occurring court obligations.

ii. The State cites no justifiable interest in maintaining the procedure employed and provides no argument for why additional procedural safeguards cannot be provided.

There is simply no justifiable reason for not providing advance written notice to K.M. of her trial date.

The State wrongly asserts that providing adequate notice sacrifices the right to speedy resolution of a case. BOR at 17. Providing notice does not mean that a case will be delayed. In fact, resolution could have been even speedier if K.M.'s trial had been scheduled with advance notice, because the dates would be set, rather than extended ad hoc over several days to accommodate the last minute notice to witnesses.

Rather than supplying a justifiable basis for maintaining this inadequate procedure, the State blames K.M. for "choosing" to leave court when her trial was not held on the scheduled September 21 trial date, arguing that she could have stayed in court waiting for her trial to begin. BOR 12, 16. According to the State's logic, K.M. would have been required to inhabit the court house waiting for a trial that did not occur until five days after her scheduled trial date, simply because the court chose not to schedule her trial in advance.

The absurd suggestion that someone with limited phone and e-mail access be required to camp out at a courthouse in expectation of an unknown trial date rather than simply being provided with advance written notice of trial date hardly justifies the procedures used, and certainly does not address why additional procedural safeguards such as advanced written notice would not better address K.M.'s fundamental interest at stake in termination trial.

The State further faults K.M. for prioritizing starting a new job for an "imminent trial." BOR at 14. To suggest that a person is required to forgo all work obligations for an unknown trial date is untenable for anyone other than the attorneys, whose job is to appear at court. This last minute notice was particularly unreasonable for K.M., who provided notice of her job with Dollar Tree the day of her scheduled trial, and whose financial precariousness was well known to the professionals assigned to her case. RP 113-114.

This procedure in which K.M. was required to appear on-call for trial is fraught with the risk of erroneous deprivation. Where advance written notice poses no discernible burden, K.M.'s fundamental rights far outweigh any possible interest the State might have in this flawed

procedure. Thus, the notice provided to K.M. was entirely inadequate and violated her due process rights.

2. The State fails to address how allowing K.M. to testify when the court's ruling did not become final until one month later, can be justified under the *Mathews v. Eldridge* balancing test.

- a. The court's ruling was not final when it denied K.M.'s request to testify.

A ruling is final only after it is signed by the trial judge in the journal entry or is issued in formal court orders. *State v. Collins*, 112 Wn.2d 303, 308, 771 P.2d 350 (1989). K.M. arrived at court during the court's pronouncement of its oral ruling and asked to testify. Thus, the trial court's ruling was not final, and did not become final until the order was entered nearly a month later. CP 89. Indeed, as acknowledged by the State, "the trial court's oral decision is subject to change because it is not effective until formal findings and conclusions are entered." BOR at 18. Thus, because the court's termination of K.M.'s parental rights did not become final until one month after she requested to testify, there would have been no need to delay entry of the order or continue the matter, as her testimony could have been taken before the November 4 entry of the court's final order.

- b. The State mischaracterizes K.M.'s request to testify as a request for a continuance, and thus fails to address the central due process concern of being denied the opportunity to be heard.

The State fails to consider the due process concerns at stake in the trial court's denial of K.M.'s right to be heard at her termination trial through its mistaken reliance on *In Welfare of Ott*, 37 Wn. App. 234, 240, 679 P.2d 372 (1984). Unlike in K.M.'s case, "Mr. Ott was given full opportunity to testify on the third day of trial. Counsel for all parties had no further questions for him." He then requested a continuance and asked to testify again. *Id.* Thus, *Ott* does not address the due process violation in K.M.'s case, where she was denied any opportunity to be heard, and neither the State nor defense counsel had been able to question her as anticipated.

The State never addresses how this denial of the right to be heard violates K.M.'s due process, and erroneously limits its analysis to whether a court's decision to grant a continuance constitutes an abuse of discretion. BOR at 17-18.

As argued in K.M.'s opening brief, de novo review is required because K.M.'s due process rights were violated. *In re Welfare of S.I.*,

184 Wn. App. 531, 541, 337 P.3d 1114 (2014). Failing to address K.M.'s due process argument, the State mistakenly applies the abuse of discretion standard. BOR at 18. But even under this standard, the court's denial of K.M.'s request to testify fails because the court provided no reasoning for its denial of K.M.'s request to testify, ruling only: "I am not going to reopen the case." RP 165. *See State v. O'Dell*, 183 Wn.2d 680, 697, 358 P.3d 359 (2015) ("failure to exercise discretion is itself an abuse of discretion subject to reversal.").

As the court articulated no factual findings or the legal standard employed for denying K.M.'s right to testify, the State has no basis to claim that the trial court's denial of K.M.'s right to testify was not an abuse of discretion.

3. The State failed to offer reasonable services to address K.M.'s medical impairment.

The State claims that the mother did not show how the disclosure of her medical status affected the ability or usefulness of services offered. BOR at 19. However, K.M.'s alleged parental deficiencies all pointed to a severe medical condition that was central to her ability to engage in services, yet was ignored by the professionals assigned to her case.

The State's refusal to regard a person's HIV status as a handicap is entirely at odds with the recognized legal status of the disease. *See Bragdon v. Abbott*, 524 U.S. 624, 641, 118 S. Ct. 2196, 2207, 141 L. Ed. 2d 540 (1998) ("Respondent's HIV infection is a physical impairment which substantially limits a major life activity, as the ADA defines it"); *Support Ministries for Persons With AIDS, Inc. v. Vill. of Waterford, N.Y.*, 808 F. Supp. 120, 130 (N.D.N.Y. 1992) ("The legislative history of the recently enacted Americans with Disabilities Act [ADA]...specifically mentions that infection with HIV is included in the ADA's definition of 'disability,' which is virtually identical to the definition of 'handicap' contained in the FHA and the Rehabilitation Act."); *Stewart B. McKinney Found., Inc. v. Town Plan & Zoning Comm'n of Town of Fairfield*, 790 F. Supp. 1197, 1202 (D. Conn. 1992) ("All HIV-infected persons are handicapped within the meaning of the Fair Housing Act")

The State suggests that K.M. had the responsibility to inform service providers about her HIV status. BOR at 22 ("If the mother had felt it important for her providers to know of her HIV status, she could have provided that information herself."). But as K.M.'s social worker, it was Ms. Fabiani's job to identify the services needed to address the

Department's allegation of parental deficiency, not K.M.'s. For instance, K.M. denied she needed chemical dependency treatment, but Ms. Fabiani made an independent assessment, based on her training and experience, that K.M. did in fact need services for the alleged deficiency. RP 85-86.

It is especially absurd to blame K.M. for not voluntarily revealing her HIV status, when Ms. Fabiani was specifically aware that K.M. felt stigmatized by her status, attempting to hide it for 10-15 years. RP 111; *See* Lisa M. Keels, "*Substantially Limited: the Reproductive Rights of Women Living with HIV/aids*," 39 U. Balt. L. Rev. 389, 409 (2010) ("Women with HIV/AIDS often feel uncomfortable communicating their needs to medical providers because of previous experiences both inside and outside of doctors' offices").

It is entirely disingenuous for the State to suggest that Ms. Fabiani failed to mention K.M.'s major health issue out of respect for the mother's privacy or concern for HIPAA. BOR at 21. First, Ms. Fabiani never cited to HIPAA as a basis for not revealing K.M.'s medical disability at trial. Second, the C.F.R. cited by the State includes only general provisions, and in no way supports the proposition that Ms. Fabiani was specifically unable to reveal K.M.'s health information as

social worker for K.M.'s dependency case. *See* 45 C.F.R. § 164.104 (a) (this regulation applies to the following entities: "(1) A health plan; (2) A health care clearinghouse; (3) A health care provider who transmits any health information in electronic form in connection with a transaction covered by this subchapter."); 45 C.F.R. § 164.501 ("Direct treatment relationship means a treatment relationship between an individual and a health care provider"). Finally, the State fails to explain why Ms. Fabiani was prohibited from disclosing only K.M.'s HIV status because of HIPAA, but not K.M.'s other private health information about chemical dependency and mental health, which Ms. Fabiani shared with the service providers without K.M.'s authorization. RP 84.

Finally, the State faults K.M. for not making a record of how the provision of services for her HIV status would have corrected "identifiable parental deficiencies in the foreseeable future." BOR at 19-20. However, the record is clear that K.M.'s medical condition was a pervasive limitation on her ability to engage with visits and was not properly factored into the assessments by the various professionals assigned to assist K.M. in remedying the parental deficiencies identified by Ms. Fabiani.

Michelle Delano, the guardian ad litem, knew that K.M. had significant health problems that made her unable to attend her visits. RP 31. Yet she did not know what her specific health issues were. RP 45. Though K.M. reported very significant health ailments to her mental health counselor, this went unexamined in the assessment. Ex. 22, p.2, 6. Her chemical dependency assessment acknowledged that the pain medication might have been appropriate in a severe medical issue such as arthritis (a common feature of HIV and specifically complained of by K.M.), but did not explore this in its evaluation. RP 66. Thus, each professional in K.M.'s case knew that there was a significant medical issue that impacted every aspect of her life and her ability to engage with the required services, yet simply failed to follow up and assess her needs. As professionals, it was their duty, not K.M.'s, to understand the significance of her medical condition as it related to the professional assessments they are trained to provide.

Because K.M. was not permitted to provide testimony, it is true that K.M.'s counsel was not able to fully develop her case that the Department's willful ignorance about K.M.'s HIV status meant that adequate services had not been provided. However K.M.'s attorney elicited the central fact of K.M.'s severe medical condition on cross-

examination, and made the Department's lack of care or knowledge about K.M.'s health impairment central to her questioning of the witnesses and in closing argument. RP 111, 146. Thus, the record clearly establishes that K.M. suffered from a medical impairment that affected her ability to engage with each of the services provided, and that there was no effort to remedy this underlying impairment.

In its Restatement of the Case, the State attempts to highlight the facts of K.M.'s previous termination case from 2013 to make up for the lack of evidence in D.M.M.'s termination proceeding. BOR 2-3. K.M.'s counsel objected to admission of these exhibits. RP 10. The trial court admitted the exhibits, but questioned their relevance, stating, "the court will make a determination about whether they are relevant to the matters that we have here." RP 11. The trial court did not reference these exhibits in its ruling, and they were not relied on by the court in terminating K.M.'s parental rights in 2016 as to D.M.M. CP 74-81; RP 152-160. Thus, this evidence is not relevant, and should not be used to make up for the State's failure to meet its burden in D.M.M.'s case.

The State failed to meet its burden to show that to show that the Department offered reasonable services to address K.M.'s medical

impairment that affected every aspect of her ability to engage in services.

B. CONCLUSION.

K.M.'s due process rights were violated when she was not given proper notice of her termination trial and was denied the right to provide testimony. The State's failure to acknowledge K.M.'s medical impairment and to offer reasonable services provides additional grounds for reversal.

DATED this 14th of July, 2017.

Respectfully submitted,

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July 14, 2017 - 4:26 PM

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Appellate Court Case Title: In re the Welfare of D.M.M.
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