

NO. 49710-7

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re the Welfare of

D.M.M.,

A Minor Child

BRIEF OF RESPONDENT,
DEPARTMENT OF SOCIAL AND HEALTH SERVICES

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I. INTRODUCTION

This is an appeal of an order terminating the parental rights of K.M. who is the mother of D.M.M. The child was removed from the mother's care in part because the mother had been found unfit due to prescription opiate abuse the year before when the court terminated her parental rights to four older children. When D.M.M. was born addicted to opiates, the mother was homeless and still had not rehabilitated herself, so a dependency petition was filed.

During the course of D.M.M.'s dependency, the mother missed visits, failed to attend meetings about her child, and failed to participate in services that may have helped her. After three days of trial, at which the mother failed to appear each day, the court set the case over to deliberate. While the court was delivering its ruling, the mother appeared. The court finished its ruling, concluding that the mother was unfit and terminating her parental rights. The mother then wanted to testify. The court denied her request. This appeal follows.

II. RESTATEMENT OF THE ISSUES

1. Does a parent waive their right to attend trial when, knowing that the trial will begin when a courtroom is available, the parent leaves the courthouse and does not respond to her attorney's attempts to

contact her and does not call her attorney during the week in which the trial occurs?

2. Even if the mother did not waive her right to attend the trial, under *Mathews v. Eldridge*, was due process violated by the court proceeding in the mother's absence when she was represented by an attorney and multiple attempts were made to contact the mother, who was aware that the trial would begin when a courtroom was available?

3. Did the court abuse its discretion in denying the mother's motion to reopen the case to allow her to testify, where she was aware that trial would begin but failed to respond to attempts at contact, did not make affirmative attempts at contacting her attorney after September 23, 2016, and made no showing of how the outcome would be different?

4. Should a Department social worker reveal a parent's HIV status, over the parent's objection, to chemical dependency providers and mental health counselors, in order to find that the services were "expressly and understandably" offered?

III. RESTATEMENT OF THE CASE

A. Facts Related to Mother's Unfitness as a Parent

K.M. is the mother of five children. Ex. 1. As to the four oldest children, in 2013 the court found that K.M. was unfit, and specifically found that she failed to have any insight into the role that her use of

prescription narcotics, along with other causes, plays into her inability to attend appointments and visitation with her children. Ex. 11, 13, 15 and 17. At the time, the mother had prescriptions for opiates, oxycodone, hydromorphone and marijuana. Ex. 11, 13, 15 and 17. The court found that she had only attended six of sixteen scheduled appointments with Dr. Rasmussen, who was her individual counselor at the time and only attended approximately 50 percent of the visits that were scheduled with her children. Ex. 11, 13, 15 and 17. The court found that K.M.'s failure to make progress with counseling was primarily because she failed to attend regularly. Ex. 11, 13, 15 and 17. The court terminated her parental rights to the four oldest children in February 2013 following four days of trial, at which she was late for two of the four days. Ex. 11, 13, 15 and 17.

When D.M.M. was born on September 4, 2014, the baby had prescription opiates in her system and went through withdrawal. Ex. 1 and 22. In addition, K.M. was homeless. Ex. 1. The alleged father was dead. Ex. 1. The dispositional plan ordered by the juvenile court required the mother to attend a chemical dependency evaluation, and the Department referred the mother to Pioneer Human Services in November 2014. RP 57. K.M. went to Pioneer to be assessed on May 28, 2015. Ex. 23. While the mother reported using fentanyl, hydromorphone and marijuana, she denied any problem regarding her use of the prescription narcotics. Ex. 23. She

attended a four hour drug and alcohol awareness class. Ex. 31. Throughout the course of the dependency of D.M.M., she did not attend any drug rehabilitation treatment programs because she did not believe she needed it and did not believe she had a problem. RP 85-87.

The mother was referred to Dr. Manley for a psychological evaluation on December 1, 2014 by Ms. Fabiani, the Department social worker. RP 79. An appointment was scheduled for February 4, 2015 and the mother failed to attend. RP 80. The social worker was unable to get a response from the mother until March 3, 2015 and then another appointment was scheduled and K.M. attended. RP 80.

Dr. Manley believed the mother, who reported anxiety and chronic pain, had a positive level of motivation, but needed to demonstrate a commitment to full-time parenting through consistency. Ex. 22.

When the child was initially placed into foster care, K.M. was offered visits twice per week, but the mother was inconsistent in attendance, so visits were reduced to once per week in an attempt for her to attend regularly. RP 35, 112. When Michelle Delano was assigned as the Guardian ad Litem in November 2015, the mother had not attended visitation with the baby since June 2015, except for one visit in August 2015. RP 28.

The mother began visits again on December 22, 2015, appearing motivated to attend visits with her child, but once again had difficulty with getting to the visit timely. RP 28-30. She visited again in mid-late January 2016. RP 30. She then attended three visits in mid-to-late March 2016, a visit in April 2016, one visit in June 2016, three visits in July 2016 and one visit in August 2016. RP 30. The Guardian ad Litem reported that she would visit two or three times then drop off and there were “very large chunks of time” where she would not attend visits with the child.¹ RP 30. As of September 27, 2016, which was during the trial, the mother had not attended a visit with the child since August 2, 2016. RP 96.

The mother reported that she missed visits with the child due to insomnia and other health issues. RP 31. In addition, the mother found morning visits difficult, so visits were moved from a starting time of 11:00 a.m. to a starting time of noon, to help mother better be able to attend. RP 36. When the social worker asked to schedule the visit back to the earlier start time of 11:00 a.m., because the noon to 3:00 p.m. interfered with D.M.M.’s nap schedule, the mother questioned whether the social worker was ‘setting her up for failure.’ RP 104-05.

D.M.M. was part of the “Best for Babies” program which is a program for not only the baby, but the parent as well. RP 34. There were

¹ In terms of scheduled visits, mother attended 29 and missed 37. RP 96.

regular meetings, in which, if a parent needs services, the team is there to assist the parent. RP 34. The mother did not attend even one Best for Babies meeting during the time Ms. Delano was the Guardian ad Litem. RP 34-35. She attempted once to attend a meeting, but was late. RP 34, 25. K.M. received invitations to the meetings by email. RP 34.

The court ordered random urinalysis testing as part of the dispositional order. Ex. 2. The mother was asked to provide samples on February 1, March 30, April 1, July 28, and August 4, 2016, but she failed to attend and do so. Ex. 27. Other times she provided UA's that were positive for narcotics (opiates) and marijuana, some of which were prescribed. RP 135-36.

When Ms. Delano was assigned the case, she emailed K.M. to introduce herself and provide contact information, but K.M. never responded directly to her, only copying her on email correspondence sent to the social worker. RP 25, 28. Mariah Fabiani, the social worker, emailed the mother monthly, but the mother would go a few months at a time without responding. RP 78.

Ms. Fabiani referred the mother to Good Samaritan Behavioral Health in Puyallup for counseling, including grief counseling, but there was no evidence the mother ever attended and Ms. Fabiani received a report that she was not a client there. RP 83. K.M. attended four

counseling appointments with Freda Haines in winter 2015 and stopped attending in April 2015. RP 84-85. Since the mother reported being a domestic violence victim, she was referred to the YWCA for domestic violence victim support groups, but there was no evidence she attended. RP 99-100.

The mother was referred to the “Incredible Years” toddler class, which is a 12-week parenting program, but she did not attend, instead requesting a different program called “Promoting First Relationships.” RP 100-101. Ms. Fabiani also referred her to that service. RP 100-101. K.M. began, but did not complete that program. RP 101. The first time Promoting First Relationships was referred, three sessions occurred in conjunction with visits, but when the mother quit attending visits, she was dropped from the Promoting First Relationships program in March 2016. RP 101-102. Mom was referred a second time to Promoting First Relationships in April 2016, but the provider was unable to contact the mother and the mother was not visiting again in May 2016, so the referral was closed again. RP 102.

B. Facts Related to Mother’s Attendance at Trial

The trial on the Department’s petition to terminate the mother’s parental rights was continued several times, but finally scheduled to begin on September 21, 2016. CP 36-37, 48-49 and 50-51. On September 21,

2016, the matter was called for trial and the mother's attorney motioned to continue the trial. Supp. RP 3. The motion was denied by Commissioner Johnson. Supp. RP 6. The Commissioner informed the parties that no courtroom was available that day and the case would be "trailing." Supp. RP 5. He directed the parties to wait and check with Connie about what was going on downtown.² Supp. RP 7. The hearing was scheduled for 9:00 a.m., and the mother had not yet appeared at the time the case was called, but the parties agreed that she had appeared later on the morning of September 21, 2016. RP 4, 6.

The case was assigned to Judge Murphy, Dept. 09, to begin on September 26, 2016.³ CP 62. The case was called at 10:08 a.m. the morning of trial. CP 57. The mother was not present, but her attorney informed the court that the mother had been calling her (Ms. Tucker) every day asking about the trial. RP 4. The mother's attorney informed the trial court that she had left her a phone message for her client that very morning, telling the mother that the trial was beginning. RP 5. Partly

² "Connie" is believed to be Connie Mangus, J. Hickman's judicial assistant as J. Hickman was the presiding judge at Pierce County Juvenile Court at Remann Hall during this time and "downtown" is believed to refer to the County-City Building in Tacoma, where the majority of courtrooms and court administration are located.

³ The record is silent as to when this assignment occurred, but the attorneys were notified by phone of the assignment. RP 6, 165.

because of scheduling and partly for an opportunity for Ms. Tucker to contact K.M., the court recessed the matter until the afternoon.⁴ RP 6.

The case was reconvened on September 26, 2016 at 1:31 p.m. CP 57. The mother was still not present. RP 9. The AAG made an opening statement and the court admitted a copy of a bench warrant that had been issued for the mother's arrest in a different, criminal proceeding. Ex. 28. Following the testimony of one witness, the case was recessed at 2:36 p.m. CP 57.

The next morning, September 27, 2016 at 9:05 a.m., the case was reconvened and the mother was still not present. RP 51, CP 58. Ms. Tucker reported that the mother had been good about checking in the previous week, but there had been no contact with her since Friday (September 23, 2016). RP 51. The court checked the jail roster, but the mother was not there either. RP 51. The trial proceeded and was recessed at 11:23 a.m. that day. CP 58. During a discussion about an exhibit, the mother's attorney informed the court that she did not know whether her client would appear the next day or not. RP 121. Rather than recess the case until the afternoon, the case was recessed until the following morning. RP 121.

⁴ The clerk's minutes reveal the hearing in the morning was from 10:08 a.m. to 10:13 a.m. before being recessed until the afternoon. CP 57-58

The case was reconvened on September 28, 2016 at 9:08 a.m. CP 58. At 9:37 a.m., the Department rested its case and the court recessed. CP 58. RP 140. The mother's attorney rested at 9:49 a.m. as the mother was still not present to testify. CP 58, RP 140. Closing arguments were made and the case was set over for the court's deliberations and a ruling until October 3, 2016 at 9:00 a.m. CP 58-59, RP 150-51.

On Monday, October 3, 2016 at 9:13 a.m., the case was called. CP 60-61. The Court began issuing its ruling and was reciting the mother's 40 percent participation rate in visits when the mother appeared at 9:22 a.m. RP 152-58. The court finished its oral ruling a few minutes later and the mother requested to testify, claiming that she had not known there was court. RP 161. The mother's explanation of her absence was confusing as she claimed that she got an email, but it was not until the day of court and when she showed up, court was already over; however, later in the colloquy she stated that she "didn't know about any of those [court] days". RP 161-62. Ms. Tucker informed the court she had also called the mother several times. RP 162. The mother claimed that from the Friday before trial started (which would have been September 23, 2016), she had not received any notification that the trial had commenced, until she received a voicemail that the trial had ended and the ruling would be on October 3, 2016. RP 163-64. This contradicted Ms. Tucker's

representations to the court that she called K.M. every day that they had trial, that she had called the mother during a recess and that she called the mother on the day that the parties came back to court in the afternoon, which would have been the September 26, 2016 date. RP 164-65. Ms. Tucker also sent emails informing the mother about the trial. RP 165. The mother acknowledged not calling her attorney after Friday, September 23, 2016, explaining that she was preparing to start a new job. RP 164.

The court declined to reopen the case to allow the mother's testimony. RP 165. This appeal follows.

IV. ARGUMENT

A. The Mother Waived Her Due Process Right to be Heard When She Failed to Attend the Trial, and the Court Did Not Abuse Its Discretion in Denying Her Motion to Reopen the Case

The mother first argues that she was denied due process because the court denied her motion to reopen the case. This argument fails for two reasons. First, the mother waived her right to appear at trial and be heard when she left the courthouse, did not respond to attempts to contact her regarding the trial, and took no steps to contact her attorney to get information about the trial. Second, even assuming that the mother did not waive her right to appear at trial, the mother's due process rights were respected under the *Mathews v. Eldridge* test.

1. The Mother's Decision to Leave the Courthouse and Take No Reasonable Steps to Attend the Trial Constituted a Waiver of Her Right to Appear and Be Heard

The mother's due process argument fails because through her actions she waived her right to appear at trial. In a dependency proceeding, "[a]ny party has a right to be represented by an attorney, to introduce evidence, to be heard in his or her own behalf, to examine witnesses, to receive a decision based solely on the evidence adduced at the hearing, and to an unbiased fact finder." RCW 13.34.090(1).

The mother complains that she was not provided adequate notice of the trial. Yet, she appeared the day of trial, September 21, 2016, in which the parties began "trailing," or waiting for a courtroom to become available. She could have chosen to wait for her trial to begin at the courthouse, while the matter "trailed" other trials currently underway. Instead, she chose to leave the courthouse and wait to be notified by phone and email, which she now complains was an unreliable notification method. The mother also took no action for an entire week to contact her attorney.

"The essential requirements of procedural due process are notice and an opportunity for a hearing appropriate to the nature of the case." *In re Dependency of M.S.*, 98 Wn. App. 91, 94, 988 P.2d 488 (1999)

(citing *In re C.R.B.*, 62 Wn. App. 608, 614, 814 P.2d 1197 (1991) and *In re Welfare of Myricks*, 85 Wn.2d 252, 254, 533 P.2d 841 (1975)). Division I of the Court of Appeals has suggested that “the decision to proceed with a termination trial in the absence of the parent rests in the trial court’s sound discretion.” *In re Welfare of L.R. and A.H.*, 180 Wn. App. 717, 723, 324 P.3d 737 (2014) (citing *In re Dependency of J.W.*, 90 Wn. App. 417, 429, 953 P.2d 104 (1998)). However, the court reviews de novo alleged due process violations. *Id.* (citing *Post v. City of Tacoma*, 167 Wn.2d 300, 308, 217 P.3d 1179 (2009)).

As the Court in *In re L.R.* observed, although the parent has a right to a meaningful opportunity to be heard, that right is not self-executing. *In re L.R.* at 723-24 (citing *In re M.S.* at 92, 96). The parent “must take reasonable and timely steps to exercise that right.” *Id.* In the present case, the mother appeared on the day the matter was called for trial, but left and did not appear once assigned to a courtroom. The mother, upon her decision to depart the courthouse, had an obligation to take reasonable and timely steps to exercise her right to attend the trial by staying in contact with her attorney. At a minimum, knowing that her email and phone were unreliable, she should have contacted her attorney daily to see if a courtroom had opened for trial. It was also the mother’s choice to make no effort to contact her attorney between Monday September 26, 2016, and

Friday, September 30, 2016. She prioritized preparation for starting her new job over the imminent trial as to whether she should retain her parental rights. Through her actions, the mother waived her right to appear at trial, and it was fully within the trial court's discretion to deny her motion to reopen the case.

2. Assuming Arguendo That the Mother Did Not Waive Her Due Process Right to Attend, a Balancing Test of the *Mathews v. Eldridge* Factors Supports the Court's Decision to Proceed With Trial on September 26, 2016

Even assuming the mother did not waive her right to appear at trial, the trial court did not violate the mother's due process rights. In determining whether a parent has received adequate due process, the court must balance the three factors set forth in *Mathews v. Eldridge*. The court considers "[1] the private interests at stake, [2] the government's interest, and [3] the risk that the procedures used will lead to erroneous decisions." *In re Dependency of M.S.R. and T.S.R.*, 174 Wn.2d 1, 14, 271 P.3d 234 (2012) (citing *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)).

The first *Mathews* factor is the private interest at stake. As in the case of *In re L.R.*, the Department recognizes the strength of the mother's interest and does not dispute its importance here. "However, the right to be present [at trial] is not absolute and must be balanced against the other two

Mathews factors.” *In re L.R.* at 725 (citing *In re Dependency of M.S.*, 98 Wn. App. at 95).

“The second [*Mathews*] factor assesses whether the hearing had sufficient procedural safeguards to insure that the parent had a full and fair opportunity to defend—i.e., to present evidence, rebut opposing evidence, and present legal arguments.” *In re L.R.* at 725 (citing *In re Dependency of J.W.*, 90 Wn. App. at 428–29); *In re Welfare of S.E.*, 63 Wn. App. 244, 250–51, 820 P.2d 47 (1991); *In re Darrow*, 32 Wn. App. 803, 808–09, 649 P.2d 858 (1982). “The ability to defend through counsel reduces the risk of error.” *In re L.R.* at 725 (citing *In re Dependency of J.W.*, 90 Wn. App. at 428–29). For example, in *In re J.W.*, the court held that conducting a dependency disposition hearing without the father present did not violate due process. *Id.* The court held that the father’s absence created little room for error where no facts were disputed and the father’s counsel argued legal issues after fully discussing them beforehand with the father. *Id.*

In the present case, the mother argues that the risk of error was high and compares this to the case of *Young v. Thomas*, 193 Wn. App. 427, 440, 378 P.3d 183 (2016). In *Young v. Thomas*, neither the party nor her attorney appeared for the trial date of February 10, and when a new trial date of February 14 was set, the only notice was a letter sent via US mail without the required six days’ notice pursuant to CR 6.

See generally Young, 193 Wn. App. at 432–35. In addition, there was confusion about whether the attorney was representing the party or not. *Id.*

In the present case, the attorneys appeared for trial on the morning of September 21, 2016, and were told to wait until the mother arrived and to check-in with Connie regarding what would happen next. The trial was not continued. The mother arrived later that same day and was aware that the parties were waiting for a courtroom, or “trailing” the trials currently underway, as she called her attorney on Thursday and Friday, September 22-23, 2016. RP 51, 162. The procedure used by the juvenile court in this case required the parties to appear at the initial trial date and then wait for a courtroom to be available. Once a courtroom became available the attorneys were notified to appear. The risk of error in such a procedure is low because parents can maintain contact with their attorneys in order to receive updates about the assigned courtroom. If a parent does not have reliable phone or email access, a parent can choose to wait at the courthouse or can contact their attorney daily.

Additionally, in this case the court recessed the trial numerous times to allow the mother’s attorney to contact her. The court spread the trial over three days, delaying the conclusion of the case until the third day of trial, which allowed for repeated attempts to contact the mother. Based on the clerk’s minutes, the case could have been held within one day.

However, it appears to be a deliberate effort by the court, on behalf of the mother, to delay the conclusion of the trial. The mother failed to appear and did not take advantage of her right to testify.

“Regarding the final *Mathews* factor, the Department has a strong interest in protecting the rights of the children, which includes a speedy resolution of the termination proceeding.” *In re the Welfare of L.R.* at 727. As in *L.R.*, there had been several previous continuances of the trial date. Additionally, the mother did not stay in contact with her attorney even though she knew the case was proceeding to trial. RP 51, 162. D.M.M. has a right to a safe, stable and permanent home and a speedy resolution of these proceedings.

Following a *Mathews v. Eldridge* balancing test, no due process violation occurred, as the risk of error was low, the mother was represented by an attorney throughout the trial, and the mother left the court house and did not contact her attorney despite being aware the trial would begin.

3. The Court Did Not Abuse Its Discretion in Denying the Mother’s Motion to Reopen the Case

The trial court’s decision to deny mother’s request to reopen the case did not violate due process and was soundly within the court’s discretion.

The granting of a continuance and the reopening of a cause for additional evidence is within the discretion of the trial court and . . . the trial court's actions in this regard will not be reversed except upon a showing of an abuse of discretion and prejudice resulting to the complaining party.

In re Welfare of Ott, 37 Wn. App. 234, 240, 679 P.2d 372 (1984) (citing *Estes v. Hopp*, 73 Wn.2d 263, 270, 438 P.2d 205 (1968)). A case may be reopened for additional testimony even though the trial court has announced a decision orally. The trial court's oral decision is subject to change because it is not effective until formal findings and conclusions are entered. *Ferree v. Doric Co.*, 62 Wn.2d 561, 383 P.2d 900 (1963).

“The [trial court's] manner of exercising that discretion will not be disturbed on appeal absent manifest abuse.” *State v. Tyler*, 166 Wn. App. 202, 214, 269 P.3d 379, 385 (2012), *aff'd*, 177 Wn.2d 690, 302 P.3d 165 (2013) (citing *State v. Sanchez*, 60 Wn. App. 687, 696, 806 P.2d 782 (1991) (citation omitted)). “Abuse of discretion is discretion exercised on untenable grounds for untenable reasons.” *Id.*

In this case, the court did not abuse its discretion in declining to reopen the case. The matter was called for trial the previous week. The mother was aware that the trial would begin when a courtroom became available. She called her attorney the previous Thursday and Friday, but then failed to call her attorney at all during the entire trial, because she was preparing to start a new job. During that time, her attorney made

repeated attempts to contact the mother by phone and email. The first day of trial, the court recessed the matter to the afternoon, to allow for additional attempts to contact the mother. The court made every effort to extend the time during which the parties were present in case the mother did appear. She failed to do so. No abuse of discretion has been shown.

Further, the mother has not shown what the nature of her testimony would have been and has not provided an offer of proof as to how the trial court's conclusions would have been different. Throughout the case, the mother missed visits with her daughter and failed to participate in services. The court did not abuse its discretion in denying the motion to reopen the case.

B. The Mother Fails to Show How Disclosing Her HIV Status or Housing Situation to Service Providers Would Have Resulted in Better Compliance With Visitation and Services

The mother also argues that the state did not “expressly and understandably” offer or provide services because the social worker did not disclose the mother’s HIV status or housing situation to service providers. This argument fails because the mother has not shown how these disclosures would have affected the availability or usefulness of services in any way.

The State has an affirmative duty to offer or provide reasonably available services that are capable of correcting identified parental

deficiencies within the foreseeable future. *In re Welfare of Hall*, 99 Wn.2d 842, 850, 664 P.2d 1245 (1983); *In re Dependency of P.A.D.*, 58 Wn. App. 18, 26, 792 P.2d 159 (1990), *review denied*, 115 Wn.2d 1019 (1990).

When the State orders remedial services, it has a statutory obligation, at a minimum, to provide the parent with a referral list of agencies or organizations that provide the services. *Hall* at 850. However, “a parent’s unwillingness or inability to make use of the services provided excuses the State from offering extra services that might have been helpful.” *In re Dependency of Ramquist*, 52 Wn. App. 854, 861, 765 P.2d 30 (1988).

“Where the record establishes that the offer of services would be futile, the trial court can make a finding that the Department has offered all reasonable services.” *In re Welfare of Ferguson*, 32 Wn. App. 865, 869–870, 650 P.2d 1118 (1982), *reversed on other grounds*, 98 Wn.2d 589, 656 P.2d 503 (1983). A parent who claims he received insufficient services must point to evidence demonstrating how the service, if offered, would have corrected parental deficiencies. *In re Dependency of T.R.*, 108 Wn. App. 149, 163, 29 P.3d 1275 (2001).

The mother does not say how, if the Department had disclosed her HIV status or housing situation to service providers, the services would have been more effective at remedying K.M.’s parental deficiencies. As

the court found, the mother's attendance at services and visitation was poor. FOF VIII(7).

Additionally, the mother did not want others to know she was HIV positive and the social worker respected that wish. Indeed, this is the type of information that the Health Insurance Portability and Accountability Act (HIPAA) is meant to protect. HIPAA sets out standards for privacy which focus on limiting the use and disclosure of sensitive personal health information. *See generally* 45 C.F.R. §§ 160, 164. The mother also had difficulty maintaining stable housing, although at times, she provided addresses of places where she was staying when she moved. RP 77. The Department offered bus transportation to the mother. RP 78.

The mother compares her HIV status to a cognitive impairment, such as the court considered in the case of *Matter of I.M.-M.*, where no one knew the parent was cognitively impaired or could explain whether integrated services would have been beneficial. *In re Matter of I.M.-M.*, 196 Wn. App. 914, 924-25, 385 P.3d 268, 273 (2016). K.M. does not explain how service providers would have been better able to address her attendance issues if they were aware of her HIV status. Many parents have a variety of conditions that may cause pain or illness, but are still able to attend visits.

In this case, K.M.'s unfitness did not stem from her HIV status or her housing situation. K.M. was unable to maintain a schedule of visits and was never able to prioritize the child's needs over her own, such as when the social worker asked to begin visits at 11:00 a.m. so as to not interfere with D.M.M.'s naptime. There is no reasonable nexus between knowledge of the mother's HIV status or housing situation and the provision of more tailored or appropriate services aimed at remedying her parental deficiencies. If the mother had felt it important for her providers to know of her HIV status, she could have provided that information herself.

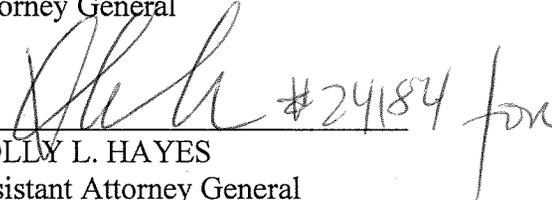
V. CONCLUSION

The Department respectfully requests that this court affirm the findings and conclusion of the trial court and uphold the termination of the mother's parental rights. The mother's due process rights were not violated because she waived her right to attend the trial. Assuming *arguendo* she did not waive her attendance, any risk of error in proceeding without her was mitigated as she was represented by an attorney. The court did not abuse its discretion when declining to reopen the case when the mother finally appeared. Additionally, the mother is unable to show how her HIV status was relevant to the provision of services or how her

inability to maintain housing contributed to offering inappropriate services. The court's ruling should be affirmed.

RESPECTFULLY SUBMITTED this 28th day of June, 2017.

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DECLARATION OF SERVICE

I, MELANIE WIMMER, declare under penalty of perjury under the laws of the state of Washington that the following is true and correct:

On June 29th, I caused a true and correct copy of the RESPONDENT'S BRIEF to be filed electronically with the Court of Appeals, Division II, and to be served via email through the Court's electronic filing system as indicated below:

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SIGNED in Tacoma, Washington, this 29th day of June, 2017.



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June 29, 2017 - 8:40 AM

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