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NO. 97731-3

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE THE TERMINATION OF PARENTAL RIGHTS OF M.B.,

A Minor Child.

N.B., father

Petitioner,

v.

State of Washington,

Respondent.

BRIEF OF *AMICUS CURIAE* WASHINGTON DEFENDER
ASSOCIATION & INCARCERATED PARENTS PROJECT
IN SUPPORT OF PETITIONER

D'Adre Cunningham
WSBA No. 32207
WDA's Incarcerated Parents Project
Attorney for *Amicus Curiae*

Washington Defender Association
110 Prefontaine Place South, Suite 610
Seattle, Washington 98104
(206) 623-4321
dadre@defensenet.org

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus curiae is the Washington Defender Association (WDA), a statewide non-profit organization whose membership is comprised of public defender agencies, indigent defenders, and those who are committed to seeking improvements in indigent defense. The WDA is a not-for-profit corporation with 501(c)(3) status. The WDA's objectives and purposes are defined in its bylaws, and include: protecting and insuring by rule of law those individual rights guaranteed by the Washington and Federal Constitutions, including the right to counsel, and to resist all efforts made to curtail such rights; promoting, assisting, and encouraging public defense systems to ensure that all accused persons and respondents receive effective assistance of counsel.

Representatives and members of the WDA frequently testify before both houses of the Washington State Legislature on proposed legislation affecting indigent defense issues. This Court has granted WDA leave on prior occasions to file amicus briefs in this Court. The WDA represents 30 public defender agencies and has over 1,600 members comprising attorneys, investigators, social workers and paralegals throughout Washington State representing indigent clients in criminal and civil proceedings where their liberty interests are at stake. The WDA's members represent parents and children involved in RCW Title 13 child

welfare proceedings. WDA attorneys have significant expertise on the issues presented in the instant case.

This Court's decision in this case has potentially far-reaching implications to child welfare practice in Washington. The purpose of this brief is to provide the court with information about how excluding incarcerated parents from trial profoundly hinders an attorney from providing effective assistance of counsel.

II. ISSUE TO BE ADDRESSED BY AMICUS

Whether excluding an incarcerated father from being present at court during the entire trial hearing on the petition to end forever his parent-child relationship violated his right to counsel through effective legal representation?

III. STATEMENT OF THE CASE

Amicus adopts the facts as stated in the briefs of petitioner, N.B., an incarcerated father.

IV. ARGUMENT

Incarcerated parents face numerous barriers when responding to child custody litigation that prevent them from advocating for their own

and for their child's legal interests, including but not limited to: barriers to accessing constitutionally guaranteed counsel. In a situation like this one, where the State is seeking permanent severance of the relationship between the child and the incarcerated father over the father's objection, those barriers to accessing one's own counsel only exacerbate the conditions where the father's legal interests are already acutely jeopardized. As petitioner noted in his brief, the trial court here violated this incarcerated father's due process rights simply by failing to wait one week for father to attend in person and participate in the entire trial hearing.

This brief aims to focus the Court's attention on the impact of this due process violation upon another constitutionally and statutorily guaranteed right—the right to counsel. The trial court's failure to wait *one (1) calendar week* to bring the father to court for the entire termination of child-parent relationship trial hearing denied this incarcerated father his right to effective assistance of counsel and the harm, which resulted was irreparable. Any decision, affirming this ruling would have deleterious effects on ensuring that incarcerated parents *and their children* receive fundamentally fair procedures in child welfare courts across this State. This Court should ensure that due process as outlined by the Washington State constitution categorically includes the transport of incarcerated

parents held within Washington State to trial hearings upon matters where the State of Washington is seeking to end forever the relationship between the parent and their child, and where transport can be safely and timely accomplished.

A. The trial court’s failure to wait one (1) calendar week to have the incarcerated father transported to court for the trial hearing irreparably harmed this father by denying his constitutional and statutory rights to legal counsel.

I. In Washington, there is a *state* constitutional and statutory right to counsel at public expense in termination of child-parent relationship proceedings.

The right to counsel at public expense in termination of child-parent relationship¹ proceedings is guaranteed by both the state constitution and a statutory right outlined at RCW 13.34.090. In Re Luscier’s Welfare, 84 Wn.2d 135, 138, 524 P.2d 906, 908-09 (1974); *see* Wash. const. art. 1, sect. 22; RCW 13.34.090.² The right to counsel in termination of child-parent relationship hearings extends from the article

¹ Washington’s legal framework requires that the petitioner seeking to permanently sever the child-parent relationship under RCW 13.34.190 prove present parental unfitness and the elements outlined at RCW 13.34.180 by clear cogent and convincing evidence, and prove that terminating the relationship is in the child’s best interests by preponderance of the evidence. In Re Welfare of A.B., 168 Wn.2d 908, 927, 232 P.2d 1104, 1113-14 (2010).

² The Supreme Court of Washington has acknowledged its holding in In Re Luscier’s Welfare is now limited to the Washington state due process clause after the Supreme Court of the United States ruling in Lassiter v. Department of Social Servs., 452 U.S. 18, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981). State v Parvin, 184 Wn.2d 741, 759, 364 P.3d 94, 103 (2015).

1, section 3 of the Washington state constitution. In Re Luscier's Welfare, 84 Wn.2d 135, 139, 524 P.2d 906, 908-09 (1974). Civil due process meets the procedural due process guaranties of article 1, section 3 of the Washington State Constitution and exceeds federal guaranties under the Fourteenth Amendment." In Re Dependency of Moseley, 34 Wn.App. 179, 185, 660 P.2d 315, 318 (1983). Civil due process equates to what procedural fairness is due in civil cases:

Notice, open testimony, time to prepare and respond to charges, and a meaningful hearing before a competent tribunal in an orderly proceeding are all elements of civil due process.

In Re Dependency of Moseley, 34 Wn.App. 179, 184, 660 P.2d 315, 318 (1983)(citations omitted). In termination proceedings, these guaranties include the right to counsel, and infringing upon the right to counsel may warrant reversal of judgment.³ In Re Luscier's Welfare, 84 Wn.2d 135, 138, 524 P.2d 906, 908-09 (1974).

³ The rights associated with the child-parent relationship are the parent's fundamental liberty interest in the custody, care, and companionship of his child, in making all child-rearing decisions for that child, and the "freedom of personal choice in matters of family life," are all protected by the Due Process Clause of The Fourteenth Amendment and Article 1, section 3 of the Washington State Constitution. U.S. CONST. amend. XIV; Wa. Const.. art. 1, sect. 3; Troxel v. Granville, 530 U.S. 57, 65-66, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000) (right to parent is oldest liberty interest recognized by Court); Santosky v. Kramer, 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982); In Re Welfare of C.S., 168 Wn.2d 51, 54, 225 P.3d 953 (2010).³ "The family entity is the core element upon which modern civilization is founded," and courts "zealously guard" the integrity of the family unit. In re Custody of Smith, 137 Wn.2d 1, 15, 969 P.2d 21 (1998), aff'd sub. nom. Troxel v. Granville, 530 U.S. 57 (2000).

2. The failure to transport the father to attend the entirety to the termination hearing deprived him of his right to counsel .

The right to counsel is the right to *effective* counsel. Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 2063, 80 L.Ed.2d 674 (1984)(citations omitted). To determine whether a parent has been deprived of his right to counsel in a termination of child-parent relationship trial, one may look to the “fair hearing” standard under Strickland v. Washington, and/or the “meaningful hearing” standard under In Re Dependency of Moseley. In Re Dependency of V.R.R., 134 Wn.App. 573, 586, 141 P.3d 85, 91 (2006).

Under the “fair hearing” standard, “[g]overnment violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense.” Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 2063, 80 L.Ed.2d 674 (1984)(citations omitted). For example, when a court’s ruling prevents a litigant from speaking with his own attorney during the overnight recess in his trial, his right to counsel is infringed upon and his convictions must be reversed. Geders v. United States, 425 U.S. 80, 88, 96 S.Ct. 1330, 1335, 47 L.Ed.2d 592 (1976). Additionally, court procedures that restrict a lawyer's tactical decision-making during trial

unconstitutionally abridge the right to counsel. *See Brooks v. Tennessee*, 406 U.S. 605, 612–613, 92 S.Ct. 1891, 1895, 32 L.Ed.2d 358 (1972).

Here, the trial court’s failure to bring the father to court interfered with the decision of the father’s attorney to cross-examine or recall witnesses the father did not hear testify. Additionally, without the father’s presence, the father’s attorney could not confer with the father about the credibility of witnesses; could not discuss cross-examination of witnesses; and could not prepare the defense and confer during recesses either throughout the court day or between court days (overnight).

Under the “meaningful hearing” standard, “if it appears from the record that an attorney was not effective in providing a meaningful hearing, due process guaranties have not been met.” *In Re Dependency of Moseley*, 34 Wn.App. 179, 184, 660 P.2d 315, 318 (1983). For example, when a trial court’s ruling prevents the responding party and his attorney from having sufficient time to prepare the defense to the termination of child-parent relationship petition in time for the trial hearing, it violates the parent’s right to effective assistance of counsel. *In Re Dependency of V.R.R.*, 134 Wn.App. 573, 586, 141 P.3d 85, 91 (2006). Preparing evidentiary objections, presenting witnesses, cross-examining witnesses, and preparing and presenting exhibits are several of the basic obligations for attorneys representing parents in termination cases. American Bar

Ass'n, Standards of Practice for Attorneys Representing Parents in Abuse and Neglect Cases, 5, 27-28 (2006),

https://www.americanbar.org/content/dam/aba/administrative/child_law/a

[ba-parent-rep-stds.pdf](#). Here, the father's absence directly interfered with his ability to communicate with, defend, and rebut evidence through his attorney as well as his attorney's ability to meet the aforementioned basic and other professional obligations.⁴ Therefore, due process was not satisfied.

3. The holding In Re the Interest of Darrow stands for proposition that incarcerated parents should be transported to termination trials when it can be done safely and timely.

Due process *does* require transport of an incarcerated father to appear personally and defend against a termination of child-parent

⁴ The Washington State Rules of Professional Conduct 1.4 requires:

(a) A lawyer shall:

(1) promptly inform the client of any decision of circumstance with respect to which the client's informed consent, as defined in Rule 1.0A(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

RPC 1.4.

relationship petition, if failing to transport the father to court for trial interferes with the “opportunity to defend through counsel. In Interest of Darrow, 32 Wn.App. 803, 808, 649 P.2d 858, 861 (1982). In Darrow, the Court reasoned that transport of an incarcerated parent to court for a termination of child-parent relationship trial should occur if it can be done safely and timely. In Re Interest of Darrow, 32 Wn.App. 803, 809, 649 P.2d 858, 861 (1982). The Darrow Court examined whether the incarcerated father could *access* his attorney during the trial. In Re Interest of Darrow, 32 Wn.App. 803, 809, 649 P.2d 858, 861 (1982). Ultimately, the Darrow Court decided that father could not be transported safely and timely. It is not applicable to the present case where father incarcerated in The State of Washington’s custody could have been brought safely just one week later. *See* In Interest of Darrow, 32 Wn.App. 803, 809, 649 P.2d 858, 861 (1982). The father and his attorney were irreparably hindered by father’s absence. Such violations warrant reversal. *See* In Re Dependency of V.R.R., 134 Wn.App. 573, 586, 141 P.3d 85, 91 (2006); In Re Dependency of Moseley, 34 Wn.App. 179, 184, 660 P.2d 315, 318 (1983).

V. CONCLUSION

Even when an incarcerated father, like N.B., overcomes structural barriers to seek transport to the trial hearing on the petition to permanently sever of his relationship with his own child, the current legal framework fails to ensure that he is transported to court for the trial hearing and fails to ensure that he can remain for the entire duration of the trial. Failing to wait one calendar week to transport the father to court so that he could meaningfully defend against the termination petition with his attorney violated his due process right to counsel and irreparably hindered the ability of his attorney to provide effective legal representation. This Court should ensure that the Washington State constitution's due process clause categorically includes transporting parents within Washington State to trial hearings, where the State of Washington is seeking to end the relationship between the parent and their child forever, and where the transport can safely and timely accomplished.

Respectfully submitted this 14th day of February 2020.



D'Adre Cunningham
WSBA No. 32207
Washington Defender Association
Incarcerated Parents Project
Attorney for *Amicus Curiae*

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that the following is true and correct to the best of my knowledge and true belief:

On February 14, 2020, I electronically filed the foregoing document using the Washington State Appellate Courts' E-Filing Portal, which will serve the document on Assistant Attorney General, Jared Rayborn, and Skylar Brett, Attorney for the Petitioner-Father, N.B.



WSBA No 32207

On Behalf of Attorneys for Amicus Curiae Brief (WDA)

WASHINGTON DEFENDER ASSOCIATION &
WDA's INCARCERATED PARENTS PROJECT

WASHINGTON DEFENDER ASSOCIATION

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