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Court of Appeals
Division II
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SUPREME COURT NO.

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STATE OF WASHINGTON
10/2/2019
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COA NO. 52632-8-II

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

IN RE THE WELFARE OF:

M.B.,
Minor Child,

N.B. (FATHER),
Petitioner.

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

Cause No. 17-7-02238-5

The Honorable Elizabeth P. Martin, Judge

MOTION FOR DISCRETIONARY REVIEW

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I. IDENTITY OF PETITIONER

The father, N.B., asks this court to review the decisions of the Court of Appeals referred to in Section II below.

II. DECISION OF THE COURT OF APPEALS

The father seeks review of the court of appeals ruling terminating review entered June 4, 2019, and order denying motion to modify entered September 20, 2019. Appendix, pp. 1-10.

III. ISSUES PRESENTED FOR REVIEW

1. In order to determine the bounds of procedural due process in a case regarding termination of parental rights, the court must weigh (1) the parent's interest, (2) the risk of error under the procedures used, and (3) the state's interest. Did the trial court violated the father's right to due process by holding a termination trial in his absence when the process rendered him unable to participate in the hearing regarding a fundamental right and the state would only have had to endure a one-week delay in order to enable the father to be present?
2. Constitutional error requires reversal of an order terminating parental rights unless the state can establish beyond a reasonable doubt that the error was harmless. Does the violation of the father's right to Due Process require reversal when his inability to participate in the termination trial leaves one able only to speculate as to what weaknesses in the state's case or strengths in his defense case would have been revealed by his participation?

IV. STATEMENT OF THE CASE

N.B. is the father of M.B., who was born in October 2015. CP 171. But the father did not know that he had a son until the child was six months old. RP 241. By that time, the child had already been found dependent and placed in foster care because he had drugs in his system at birth and the mother's older children were already involved with the Department of Social and Health Services (the department). RP 100-01, 241; Ex. 5, 7.

The mother demonstrated little interest in the child throughout the dependency process. RP 101. She never communicated with the department at all. RP 101. She was eventually determined to have abandoned the child and her parental rights were terminated by default. RP 101; CP 166-70.

The father, on the other hand, worked hard to gain custody of his son. *See* RP 241-69. He was incarcerated when the child was found dependent but began engaging in services to address his drug addiction as soon as he was released, when the child was five months old. RP 145, 241-42.

The father completed intensive outpatient treatment for his chemical dependency. Ex. 90, p. 6. The father actively engaged in the recovery community, "enthusiastically" participating in Recovery Circle

groups, one-on-one recovery coaching, and “fatherhood engagement” classes. Ex. 87. In fact, the father chose to give back to other recovering addicts by becoming a peer counselor and recovery coach as well. Ex. 90, pp. 3-5; RP 249. He also did some public speaking on behalf of Recovery Café, where he engaged in these services. RP 263-64.

The father completed a psychological evaluation with a parenting component. *See* Ex. 86. As recommended, he found a mental health counselor and started attending therapy. Ex. 80. He was open and engaged in his counseling sessions and made significant progress. Ex. 80.

The father also visited with his son consistently. RP 122. His visits progressed from twice to three times per week, and then to twelve hours of visitation per week in the father’s home. RP 242. The child’s guardian *ad litem* and the father’s psychological evaluator agreed that the father and child were comfortable with one another and enjoyed spending time together. RP 216, 302. The father was a “very capable” parent during his time with his son. RP 216.

But the father continued to struggle with substance abuse and eventually relapsed. He stopped attending his therapy sessions and his DOSA (Drug Offender Sentencing Alternative) sentence was revoked,

sending him back to prison in May 2018 for about eight months. RP 157, 255.¹

The father continued to engage in services during his time in custody. RP 253-56. He participated in the Strength in Families Program as well as AA/NA. RP 253, 265. At the time of the termination trial, he was about to start another parenting program as well as the “Walking the Line” program, which teaches about how to be successful upon release. RP 254.

The father wrote to the social worker, asking for the opportunity to visit with son again and making it clear that he remained committed to his child. Ex. 81. But the case proceeded to a termination trial about five months before the father would have been released. *See RP generally*, RP 255.

The father consistently informed the termination court (through counsel) that he wanted to participate in the termination trial. RP 3, 93, 97. But Department of Corrections (DOC) officials would not let him use the “legal phone” at his facility to appear telephonically for the entire termination trial, which was expected to last two to three days. RP 4. The

¹ The father also spent some short periods in jail for Community Custody violations during the course of the dependency. RP 174. The average length of those jail stays was 12.5 days. RP 174.

father's attorney asked for an order to transport the father for him to attend the trial and the court agreed. *See* RP 9-10.

By the next day, DOC had agreed to transport the father for the trial. *See* RP 16. But, when the trial was supposed to begin five days later, he was still not there. RP 35.

The court admitted that the father's absence was because of a mistake that the court had made on the order for transport. RP 36. But the judge said that she wanted to go forward and take testimony from the two witnesses who were present that day anyway. RP 36.

The father's chemical dependency counselor and mental health counselor both presented their testimony on behalf of the state without the father's physical or telephonic presence. *See* RP 42-83.

On the second day of trial, the father had still not been transported but his attorney provided the court with a letter from DOC, saying that the father could be transported to attend the trial the following week. RP 92; CP 137-38. The father's attorney again told the court that the father had a sincere interest in participating the in the trial. RP 93. Father's counsel explained that the delay was because the court's order to transport the father did not say that he should be transported on a certain date or "as soon thereafter as possible." RP 96.

But the court insisted on continuing the trial without the father's participation, noting that they had "made efforts." RP 97.

In all, the state called seven witnesses for whom the father was unable to hear or communicate with his attorney about any of the testimony. *See* RP 43-235.

Finally, on the last day of trial, the father was able to appear telephonically in order to present his own testimony. *See* RP 238-78.

After that, the father was permitted to remain on the phone for a short portion of his attorney's cross-examination of the department's social worker. *See* RP 279-99. The portion of the social worker's testimony that the father heard lasted for thirty-three minutes. *See* CP 157. But the social worker had already presented one hour and nine minutes-worth of testimony that the father was not permitted to hear, including all of the state's direct-examination and part of the father's attorney's cross-examination. *See* CP 153-54.

The father was also permitted to stay on the phone for the guardian *ad litem*'s testimony, which lasted three minutes. *See* CP 156. But he was unable to appear telephonically for the closing arguments by the state or his own attorney. *See* RP 305-35.

The court entered an order terminating the father's parental rights. CP 171-76. The father timely appealed. CP 177. A commissioner of the

Court of Appeals affirmed the order terminating the father's rights and the panel denied a motion to modify that decision. *See* Appendix.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

THE TRIAL COURT VIOLATED THE FATHER'S RIGHT TO DUE PROCESS BY HOLDING ALMOST THE ENTIRE THE TERMINATION TRIAL IN HIS ABSENCE, RATHER THAN WAITING A WEEK FOR HIM TO BE ABLE TO PARTICIPATE. THIS COURT SHOULD GRANT REVIEW PURSUANT TO RAP 13.4(B)(3) AND (4).

- A. Termination proceedings implicate a fundamental right of parents and require robust Due Process protections.

Despite his clear desire to participate in the termination trial regarding his son, the father was not permitted to appear either telephonically or in person for the testimony of seven of the state's witnesses or for most of the testimony by the department social worker. *See* RP 43-235. The only witness for whom the father heard the entire testimony was the guardian *at litem*, who testified for three minutes. RP 300-02; CP 156.

The termination court held the majority of the trial without the father's participation even though the judge had information showing that he would could be transported the following week. RP 92; CP 137-38. This was true despite the fact that the delay in transporting the father was due to an error by the trial court itself. RP 96.

Under the circumstances of this case, the termination court violated the father's constitutional right to Due Process by continuing with the trial without his telephonic or physical presence.

A parent has a fundamental due process right to preservation of the family unit. *In re Welfare of R.H.*, 176 Wn. App. 419, 425, 309 P.3d 620 (2013) (citing *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982)); U.S. Const. Amend. XIV; Wash. Const. art. I, § 3.

Termination hearings affect a basic constitutional interest and, accordingly, require greater due process protections for parents than dependency proceedings or other proceedings regarding custody of children. *Id.* Due process requires that parents in termination proceedings be afforded notice, an opportunity to be heard and participate in their defense, 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)).

To determine whether a parent has received due process, courts apply the balancing test set forth by the United States Supreme Court in *Mathews v. Eldridge*. *Id.* (citing *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976); *In re Dependency of C.R.B.*, 62 Wn. App. 608, 614–15, 814 P.2d 1197 (1991)). The three-part test weighs: (1)

the parent's interests, (2) the risk of error presented by the procedures used, and (3) the state's interest. *Id.*

Because of the fundamental liberty interest involved, an incarcerated parent has a right to meaningful participation in a termination hearing. *State ex rel. Children, Youth & Families Dep't v. Ruth Anne E.*, 126 N.M. 670, 974 P.2d 164, 171 (N.M. Ct. App. 1999). That right must include the opportunity to review and challenge the evidence presented against him/her during the trial. *Id.*

Alleged violations of a parent's right to Due Process are reviewed *de novo*. *Id.*

This case involves a significant question of constitutional law regarding the due process rights of parents in termination proceedings. The issue is also of substantial public interest because it could affect the rights of all incarcerated parents whose children are in the care of the department. This Court should grant review pursuant to RAP 13.4(b)(3) and (4).

B. Proper application of the *Mathews* test indicates that the court violated the father's right to Due Process by proceeding with the termination trial in his complete absence.

Applying the *Mathews* test to this case, Due Process prohibited the court from moving forward with the termination trial in the father's complete absence.

Turning, first, to the father's interests at stake, the father has a fundamental liberty interest in the care and custody of his son. *In re Dependency of K.D.S.*, 176 Wn.2d 644, 652, 294 P.3d 695 (2013). Termination of a parent's rights is "one of the severest of state actions and implicates fundamental interests." *In re Welfare of J.M.*, 130 Wn. App. 912, 921, 125 P.3d 245 (2005).

Considering, second, the risk of error, the risk of erroneous termination is "greatly magnified" when a parent is absent from a termination trial "unless alternative arrangements are made to permit an incarcerated parent... to consult with his or her attorney, and to confront the witnesses called by the state." *State ex rel. Children*, 126 N.M. 670.

The parent has the most intimate working knowledge of the facts of his/her case and is in the best position to recognize errors in the state's evidence. This is particularly true where, as in the father's case, the defense attorney was not assigned to the case during the lengthy dependency phase. *See* RP 8. Indeed, counsel had never spoken to the father until less than a week before the trial began. RP 8. The risk of error involved in holding the termination trial without the father's presence was very high.

Finally, looking to the state's interest in the procedures used at trial, the state has a strong interest in the "speedy resolution of the termination proceeding." *L.R.*, 180 Wn. App. at 727.

In this case, however, the DOC would have been able to transport the father to attend the trial if it had been postponed by only a week. RP 92; CP 137-38. Indeed, the state had already requested three continuances of the termination trial (for about thirty days each), apparently having determined that brief delays would not significantly affect its interests. *See* CP 83-104. The state was unable to provide any reason why an additional 7-days' continuance would have affected the state's interest in any way. *See* RP 91-97.

Weighing the *Mathews* factors, including the father's extremely high interest, the significant risk of error, and the state's low interest in avoiding a weeklong delay, the trial court violated the father's right to Due Process by proceeding with the termination trial in his absence. *of L.R.*, 180 Wn. App. at 723; *Mathews*, 424 U.S. at 335.

In *L.R.*, this court applied the *Mathews* factors to find that an incarcerated mother's right to Due Process had not been violated by her absence from the first day of a termination trial. *L.R.*, 180 Wn. App. 722. In that case, however, the mother only missed the testimony of one witness (the department social worker) and was able to appear telephonically for the

remaining two full days of the trial. *Id.* at 722. Additionally, the trial court provided the mother in *L.R.* with the additional procedural protection of recesses after each witness's direct testimony to permit her to consult with her attorney prior to cross-examination. *Id.* at 722. The court also allowed the mother's attorney to re-call the social worker (whose testimony the mother had missed) and conduct another cross-examination with the mother present telephonically. *Id.*

The *L.R.* court relied heavily on the fact that the mother in that case had only been absent from one day of trial and had been afforded additional protections to enable her to consult with her attorney and meaningfully participate in the hearing. *Id.* at 727. The court reasoned that those procedures minimized the risk of error under the second *Mathews* factor and protected the mother's right to due process. *Id.* at 728.

Even so, the *L.R.* court found it "troubling" that the mother was unable to appear telephonically for the entire trial. *Id.* The court noted that:

This lack of cooperation and effort could lead to a due process violation when interests as fundamental as those involved in termination proceedings are at stake. Under these circumstances, the better practice may have been to continue the trial to allow the parent to attend telephonically.

Id.

Courts in other jurisdictions have, similarly, held that, when an incarcerated parent is unable to be physically present at a termination trial,

s/he must be afforded some other meaningful way to participate, such as a telephonic appearance or an opportunity to review a transcript of the state's evidence before his/her attorney conducts cross-examination and presents defense evidence. *See e.g. Orville v. Div. of Family Servs.*, 759 A.2d 595, 600 (Del. 2000) (incarcerated mother's right to due process violated when she was permitted to appear telephonically for only a portion of her termination trial); *State ex rel. Children*, 126 N.M. 670 (incarcerated father's right to due process violated by termination court's failure to adopt some procedure to permit him to meaningfully participate despite his absence); *In re Interest of L.V.*, 240 Neb. 404, 417, 482 N.W.2d 250 (1992) (incarcerated father's physical absence from termination trial did not violate due process because he was given the opportunity to review a transcript of the state's evidence before his attorney conducted cross-examination or presented evidence on his behalf); *In re C.G.*, 954 N.E.2d 910, 920 (Ind. 2011) (incarcerated mother's physical absence did not violate due process because she participated telephonically in the entire hearing); *See also Alex H. v. State Dep't of Health & Soc. Servs.*, 389 P.3d 35, 54 (Alaska 2017); *In re J.E.*, 45 N.E.3d 1243, 1246 (Ind. Ct. App. 2015).

But the father in this case was not afforded any of the protections relied upon in *L.R.* or in the other cases cited above. *See RP generally.* Rather, he completely missed the vast majority of the state's evidence

against him and, accordingly, had no opportunity to discuss that evidence with his attorney. While the father was able to present his own telephonic testimony, he had no idea what evidence the state had presented before he did so.

Nonetheless, the Court of Appeals ruled that the father's total absence from almost the entire termination trial did not violate due process under the *Mathews* factors because the risk of error was not high, relying on *L.R.* Ruling, pp. 5-9 (*citing L.R.*, 180 Wn App. at 723). The father's case makes clear that the department and lower courts have not heeded the *L.R.* court's admonition. And, because the father was absented from a far greater portion of his trial than was the mother in *L.R.* and was not provided the additional procedural safeguards afforded to that mother to remedy any prejudice from her absence, this case resulted in a due process violation, just as the *L.R.* court warned it could. *Id.*

The Court of Appeals also notes that the trial court said that it would permit the father's attorney to recall witnesses, as necessary, and would consider extending the trial to permit the father to appear in person if his attorney could confirm that he would be present on September 27th. Ruling, pp. 7-8. But the trial court also made clear that it intended to move forward with the state's case without the father's presence, denying his request for a continuance. RP 97. Accordingly, any recalling of witnesses

would have taken place without him there. And the court's offer to extend the trial to permit the father's presence referred only to his appearance in order to offer his own testimony. That offer did nothing to solve the problem of his absence from the state's presentation of its case-in-chief.

Finally, the trial court's "efforts" toward providing due process are not part of the analysis under the *Mathews* factors. Even so, the Court of Appeals relies on the trial court's efforts to secure the father's presence as evidence that the risk of error was not high enough to result in a due process violation. Ruling, p. 7. The Court of Appeals' reasoning is flawed. The trial court's efforts are inapposite to the risk of error flowing from the father's complete absence from the majority of his termination trial.

The trial court violated the father's right to Due Process by holding most of the termination trial in his absence. *R.H.*, 176 Wn. App. at 425; *Santosky*, 455 U.S. at 753; *L.R.*, 180 Wn. App. at 727. This Court should grant review pursuant to RAP 13.4(b)(3) and (4).

C. The violation of the father's right to Due Process requires reversal of the order terminating his parental rights.

Due Process violations during a termination proceeding require reversal unless the state can prove beyond a reasonable doubt that the error did not affect the outcome. *State v. Lynch*, 178 Wn.2d 487, 494, 309 P.3d 482 (2013).

A failure of Due Process prejudices a parent when the court is left to “only speculate as to what weaknesses in the State’s case or strength in [the parent]’s case might have been revealed” if the parent had been afforded Due Process. *J.M.*, 130 Wn. App. at 925 (reversing a termination order when the parent’s counsel had made no meaningful attempt to challenge the state’s evidence); *See also In re Dependency of G.A.R.*, 137 Wn. App. 1, 8, 150 P.3d 643 (2007).

The state cannot demonstrate that the violation of the father’s right to Due Process was harmless beyond a reasonable doubt in this case because one can do no more than “speculate” as to what weaknesses in the state’s evidence or strength in the father’s evidence would have been revealed if the father had been afforded the opportunity to meaningfully participate in the termination trial.² *Id.*

The trial court’s violation of the father’s right to Due Process requires reversal of the order terminating his parental rights. *J.M.*, 130 Wn. App. at 925. This Court should grant review. RAP 13.4(b)(3)-(4).

² Because the violation of his right to Due Process rendered the evidence in the case improperly tested and incomplete, the father assigns error to the termination court’s Findings of Fact regarding each contested issue at trial.

VI. CONCLUSION

The termination court violated the father's right to Due Process by holding almost the entire termination trial under circumstances in which the father had no opportunity to meaningfully participate.

This case involves a significant question of constitutional law regarding the due process rights of parents in termination proceedings. The issue is also of substantial public interest because it could affect the rights of all incarcerated parents whose children are subject to termination proceedings. This Court should grant review pursuant to RAP 13.4(b)(3) and (4).

Respectfully submitted on October 1, 2019.



Skylar T. Brett, WSBA No. 45475
Attorney for Petitioner

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Motion for Discretionary Review, postage prepaid, to:

N.B. (father)
(at private mailing address)

I delivered an electronic version of the brief, using the Court's filing portal, to:

Attorney General's Office
shstacappeals@atg.wa.gov

I filed the Motion for Discretionary Review electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Seattle, Washington on October 1, 2019.



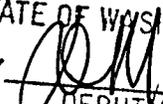
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APPENDIX

FILED
COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY  DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

IN THE MATTER OF THE
WELFARE OF:

M.B.,

A minor child.

No. 52632-8-II

RULING AFFIRMING ORDER
TERMINATING PARENTAL
RIGHTS

N.B. is the father of M.B., born in 2015. He appeals the juvenile court's order terminating his parental rights as to M.B.¹ He alleges the juvenile court violated his right to due process by proceeding with part of the termination trial in his absence. This court considered his appeal on an accelerated basis and affirms the juvenile court.

¹ The juvenile court terminated M.B.'s mother parental rights by default.

BACKGROUND

The Department of Social and Health Services (DSHS) filed a dependency petition regarding M.B. shortly after his birth in October 2015 and the juvenile court found him dependent in December 2015. N.B. was incarcerated when the juvenile court found M.B. dependent. M.B. was placed in a foster home when he was "days old." 5 Report of Proceedings (RP) Sept. 19, 2018 at 300.

N.B. was released when M.B. was about six months old to serve a drug offender sentencing alternative (DOSA) sentence. Shortly thereafter, paternity was established. N.B. attempted to obtain custody of M.B. during the dependency but struggled with substance abuse. He violated his DOSA conditions sixteen times for offenses such as failing to report, failing to be available for urinalyses, and consuming controlled substances. Because of the violations, N.B. went back to jail six times during the dependency.

In October 2017, DSHS filed a petition to terminate parental rights citing N.B.'s lack of progress in correcting his parental deficiencies despite participation in services. . In May 2018, Department of Corrections (DOC) officers found drug paraphernalia in his bedroom and car and N.B. admitted to using methamphetamine. 4RP at 129, and 135-36. Consequently, N.B.'s DOSA sentence was revoked a month later and he was held in total confinement.

The juvenile court originally set the termination trial for April 25, 2018, but the parties agreed to continue to June 13, 2018 due to scheduling conflicts. The parties agreed to a second continuance to June 20, 2018 because of an anticipated change in

M.B.'s permanency plan to guardianship. The juvenile court maintained adoption as the permanent plan and the parties agreed to continue the trial to August 8, 2018. Finally, the parties agreed to continue to September 5, 2018, in order to obtain necessary records for trial.

The termination trial commenced on September 5, 2018. N.B. was incarcerated at the time. The parties discussed facilitating N.B.'s participation at trial. The "legal phone" at the Larch Corrections Center, where N.B. was held, however, was not operational and there was no other phone available to him. 1 RP Sept. 5, 2018 at 4. The juvenile court agreed to sign an order for transport, but acknowledged it could not force DOC to comply. The juvenile court granted a 24-hour continuance to prepare and implement the transport order.

The following day, on September 6, 2018, the parties appeared and explained DOC could not transport N.B. to court until September 11, 2018. The trial court continued trial until September 11, 2018. Once September 11 came, however, DOC informed N.B. they would not transport him due to problematic language in the September 5, 2018 transport order.² The juvenile court amended the transport order directing DOC or Pierce County to transport N.B. to court by September 18, 2018. However, the juvenile court also emphasized that, due to scheduling concerns, the termination trial needed to finish by September 20.

² N.B.'s counsel stated that it was because the transport order "did not say 'ordered.'" 3 RP Sept. 11, 2018 at 36.

On September 11, 2018, the court proceeded with trial despite N.B.'s absence. N.B.'s chemical dependency counselor and mental health counselor testified without N.B. present. N.B.'s counsel cross-examined both witnesses. The juvenile court indicated N.B.'s counsel could recall the witnesses later if she desired.

Trial resumed the following week, on September 18, 2018. N.B. was not present. N.B.'s counsel informed the court she received correspondence stating the earliest N.B. could be transported was September 27, 2018. The trial court directed the parties to proceed. It emphasized that it had continued the trial multiple times to accommodate N.B. A Department of Children, Youth, and Families (DCYF)³ supervisor, two DOC community corrections officer and the psychologist who performed N.B.'s evaluation testified. All were cross-examined by N.B.'s counsel.

The next day, September 19, 2018, N.B. appeared telephonically. In addition to testifying, he heard part of his counsel's cross examination of a social worker and the guardian ad litem's brief testimony. A day later, the juvenile court orally terminated N.B.'s parental rights. It later entered an order terminating N.B.'s parental rights.

ANALYSIS

N.B. argues the juvenile court's commencement of the termination trial without him being present violated his right to due process. *In re the Welfare of R.H.*, 176 Wn. App. 419, 425, 309 P.3d 620 (2013); U.S. CONST. AMEND. XIV, art. I, § 3. In the termination

³ By the time of the termination trial, child welfare functions had been transferred from the Department of Social and Health Services to the Department of Children, Youth, and Families.

context, due process requires parents have notice, opportunity to be heard and defend, and the right to be represented by counsel. *In re the Welfare of L.R.*, 180 Wn. App. 717, 723, 324 P.3d 737 (2014). The right to be heard ordinarily includes the right to be present. *L.R.*, 180 Wn. App. at 723. However, there is no absolute right for an incarcerated parent to attend a termination proceeding or to appear telephonically. *L.R.*, 180 Wn. App. at 723-24. This court reviews alleged due process violations de novo. *L.R.*, 180 Wn. App. at 723.

Parents' due process rights are subject to the *Mathews*⁴ balancing test, which requires weighing of: (1) the parent's interest, (2) the risk of error created by the procedures used, and (3) the State's interests. *L.R.*, 180 Wn. App. at 724. N.B. argues his high interest, the likelihood of error, and the state's low interest in postponing the trial for another week culminate in a violation of his due process rights.

As to the first factor, N.B. and DCYF agree he has a strong liberty interest in the care and custody of his son. *In re Dependency of K.D.S.*, 176 Wn.2d 644, 294 P.3d 695 (2013). "However, the right to be present is not absolute and must be balanced against the other two *Mathews* factors." *L.R.*, 180 Wn. App. at 725.

As to the second factor, the risk of error, N.B. argues the risk of error is magnified when a parent is absent from trial because a parent possesses the most intimate working knowledge of his or her case, and the lack of case knowledge was particularly significant because N.B.'s defense attorney had not spoken to N.B. since he arrived at Larch

⁴ *Mathews v. Eldridge* 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).

Correctional Facility until a week prior to trial. The ability to defend through counsel substantially reduces the risk of error. *In re Dependency of J.W.*, 90 Wn. App. 417, 428-29, 953 P.2d 104 (1998). In *n re Interest of Darrow*, 32 Wn. App. 803, 809, 649 P.2d 858, *review denied*, 98 Wn.2d 1008 (1982), Division One of this court held a juvenile court did not violate a father's due process rights by denying his order of transport to be physically present at a termination trial because the father was afforded a full opportunity to defend in a fair hearing while represented by counsel. In *In re the Welfare of S.E.*, 63 Wn. App. 244, 251, 820 P.2d 47 (1991), Division Three of this court held parents' due process rights were not violated by excluding them from the termination trial at which their children testified because their counsel had the opportunity to cross examine the children and rebut their testimony with other evidence. And in *L.R.*, this division held a mother's due process rights were not violated by her inability to attend the first of a three day trial. *L.R.*, 180 Wn. App. at 728. While the mother was absent, her attorney was present and able to cross-examine the testifying social worker. *L.R.*, 180 Wn. App. at 726. Further, the mother was able to appear telephonically for the remaining two days and given the opportunity to testify and present additional evidence. *L.R.*, 180 Wn. App. at 726. The juvenile court also permitted the mother to recall the social worker. *L.R.*, 180 Wn. App. at 726. The *L.R.* court determined these procedural safeguards insured the mother a full opportunity to defend herself despite her absence. *L.R.*, 180 Wn. App. at 726. It also underscored the mother's failure to identify how her telephonic presence on the first day of trial would have resulted in any different or additional evidence relevant to the factual questions in need of resolution. *L.R.*, 180 Wn. App. at 726.

N.B. argues *L.R.* is distinguishable. He observes that the *L.R.* court relied heavily on the fact that the mother had only been absent from one day of trial. He points out that even with the protections enabling her to consult with her attorney and meaningfully participate in the hearing, the *L.R.* court found it troubling that mother was unable to appear telephonically for the entire trial:

This lack of cooperation and effort could lead to a due process violation when interests as fundamental as those involved in termination proceedings are at stake. Under these circumstances, the better practice may have been to continue the trial to allow the parent to attend telephonically.

L.R., 180 Wn. App. at 728.

While N.B. was absent for a significantly longer portion of his termination trial than had been the mother in *L.R.*, the difference does not result in a different conclusion as to the risk of error. Many of the procedural safeguards in *L.R.* were also available to N.B. N.B. had an attorney representing his interests throughout the termination trial. The same attorney had represented him during the dependency proceedings, and so was familiar with the case. His counsel was able to send him documentation and discuss proceedings throughout. The juvenile court also gave the defense counsel the option of recalling witnesses. Like the mother in *L.R.*, N.B. fails to identify how his presence would have resulted in any distinct or additional evidence relevant to the termination trial. And unlike the court in *L.R.*, the juvenile court made considerable efforts to have N.B. present for the termination trial, even though those efforts were largely unsuccessful. Thus, the risk of error factor does not support the claim of a due process violation.

As to the third factor, the State's interest, N.B. argues the Department's interest in the speedy resolution of the termination proceeding would not have been compromised

by an additional continuance. *L.R.*, 180 Wn. App. at 727. He argues N.B. would have been able to attend trial had it been postponed by only a week, from September 18, 2018 to September 27, 2018. However, the record reflects that the juvenile court agreed that if defense counsel could confirm N.B. would actually be present in court on September 27, 2018, it would consider extending trial for him to appear that day. The correspondence from DOC merely stated that was the earliest date at which N.B. could be transported and defense counsel never confirmed with the juvenile court that he could attend on that day.⁵ The juvenile court also previously notified the parties it would run into scheduling problems anytime beyond September 20. Further, the Department notified the juvenile court the number of continuances was beginning to threaten the availability of its witnesses. This court concludes that the juvenile court's denial of an additional continuance based on the Department's interests was appropriate. *L.R.* supports this conclusion. In *L.R.*, the mother requested a fourth continuance from the juvenile court and it denied her motion, determining another continuance would cause scheduling problems. *L.R.*, 180 Wn. App. at 727. Further, mother's counsel was not able to guarantee her availability for the proposed future date. *L.R.*, 180 Wn. App. at 727. In both cases, the Department had a strong interest in proceeding with the hearing as scheduled, rather than allow further delay and the juvenile courts were correct in denying the respective requests to continue. *L.R.*, 180 Wn. App. at 727.

⁵ The fax sent to N.B.'s counsel stated: "The soonest WCC can facilitate a transport to Pierce County Jail is September 27th 2018." Clerk's Papers (CP) at 138 (capitals omitted).

The *Mathews* factors weigh in favor of a conclusion that the juvenile court's commencement of the termination trial without N.B. being present did not violate his right to due process. Accordingly, it is hereby

ORDERED that the juvenile court's order terminating N.B.'s parental rights to M.B. is affirmed.

DATED this 4th day of June, 2019.

Eric B Schmidt
Eric B. Schmidt
Court Commissioner

cc: Skylar T. Brett
Jared R. Rayborn
Hon. Elizabeth P. Martin

September 20, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In the Matter of the Welfare of:

M.B.,

A minor child.

No. 52632-8-II

**ORDER DENYING
MOTION TO MODIFY**

Appellant, N.B., moved to modify the Commissioner's ruling dated June 4, 2019, in the above-entitled matter. After consideration, it is hereby

ORDERED that the motion to modify is denied.

FOR THE COURT: Jj. Lee, Melnick, Crusier

 **A.C.J.**

LEE, ACTING CHIEF JUDGE

LAW OFFICE OF SKYLAR BRETT

October 01, 2019 - 9:34 PM

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