

Supreme Court No. 100096-1
(COA No. 81795-7-I)

THE SUPREME COURT OF THE STATE OF WASHINGTON

In re the Dependency of:

J.D.E.C.
and
J.C.,

minor children.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

C. G.-R., the appellant father, requests this Court accept review of the opinion of the Court of Appeals in *In re the Dependency of J.D.E.C. and J.C.*, No. 81795-7-I (consolidated with No. 81796-5-I). A copy of the opinion is attached in the Appendix.

B. ISSUE PRESENTED FOR REVIEW

The Due Process Clauses of the Fourteenth Amendment and article I, § 3 protect a parent's fundamental right to the care, custody, and companionship of his children. To determine whether a parental rights termination trial satisfies due process, the court must weigh the parent's interest, the risk of error given the procedures employed, and the State's interest. Did the trial court violate Mr. G.-R.'s right to due process where the process rendered him unable to fully participate in the proceedings and limited his access to his attorney?

C. STATEMENT OF THE CASE

The State petitioned to terminate Mr. G.-R.'s parental rights to his children, J.D.E.C. and J.C.. CP 5-12, 209-15. The trial on both petitions began July 20, 2020. At the time, orders issued by the Washington Supreme Court and the Skagit County Superior Court in response to the COVID-19 pandemic permitted termination trials to be

conducted remotely. See Order re: Dependency and Termination Cases 25700-B-622 (April 30, 2020) (pp. 9-11); see also Skagit County Superior Court Admin. Order No. 20-8 (June 16, 2020) (pp. 3-4).¹ Accordingly, the court conducted the trial via Zoom, an online video conferencing service. RP 7.

From the start, Mr. G.-R. struggled with remote access to the court. RP 6-8. He did not have Zoom, so he called in by telephone and was eventually able to connect. RP 7, 9. When all parties were present, Mr. G.-R.'s attorney requested a recess to the next day due to a medical emergency. RP 9-14.

Trial resumed on the 21st. RP 14. Mr. G.-R. moved for a continuance, citing the pandemic and his limited access to the court and his attorney. RP 17-18. Counsel stated, "It's almost impossible for me to have discussion with my client . . . as he may object to things that are going on that he doesn't let me know about." RP 18. Counsel argued he could not adequately represent Mr. G.-R. in a remote trial. *Id.* Mr. G.-R. noted he was using an old, unreliable cell phone to call into court

¹ This case is a Whatcom County matter that was transferred to and heard in Skagit County.

and did not appear to have any other means to access the court remotely. RP 22.

Although all other participants appeared by video and could see the court, the parties, the witnesses, and the exhibits, the State argued Mr. G.-R.'s appearance by phone alone was sufficient, and that he could text his attorney if necessary. RP 19-20. No one confirmed whether Mr. G.-R. had the ability to text on his phone, or whether he could simultaneously use the call and text functions, if texting were even available. Later, counsel revealed he did not use his personal cell phone to communicate with Mr. G.-R., indicating Mr. G.-R. could not have texted his attorney in any event. RP 288-89.

The court denied the motion without discussion. RP 22. Mr. G.-R. attempted to further argue about his right to presence, but the court muted him, cutting off his access to the court and his attorney. RP 23. The court stated it would create a breakout room in Zoom for Mr. G.-R. to speak with his counsel privately if necessary, but it did not address how Mr. G.-R. could do that while muted by the court. *Id.* The court insisted, without considering the impacts of the pandemic or whether it would be safe, that Mr. G.-R. could have appeared in court in person or at his attorney's office but chose not to do so. *Id.*

Mr. G.-R.'s access to the court and to his attorney was limited throughout the trial. He told the court he could not see any of the exhibits and asked, "How is this fair?" RP 28. The court ignored him. *Id.* The court also repeatedly muted him for minutes at a time, which, although intended to stop him from interrupting, also prevented him from asking to speak to his attorney. RP 35, 38, 133-34, 158. The court did not always unmute him before his attorney began cross-examining a witness, preventing him from consulting with his counsel about how to question the State's witnesses. RP 134-37; 158-162. Other times, when Mr. G.-R. attempted to ask questions, the court instructed him to pose them to his attorney but did not set up a breakout room. RP 123.

Mr. G.-R. also struggled to hear the proceedings accurately. At times, his attorney attempted to object to the State's questions posed during Mr. G.-R.'s testimony, but Mr. G.-R. mistakenly answered because he did not hear the objection. RP 42-43. When Mr. G.-R. did not return after a recess, the court assumed he had voluntarily absented himself and proceeded without him, when in fact he had misunderstood what time he was supposed to come back. RP 60-61; 85. As a result, he missed the entire testimony of two social workers. RP 61-85.

On the day the court issued its ruling on the termination petitions, Mr. G.-R. could not use the Zoom meeting links to access the courtroom. RP 286. His attorney said, “I think [Mr. G.-R.] would participate, but he hasn’t responded to me. I think the Court should not wait any longer for him.” RP 288. The court asked counsel to try calling Mr. G.-R., and the ensuing private conversation between counsel and Mr. G.-R.’s mother, in which his mother claimed Mr. G.-R. did not want to participate in the hearing, was heard by the court and recorded as part of the trial. RP 288-90. The court acknowledged it had heard the entire conversation and proceeded to make its ruling without Mr. G.-R.’s presence. RP 290-300. The court granted the State’s petitions to terminate Mr. G.-R.’s parental rights. RP 294.

On review, the Court of Appeals determined Mr. G.-R.’s due process rights were not violated by his unnecessarily limited access to the court and to counsel. Slip Op. at 8-11. The court faulted Mr. G.-R. for not appearing in person during a global pandemic, and found that any limitations he faced were the result of his own actions. *Id.*

D. ARGUMENT

This Court should grant review because the termination trial was held in violation of Mr. G.-R.'s right to due process.

The Court of Appeals found no violation of Mr. G.-R.'s due process rights and essentially placed the blame for Mr. G.-R.'s limited access to the court and his attorney on him rather than on the faulty procedures employed by the trial court. This issue concerns a significant question of law under the United States constitution, the Court of Appeals decision conflicts with this Court's decision in *In re Welfare of M.B.*, 195 Wn.2d 859, 467 P.3d 969 (2020), and this case presents an issue of substantial public interest, warranting review. RAP 13.4(b)(1), (3), (4).

a. Termination proceedings implicate a parent's fundamental rights to his children and require robust due process protections.

“Preservation of the family unit is a fundamental constitutional right protected by the Fourteenth Amendment. . .” *In re Welfare of L.R.*, 180 Wn. App. 717, 723, 324 P.3d 737 (2014) (citing *In re Welfare of Darrow*, 32 Wn. App. 803, 806, 649 P.2d 858 (1982)); U.S. Const. amend. XIV; Const. art. I, § 3.

Termination hearings require greater due process protections for parents than in dependency proceedings because they can result in the

permanent severance of the parent-child bond. *In re Welfare of R.H.*, 176 Wn. App. 419, 425, 309 P.3d 620 (2013). At a minimum, “[d]ue process protections include a strict burden of proof, the right to notice and an opportunity to be heard and defend, and the right to the assistance of counsel.” *M.B.*, 195 Wn.2d at 867. Parents who cannot appear in person must be provided a meaningful opportunity to be heard and defend through alternative procedures. *Id.* at 868.

To determine whether a procedure violates due process, a reviewing court considers three factors: (1) the parents’ interests, (2) the risk of error created by the procedures used, and (3) the countervailing governmental interest supporting use of the challenged procedure. *In re Welfare of Key*, 119 Wn.2d 600, 610-11, 836 P.2d 20 (1992); *see Mathews v. Eldridge*, 424 U.S. 319, 334-35, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976); *Santosky v. Kramer*, 455 U.S. 745, 754, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982).

b. Focusing primarily on the second Mathews factor, the Court of Appeals incorrectly found Mr. G.-R.'s right to due process was not violated even though he could not meaningfully partake in the trial in the same manner as all other participants.

The second *Mathews* factor assesses the risk of erroneous deprivation of the interest at stake through the procedure used and the probable value, if any, of additional safeguards. 424 U.S. at 335. The Court of Appeals found that Mr. G.-R. was able to participate in the trial, and to the extent he was not able to, it was due to his own behavior. Slip Op. at 8-11. Additionally, the Court of Appeals faulted Mr. G.-R. for “choosing” to appear by phone rather than in person or with his attorney, a “choice” that was in fact mandated by the courts, Mr. G.-R.’s personal circumstances, and a global pandemic. *Id.*

The Court of Appeals opinion misapplies the second factor of the *Mathews* test, focusing on Mr. G.-R.’s actions rather than on the risk of erroneous deprivation created by the trial court’s remote trial procedures. Indeed, the severe limitations on Mr. G.-R.’s ability to participate in the trial increased the risk of erroneous termination in several ways: (1) he was not able to testify or communicate with the court in the same manner as the State’s witnesses, namely by video, (2) he was unable to meaningfully review and challenge the State’s

evidence, and (3) he lacked the same level of access to his attorney as the other parties.

As the Court explained in *Santosky*, the risk of error in termination proceedings is already significant because they:

employ imprecise substantive standards that leave determinations unusually open to the subjective values of the judge. See *Smith v. Organization of Foster Families [for Equal. & Reform]*, 431 U.S. [816] , 835, n.36[, 97 S. Ct. 2094, 53 L. Ed. 2d 14 (1977)]. In appraising the nature and quality of a complex series of encounters among the agency, the parents, and the child, the court possesses unusual discretion to underweigh probative facts that might favor the parent. Because parents subject to termination proceedings are often poor, uneducated, or members of minority groups, *id.*, at 833-835, such proceedings are often vulnerable to judgments based on cultural or class bias.

Santosky, 455 U.S. at 762-63. In Washington, courts employ similarly subjective standards when deciding whether to terminate a parent's rights, such as whether a parent is likely to correct his deficiencies in the near future or whether termination is in the best interest of the child. See RCW 13.34.180(1)(e). The risk of error is also heightened because the State's ability to "assemble its case almost inevitably dwarfs the parents' ability to mount a defense." *Santosky*, 455 U.S. at 763.

M.B. is instructive. There, this Court determined an incarcerated father's due process rights were violated when the court held a

termination trial largely in his absence despite his desire to attend and participate. 195 Wn.2d at 859. Because the father only appeared by phone and only on the day he testified, he was unable to observe or even hear the State's witnesses, or consult with his attorney throughout the trial. *Id.* at 872. The court found that because the father "had intimate knowledge of [the] subjects" the State's witnesses testified about, "he was in the best position to help counsel identify inaccuracies in the State's evidence and any additional evidence that could be used in his defense." *Id.*

The *M.B.* court concluded that a meaningful opportunity to be heard in a parental termination case includes the opportunity to hear the State's evidence and consult with counsel. 195 Wn.2d at 874. Despite this holding, the Court of Appeals here determined that Mr. G.-R.'s limited appearance was sufficient because *M.B.* does not require that all witnesses appear via the same means. Slip Op. at 8-9.

The Court of Appeals is incorrect. *M.B.* holds that due process is violated when the trial court is unable to evaluate a parent's in the same way it could evaluate that of the State's witnesses, and a parent is unable to participate fully in the trial. *M.B.*, 195 Wn.2d at 871-72. "In parental termination proceedings, where the State is already advantaged

and where the outcome largely turns on subjective standards, the benefits of nuanced communication and an increased ability to convey truth-telling are particularly important for a parent.” *Id.* at 871 (citations omitted).

The procedures employed in Mr. G.-R.’s trial posed a similar risk of erroneous termination. Although Mr. G.-R. was “present” for most of the trial by audio only, he faced limitations on his ability to access the court and his attorney nearly identical to those in *M.B.*. While all other witnesses and parties appeared by video, Mr. G.-R. was limited to use of an old cell phone. He could not see the witnesses testify or see any of the exhibits. Because he could not hear properly, he accidentally answered questions to which his attorney had lodged an objection. Another time, he returned to court late because he misheard when court was resuming, missing the testimony of multiple social workers. Like in *M.B.*, Mr. G.-R. was best situated to identify any inaccuracies in these witnesses’ testimonies, but he was unable to do so because the court incorrectly assumed he had voluntarily absented himself.

The Court of Appeals dismissed these concerns, insisting that Mr. G.-R. could have appeared in court in person or at his attorney’s

office. First, even if Mr. G.-R. could have appeared in person, he would have done so without the presence of his attorney, who appeared by video from his office. Thus, as a procedure, Mr. G.-R.'s actual presence in court would not have cured the problem of his access to his attorney. Second, the record does not support the trial court's or the Court of Appeals's finding that Mr. G.-R. could have appeared with his attorney at his attorney's office. It is unclear why, with social distancing measures in place, the courts would presume Mr. G.-R. could safely appear with his attorney in the same room, particularly where counsel suffers from diabetes and is at increased risk of COVID-19 complications.

Finally, the Court of Appeals acknowledges in its opinion that remote trial procedures were in place to prevent unnecessary exposure to a "deadly disease," yet suggests that Mr. G.-R. should have risked such exposure by appearing in court to ensure his due process rights were not violated. Slip Op. at 8-9. This reasoning shifts the burden to parents to ensure their own due process rights, and places them in the untenable position of choosing between exposure to a deadly disease or a fair trial that abides by due process.

Due to the remote trial procedures, Mr. G.-R. was limited in his ability to speak with his attorney. Although the court told him he could ask for a breakout room when needed, at times the court muted him for several minutes. The State assumed Mr. G.-R. could text his attorney, but it is unknown whether Mr. G.-R.'s phone was capable of texting, especially considering he was using his phone to call in for the trial. Later, counsel revealed he did not use his personal cell phone to communicate with Mr. G.-R., demonstrating it was impossible for Mr. G.-R. to text his attorney during the trial. Thus, Mr. G.-R. could only consult his attorney by interrupting the trial to ask for a breakout room. However, several times the court muted him and failed to unmute him until after his attorney had completed cross-examination of a State's witness. Therefore, not only was Mr. G.-R. unable to see the witnesses, he had no ability to discuss those witnesses' testimonies with his counsel before or during cross-examination.

And, as in *M.B.*, the court had the opportunity to view all of the State's witnesses and evaluate their demeanor and credibility while they testified. The same cannot be said for Mr. G.-R. Like in *M.B.*, Mr. G.-R.'s limited participation in the trial increased the risk of erroneous

termination in a proceeding which already bears a high risk of error.

This factor weighs in favor of error-reducing procedures.

c. The State's interests do not outweigh Mr. G.-H.'s interests or the high risk of error presented by this remote termination trial.

The final *Mathews* factor considers the State's interest supporting use of the challenged procedure and the burdens that additional procedures would entail. *M.B.*, 195 Wn.2d at 875. The State has an interest in the welfare of children in its custody and in preventing delay in a child's chance for permanency. *Id.* The State also has an interest in avoiding burdensome costs of additional procedures. *Id.* at 876.

Here, although Mr. G.-R. wanted his trial conducted in person, at the very least it would not have been too costly or posed unreasonable security risks to provide Mr. G.-R. with access to a computer with a camera and internet access for four days. Indeed, school districts across the State have been providing the same technology for students without such access at home.² Moreover, the Supreme Court's emergency orders require trial courts to provide

² See <https://www.seattletimes.com/education-lab/seattle-schools-face-steep-challenges-rolling-out-tech-during-coronavirus-closures-heres-why/>

persons with limited means remote access to the courts at no cost. Order 25700-B-626, p. 17. Any delay in making these provisions, particularly in light of Mr. G.-R.'s stated and obvious difficulties navigating the trial through a cell phone, would have been relatively minimal and would not have threatened any of the State's interests. On balance, the State's interests here do not outweigh Mr. G.-R.'s fundamental interest in maintaining his relationship with his children and the risk of error that arose from the severe limitations to his participation in this trial.

d. The Court of Appeals opinion raises a significant question of law under the United States Constitution, conflicts with an opinion of this Court, and raises an issue of public interest, justifying review by this Court.

The Court of Appeals opinion in this case raises a significant question of law under the due process clause of the Fourteenth Amendment: whether remote trial procedures that severely limit a parent's ability to participate in a parental rights termination trial violate due process. RAP 13.4(b)(3). The opinion also conflicts with this Court's opinion in *M.B.*, which holds that due process is violated where a parent's ability to participate in a termination trial is hamstrung by limited access to the court and to counsel. RAP

13.4(b)(1). Additionally, this case raises an issue of public interest because it implicates a parent's right to be present for a termination trial vis-à-vis his right to health and safety during a global pandemic. RAP 13.4(b)(4). This Court should accept review.

E. CONCLUSION

For the reasons stated above, Mr. G.-H to accept review. RAP 13.4(b)(1), (3), and (4).

DATED this 18th day of August, 2021.

Respectfully submitted,

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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

In the Matter of the Dependency of)	No. 81795-7-I
J.D.E.C., d.o.b. 10/29/15,)	consolidated with
J.C., d.o.b. 10/16/17,)	No. 81796-5-I
)	
Minor Children.)	
)	
WASHINGTON STATE DEPARTMENT)	
OF CHILDREN, YOUTH, & FAMILIES,)	
)	
Respondent,)	
)	
v.)	
)	
CLEVE GOHEEN-RENGO,)	PUBLISHED OPINION
)	
Appellant.)	

VERELLEN, J. — A parent facing termination of their parental rights must have a meaningful opportunity to be heard, including the ability to meaningfully assist counsel. Consistent with emergency orders issued by the Washington Supreme Court during the COVID-19 pandemic, Skagit County Superior Court adopted procedures to allow termination trials to be conducted remotely by videoconference and teleconference. Because the record shows those procedures did not deprive Cleve Goheen-Rengo of a meaningful opportunity to be heard, he fails to establish a violation of his due process rights.

Therefore, we affirm.

FACTS

J.D.E.C. (hereinafter, “John”) and J.C. (hereinafter, “Jane”) were found to be dependent on April 21, 2017, and on January 3, 2019, respectively.¹ The State petitioned to terminate their biological father’s, Cleve Goheen-Rengo’s, parental rights as to John in December of 2017 and petitioned to terminate his rights as to Jane in September of 2019.² By the time of trial in July of 2020, the children had not been in Goheen-Rengo’s custody for more than two-and-a-half years.

A bench trial was held in Skagit County Superior Court. At that time, the COVID-19 pandemic had forced trial procedures to change, and courts statewide were operating under emergency administrative orders.³ Pursuant to those orders, bench trials in Skagit County were to be conducted remotely by video conference or telephonically.⁴ The court used the Zoom videoconference platform for remote trials. Members of the public could attend trial in person so long as they complied with masking and physical distancing requirements. The court created specific protocols for remote trials, and those protocols applied equally to

¹ “John” and “Jane” are pseudonyms used for ease of reference.

² Their mother voluntarily relinquished her rights to both children.

³ Order No. 25700-B-622, In re Statewide Response By Washington State Courts to the COVID-19 Public Health Emergency (Wash. Apr. 30, 2020), www.courts.wa.gov/content/PublicUpload/Supreme%20Court%20Orders/Supreme%20Court%20Order%20Dependency%20Termination%20Cases.pdf.

⁴ Admin. Order No. 20-8, In re Emergency Response to COVID-19 Outbreak, at 3-4 (Skagit County Super. Ct., Wash. June 16, 2020), www.skagitcounty.net/SuperiorCourt/Documents/Superior%20Court%20Emergency%20Order%2020-8.pdf.

all parties.⁵ Among other requirements, a party or attorney wishing to speak privately with the other was required to inform the court so it could create a private, virtual breakout room from the video conference.⁶

Goheen-Rengo participated telephonically because he was unable to access Zoom. Goheen-Rengo's attorney, the State's attorney, most witnesses, and the court participated by videoconference. Following a two-day trial, the court found Goheen-Rengo was an unfit parent and terminated his rights to both children.

Goheen-Rengo appeals.

ANALYSIS

Goheen-Rengo argues his procedural due process rights were violated because the trial was conducted by video conference, placing "severe limitations on [his] ability to participate."⁷ We review alleged due process violations de novo.⁸

⁵ Remote Bench Trial Protocol and Procedures 1 (Skagit County Super. Ct., Wash. May 2021), www.skagitcounty.net/SuperiorCourt/Documents/Bench%20Trial%20Protocols.pdf.

⁶ Id. at 3. "Breakout rooms" are "split off from the main Zoom meeting" and are "completely isolated in terms of audio and video." Participating in Breakout Rooms, ZOOM HELP CTR. (Mar. 25, 2021), <http://support.zoom.us/hc/en-us/articles/115005769646-Participating-in-Breakout-Rooms#:~:text=Breakout%20rooms%20are%20sessions%20that%20are%20split%20off,used%20for%20collaboration%20and%20discussion%20of%20the%20meeting>.

⁷ Appellant's Br. at 9.

⁸ Matter of Welfare of M.B., 195 Wn.2d 859, 867, 467 P.3d 969 (2020) (citing In re Welfare of A.W., 182 Wn.2d 689, 701, 344 P.3d 1186 (2015)).

A parent’s procedural due process rights protect their “fundamental liberty interest in the care and custody of their children.”⁹ These protections include the right to assistance of counsel, a meaningful opportunity to be heard, the opportunity to hear the State’s presentation of evidence, and the opportunity to consult with counsel about the State’s presentation.¹⁰ The right to be heard “ordinarily includes the right to be present,”¹¹ but if a parent is unable to be physically present, then “they must be given a meaningful opportunity to be heard and defend through alternative procedures.”¹² If alternative procedures must be used, then the parent “must take reasonable and timely steps to exercise” their right to be heard.¹³

We apply the Mathews v. Eldridge¹⁴ balancing test to determine if a parent's due process rights were violated at a termination trial.¹⁵ We balance (1) the private interests affected, (2) the State’s interest in using the challenged procedures, and (3) the risk of erroneous deprivation of the private interests due to

⁹ Id. (citing Santosky v. Kramer, 455 U.S. 745, 753-54, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982) (plurality op.)).

¹⁰ Id. at 868, 874.

¹¹ In re Welfare of L.R., 180 Wn. App. 717, 723, 324 P.3d 737 (2014) (quoting In re Welfare of Houts, 7 Wn. App. 476, 481, 499 P.2d 1276 (1972)).

¹² Welfare of M.B., 195 Wn.2d at 868.

¹³ Welfare of L.R., 180 Wn. App. at 724 (citing RCW 13.34.090; In re Dependency of M.S., 98 Wn. App. 91, 96, 988 P.2d 488 (1999)).

¹⁴ 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).

¹⁵ Matter of Welfare of D.E., 196 Wn.2d 92, 102, 469 P.3d 1163 (2020) (citing Santosky, 455 U.S. at 754).

the procedures used.¹⁶ A due process violation occurred when “there was an intolerable risk of error at the proceedings given the private interests at stake.”¹⁷

In Matter of Welfare of M.B., the court concluded an incarcerated father’s due process rights were violated by the trial court’s management of a termination trial.¹⁸ The father’s attorney had attempted to arrange for the father to participate telephonically, but prison staff refused to cooperate.¹⁹ The morning of trial, the court issued a transport order requiring transportation within five days, and it entered a six-day continuance.²⁰ The prison failed to transport the father by the time of trial.²¹ To avoid a lengthy delay, given the multiple witnesses and their busy schedules, the court began trial and delayed the testimony of “the primary witnesses—the social worker and the guardian ad litem (GAL)—until [the father] was present.”²² The father’s attorney did not object, and the court began hearing testimony.²³

The following week, the primary witnesses and others were set to testify, but the prison would not transport the father for at least another week.²⁴ To maintain its schedule and ensure the children’s rights were respected, the court

¹⁶ Id. (citing Mathews, 424 U.S. at 335).

¹⁷ Welfare of M.B., 195 Wn.2d at 877.

¹⁸ 195 Wn.2d 859, 878, 467 P.3d 969 (2020).

¹⁹ Id. at 865.

²⁰ Id.

²¹ Id.

²² Id.

²³ Id.

²⁴ Id.

decided to take testimony from the father telephonically and to hear testimony without the father present.²⁵ Several critical witnesses, including the social worker and a psychologist, testified about the father's fitness to parent and were cross-examined without the father present at all.²⁶ When the father appeared telephonically, he was also able to hear some of the cross-examination of the social worker and testimony from the GAL, but he had no opportunity to speak with his attorney during the proceedings that day.²⁷

The court concluded the father's "inability to testify in person and to aid his counsel . . . created a significant risk of erroneous termination."²⁸ The prison prevented the father from physically attending trial, which deprived the court of the ability to evaluate his credibility akin to the other witnesses.²⁹ The father was also prevented from hearing the testimony of six witnesses, including the social worker's critical testimony during the State's case-in-chief.³⁰ And even after hearing some limited testimony, he had no opportunity to consult with his attorney before or after cross-examination.³¹ Because these severe limitations deprived the father of a meaningful opportunity to evaluate the State's case or aid his

²⁵ Id.

²⁶ Id. at 865-66.

²⁷ Id.

²⁸ Id. at 869.

²⁹ Id. at 871.

³⁰ Id. at 872.

³¹ Id.

attorney, thus creating a risk to his fundamental right to parent, the court reversed.³²

Here, the parties agree that Goheen-Rengo “has a significant private interest” in the care and custody of his children.³³ John and Jane also have interests at stake, including a shared interest with Goheen-Rengo in achieving an accurate outcome.³⁴ The children also have interests “in being free from unreasonable risks of harm and a right to reasonable safety; in maintaining the integrity of the family relationships . . . ; and in not being returned to (or placed into) an abusive environment over which they have little voice or control.”³⁵

The State has similar interests in the children’s welfare.³⁶ It also has interests in quickly resolving parental termination cases to keep the children in its custody from “‘legal limbo[,]’ suffer[ing] much ‘mental and emotional strain’” from the uncertainty.³⁷ Due to COVID-19, Skagit County Superior Court suspended all termination trials as of March 23, 2020,³⁸ and resumed them remotely on June

³² Id. at 877-78.

³³ Resp’t’s Br. at 20-21 (citing Welfare of L.R., 180 Wn. App. at 724); Appellant’s Br. at 8.

³⁴ Welfare of M.B., 195 Wn.2d at 869 (citing Santosky, 455 U.S. at 760).

³⁵ In re Dependency of M.S.R., 174 Wn.2d 1, 20, 271 P.3d 234 (2012); see RCW 13.34.020 (children have private interests in “a safe, stable, and permanent home and a speedy resolution of any proceeding”).

³⁶ Id.

³⁷ Welfare of M.B., 195 Wn.2d at 876-77 (quoting In re Dependency of M.H.P., 184 Wn.2d 741, 762, 364 P.3d 94 (2015)); see Welfare of L.R., 180 Wn. App. at 727 (State’s interests include “a speedy resolution of the termination proceeding”).

³⁸ Admin. Order No. 20-3, In re Emergency Response to COVID-19 Outbreak, at 2 (Skagit County Super. Ct., Wash. Mar. 23, 2020),

22.³⁹ Thus, the State was relying on videoconference and teleconference procedures to ensure termination trials could occur without further substantial delay and without risking exposure of the trial participants to a deadly disease.

Goheen-Rengo contends his interest in the care and custody of his children was placed at risk because “(1) he was not able to testify or communicate with the court in the same manner as the State’s witnesses, namely by video, (2) he was unable to meaningfully review and challenge the State’s evidence, and (3) he lacked the same level of access to his attorney as the other parties.”⁴⁰ None of his contentions are supported by the record.

First, Goheen-Rengo relies upon Matter of Welfare of M.B. for the proposition that he was entitled to testify by the same means as the State’s witnesses. M.B. does not mandate that every witness present their testimony through identical means. Rather, M.B. requires that a parent unable to attend a termination trial in person “be given a meaningful opportunity to be heard and defend through alternative procedures.”⁴¹

<https://www.skagitcounty.net/SuperiorCourt/Documents/Emergency%20Order%20No%2020-3.pdf>.

³⁹ Admin. Order No. 20-8, at 3.

⁴⁰ Appellant’s Br. at 9. Notably, Goheen-Rengo moved to continue the trial until the conclusion of the COVID-19 pandemic so his trial could be conducted in person. He believed this continuance was appropriate even if he could have accessed Zoom. The court denied his motion, and Goheen-Rengo does not challenge that decision.

⁴¹ 195 Wn.2d at 868.

The court's procedures let Goheen-Rengo participate either by appearing in person, which Goheen-Rengo said he could do but never did,⁴² or by appearing telephonically, which he did. Goheen-Rengo was afforded the opportunity to have the judge evaluate his credibility in person, but he chose not to take it.⁴³ For the means Goheen-Rengo chose, he used his telephonic appearance to participate actively in the trial, hear the State's evidence, and meaningfully communicate with his counsel.

Goheen-Rengo actively engaged in the trial. He directed his attorney to move for the judge to recuse himself. He consulted with his attorney both before and after witnesses testified to provide additional information and to help direct cross-examination. He directed which witnesses would be called to testify on his behalf. After deciding to testify on his own behalf, Goheen-Rengo directed which questions defense counsel was supposed to ask him.

He was able to participate so actively because he could coordinate with his counsel through the use of private breakout rooms. Seven times, Goheen-Rengo requested that the court create a breakout room, and the court did so six of those seven times. The one time the court declined came at the end of the day when Goheen-Rengo and defense counsel could speak on the phone after the court recessed. The court also created breakout rooms for Goheen-Rengo and his

⁴² It also appears that he had the opportunity to participate by video from his attorney's office.

⁴³ To the extent Goheen-Rengo now argues the State should have provided a reliable computer and internet connection to access Zoom, the record does not show he requested it. See Welfare of L.R., 180 Wn. App. at 724 (a parent wishing to utilize alternative procedures must take steps to do so).

counsel to consult each other during recesses. It was clear that Goheen-Rengo and defense counsel could speak with each other without a breakout room. For example, defense counsel called Goheen-Rengo twice when he had failed to call into the proceeding. Contrary to Goheen-Rengo's argument, he actively reviewed and challenged the State's case and consulted closely with his attorney to do so.

The portions of the trial Goheen-Rengo missed were due to his own actions. On the first full day of proceedings, the court granted a 15-minute morning recess, but Goheen-Rengo failed to return until 1:30, explaining "he misheard when court was resuming."⁴⁴ He missed testimony from two social workers, one who managed his case from December of 2014 until September of 2016 and a few minutes of testimony from another one. He declined to participate the day the court made its ruling granting termination. During both voluntary absences, his counsel actively participated. Nothing suggests the remote trial format contributed to either absence.

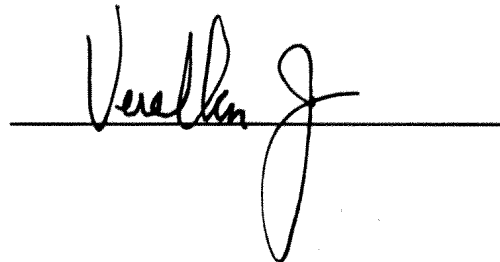
Six times during the two-day trial, the court briefly muted Goheen-Rengo and prevented him from speaking. Each time it did, the court was responding to Goheen-Rengo's own interruptions and inappropriate behavior, including calling one witness a "moron" and interrupting the GAL's testimony to argue with her. But unlike removal from the courtroom, Goheen-Rengo was not prevented from hearing the State's case or from consulting with his attorney after being unmuted.

⁴⁴ Appellant's Br. at 11. The record reflects that the trial court expressly told the parties it was granting a 15-minute recess.

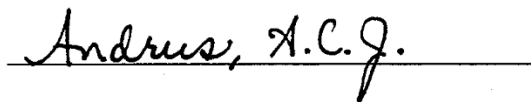
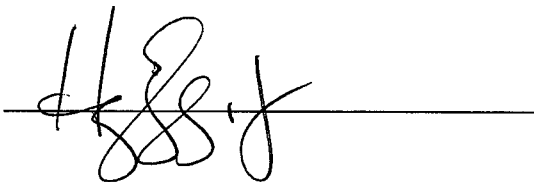
Nothing suggests the court's exercise of its considerable discretion to manage the courtroom violated Goheen-Rengo's due process rights.⁴⁵

Unlike Welfare of M.B., Goheen-Rengo participated actively in trial and routinely assisted his counsel. In Welfare of M.B., the incarcerated father was prevented from hearing nearly all of the testimony about his fitness to parent due to the prison's actions. The small portions of trial Goheen-Rengo missed were due to his own actions. The court here weighed the Mathews factors at the outset of trial, and the procedures used did not deprive Goheen-Rengo of a meaningful opportunity to be heard. Because there was little risk to Goheen-Rengo's interest from the procedures used and strong interests for both the State and the children in holding a trial without risking the spread of COVID-19, Goheen-Rengo fails to show his due process rights were violated.

Therefore, we affirm.



WE CONCUR:



⁴⁵ See In re Marriage of Ziqler and Sidwell, 154 Wn. App. 803, 815, 226 P.3d 202 (2010) ("Trial judges have wide discretion to manage their courtrooms and conduct trials fairly, expeditiously, and impartially.") (citing State v. Johnson, 77 Wn.2d 423, 426, 462 P.2d 933 (1969)).

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, a true copy of the **Petition for Review to the Supreme Court** was filed in the **Court of Appeals** under **Court of Appeals Case No. 81795-7-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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Date: August 18, 2021

WASHINGTON APPELLATE PROJECT

August 18, 2021 - 4:17 PM

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Appellate Court Case Title: In re the Dependency of J.C.
Superior Court Case Number: 19-7-00526-7

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