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AUGUST 20, 2020
CHIEF JUSTICE

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In the Matter of the Welfare of D.E., V.E., and M.E., Minor children.	)	No. 98043-8 En Banc Filed August 20, 2020

WHITENER, J.—At the end of 2018, the Department of Children, Youth, and Families[1] (Department) went to trial to terminate J.J.'s parental rights to her three children. After closing arguments, the trial court orally ruled that the Department had not met its burden to prove by clear, cogent, and convincing evidence that the Department had offered all necessary services or that there was no reasonable likelihood of J.J. correcting her parental deficiencies in the near future.

Instead of dismissing the termination petition, the trial court continued the trial without entering any findings of fact or conclusions of law. Two months later, the trial court heard more evidence and terminated J.J.'s parental rights to all three

[1] Some documents in the record refer to the Department of Social and Health Services because they were filed prior to the transfer of child welfare functions to the Department of Children, Youth, and Families. *See* RCW 43.216.906. We use "Department" to encompass both to avoid confusion.

of her children. J.J. appealed, arguing that the trial court violated her right to due process when it continued the trial after finding that the Department had not met its burden of proof. The Court of Appeals, Division Two commissioner affirmed the termination. We reverse the Court of Appeals and dismiss the termination petition. The trial court violated J.J.'s right to due process when it continued the trial after finding the Department had not met its burden of proof.

FACTS AND PROCEDURAL HISTORY

J.J. is mother to three children: eight-year-old D.E., five-year-old V.E., and three-year-old M.E.[2] In August 2016, prior to M.E.'s birth, the Department became aware of the family's "deplorable" living conditions. 2 Verbatim Report of Proceedings (VRP) (Nov. 7, 2018) at 177, 185. The children were removed from the home because of the conditions, suspected domestic violence perpetrated by the children's father against their mother, and suspected substance abuse. D.E. and V.E. were placed into foster care together. The court found them dependent in November 2016.

In March 2017, J.J. gave birth to M.E. Right after M.E.'s birth, J.J. tested positive for amphetamines. Because of the positive drug test and because J.J. had not engaged in services for substance abuse or domestic violence, M.E. was removed

[2] The children's father, S.E., voluntarily relinquished his parental rights and is not a party to this appeal.

from her mother's care just days after her birth. The court found M.E. to be dependent in May 2017.

Shortly after M.E.'s birth, J.J. completed her court-ordered parenting assessment. This was five months after her initial referral. The provider recommended that J.J. engage in counseling, protective parenting groups, domestic violence support groups, and that she find stable housing. Although J.J. was living in Thurston County and expressed concerns about transportation, the proposed services offered were in Pierce County. J.J. consistently expressed that she did not believe that she needed any services and that S.E.[3] was not violent toward her, although the Department provided evidence of multiple incidents of domestic violence between them. J.J. also stated that she would not live in clean and sober housing or domestic violence housing. J.J. did obtain a chemical dependency assessment and although there were no recommendations, the Department still required random urinalyses (UAs) throughout the case.

The Department filed petitions for termination of parental rights as to D.E. and V.E. in November 2017, and as to M.E. in April 2018. At the November 2018 termination trial, the court heard testimony as to the alleged parental deficiencies and incidents of domestic violence. *See, e.g.*, 1 VRP (Nov. 6, 2018) at 71-73 (J.J.'s

[3] At trial J.J. testified that she and S.E. are "not [in a relationship] and have not been for quite sometime [sic]." 1 VRP (Nov. 6, 2018) at 74.

testifying about violent interactions with S.E.); 2 VRP (Nov. 7, 2018) at 171-77 (police officer testifying as to a violent incident between S.E. and J.J.). Throughout the dependency, J.J. engaged in services sporadically, but she consistently indicated that she was struggling with transportation both in regard to services and visitation with her children. *See, e.g.*, 1 VRP (Nov. 6, 2018) at 30, 45, 98, 100-101, 104, 120, 142, 145; 2 VRP (Nov. 7, 2018) at 198-199; 3 VRP (Nov. 8, 2018) at 254, 277, 279, 300, 335, 337, 389. Although transportation was a key issue, the initial social worker testified there were no comparable services in Thurston County that J.J. could access. J.J. asked a subsequent social worker about a provider in Thurston County, but that social worker testified she could not find information on that provider. There is no indication in the record that there was any subsequent investigation into whether services could be provided in Thurston County.

After trial, the parties met again for the trial court's decision. The trial court judge indicated, "I have struggled with the fact that mom, [J.J.], really has not fully acknowledged why we got where we are. . . . At the same time, I found that the Department and particularly the testimony of [one social worker] was weak in some very significant respects." 4 VRP (Nov. 16, 2018) at 428. After discussing the evidence of services the judge stated,

> I think I cannot make a finding at this moment in time by clear, cogent and convincing evidence that all necessary services have been offered

> or that there is no reasonable likelihood of her correcting them within the immediate future.[4]
>
> That said, I am not willing to dismiss this petition because I think there are a lot of issues. And the fact that [J.J.] cannot give me her address, continues to not have any source of income by which she could support her children or pay for a subsidized housing and the fact that we are in this limbo of not really understanding whether she has a substance use problem, whether she has ongoing mental health needs that are being met or aren't being met leaves us with a need to get to the heart of where we are.
>
> And so my solution and what I am ordering is that this matter be continued without findings by the Court at this moment and that we immediately start to address where I find there to be deficiencies in what has been offered and what mother needs to do.
>
> In not terminating your children this morning, [J.J.], I want you to know that I think you have some work to do. And what I am inclined to do is to continue this just until the end of January or sometime in February and give the Department an opportunity to work with [J.J.], but, [J.J.], you really need to step it up.

Id. at 431-32.

The trial court found it hard to believe that "there were no comparable parent courses . . . in Thurston County that would be more accessible to [the mother]." *Id*. at 432-33. The court also observed that the mother's visitation became more consistent when the Department moved the visits closer to her and stated, "I think it behooves the Department to look at whether there are resources available to [J.J.] in

[4] This encompasses two of the six statutory factors that must be met to terminate parental rights. *See* RCW 13.34.180(d)-(e).

Thurston County that would be more accessible to her." *Id*. at 433. The court also stated,

> If we can see significant progress from [J.J.] that leads the Court to conclude that there is a likelihood that we could be reunified, then we can move forward. But if that—if I don't see that within a fairly short time frame and the Department immediately addresses the deficient areas that I have identified, then I think termination will be appropriate at that point, but not today. I am giving mother essentially another chance.

Id. at 434. This effectively gave both the Department and the mother 2 months to set up services that the court found had not been adequately provided since the children were removed from the home approximately 28 months prior. The court also asked J.J. to complete a UA that day and indicated concerns about J.J.'s ongoing, untreated mental health concerns. The court then set a status hearing and continued the trial until January 2019.

J.J.'s UA was positive for methamphetamine. At the status hearing, the parties and the court set out a detailed plan for services, including random UAs, a chemical dependency assessment, Protective Parenting Group, a psychological assessment, counseling, and medication management. Although the initial social worker had testified that there were no comparable services in Thurston County, 2 weeks after the court recommended that the Department locate services in Thurston County, the Department identified multiple Thurston County providers for the recommended services. The court told J.J. to stay and fill out health insurance forms to get Medicaid

and to contact the chemical dependency provider within 14 days. The court also ordered the Department to help J.J. with transportation through gas cards and bus passes.

When the parties reopened the trial[5] in January, witnesses testified that J.J. had been unable to obtain health insurance so she could not attend some services. She rescheduled her psychological assessment twice and had still not attended. She had attended one of three Protective Parenting Groups.

At the end of the reopened trial, the court terminated J.J.'s parental rights. 7 VRP (Jan. 30, 2019) at 694. In doing so, the court emphasized that there was a positive UA, and that the mother had not contacted the chemical dependency service within 14 days as ordered, did not attend psychological testing, had not obtained Medicaid, and did not attend all of the Protective Parenting Groups. The court then "conclude[d] that the Department has satisfied its burden by clear, cogent and convincing evidence; that services have been expressly and understandably offered and provided, reasonably available. It is [J.J.] that has not availed herself of those services." *Id*. at 691. The court also found that because of J.J.'s denial, excuses, and failure to engage in services, the Department had met the burden to prove that there was little likelihood the conditions would be remedied.

[5] It appears from the record that the Department understood the trial to have ended as it asked the court at the status hearing on January 15, 2019 to "reopen" the termination trial, which the court did by setting the January 30, 2019 date. 6 VRP (Jan. 15, 2019) at 495-96.

J.J. appealed the termination of her parental rights, alleging that the trial court violated her right to due process when it did not dismiss the termination petition at the conclusion of the trial when the court found that the Department had not met its burden of proof by clear, cogent, and convincing evidence. J.J. also asserted that the trial court erred when it held "review" and "status" conferences *after* the trial had ended and the Department had not met its burden, and it also erred when the trial court, during a subsequent "review" hearing, considered the best interests of the children prior to finding the Department had met its burden of proof. Furthermore, J.J. challenged the trial court's findings that the Department provided all necessary services, that there is little likelihood that she can parent in the near future, and that she was currently unfit to parent.

Commissioner Schmidt of the Court of Appeals, Division Two, affirmed the termination, finding that no due process violation occurred, that substantial evidence supported the trial court's findings, and that the findings of fact supported the conclusions of law as to the termination elements by clear, cogent, and convincing evidence. J.J. moved to modify this ruling, but a panel of judges denied the motion.

J.J. then petitioned this court for review of whether the trial court violated J.J.'s right to due process when it did not dismiss the termination trial after finding the Department had not met its burden of proof or when the trial court considered the best interests of the children in the middle of the termination trial. She also sought

review of whether a status as a domestic violence victim is a parental deficiency. We granted review "only on the issue of whether the trial court violated the mother's due process rights in continuing the termination trial after concluding that the Department . . . had failed to meet its burden of proof." Order at 1 (Wash. Apr. 1, 2020).

ANALYSIS

J.J. argues that the trial court violated her right to due process when the court continued the trial after stating that it could not find that the Department had met its burden of proof. J.J. argues that the proper remedy when the Department has not met its burden of proof is to dismiss the termination petition. We agree.

I. Standard of Review

The Department contends that the standard of review in this case is abuse of discretion. Suppl. Br. of Dep't at 12 (quoting *In re Interest of Pawling*, 101 Wn.2d 392, 396, 679 P.2d 916 (1984)). We disagree.

The case relied on, *Pawling*, is distinguishable from the case at hand. First, *Pawling* concerns a private termination brought under the former adoption statutory scheme and allegations of abandonment. Under the current adoption statutory scheme, specifically RCW 26.33.120, the court looks to whether termination is in the best interests of the child at the outset. In contrast, in the present case, the court must first find parental unfitness and that all statutory termination factors are met

prior to examining the best interests of the child. *See* RCW 13.34.190; *In re Interest of S.G.*, 140 Wn. App. 461, 467, 166 P.3d 802 (2007).

Further, *Pawling* involved a continuance of the fact-finding hearing to provide the parent whose rights were at risk of being terminated with adequate notice of an amended pleading and an opportunity to respond. In the present case, the court, after finding the Department did not meet its burden, continued the trial and requested that the Department supplement the inadequate record to meet its burden of proof by clear, cogent, and convincing evidence. Also, the father in *Pawling* did not allege that the continuance to hear more evidence in that case violated his right to due process, as J.J. does here. Therefore, the standard of review in the present case is that of due process violations.

We review alleged violations of due process de novo. *In re Welfare of L.R.*, 180 Wn. App. 717, 723, 324 P.3d 737 (2014) (citing *Post v. City of Tacoma*, 167 Wn.2d 300, 308, 217 P.3d 1179 (2009)).

II. Due Process in Termination Cases

Parents have a fundamental liberty interest in the care, custody, and management of their children. *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982) (plurality opinion). This right "does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State." *Id*. Accordingly, when the State seeks to terminate parental

rights, "it must provide the parents with fundamentally fair procedures." *Id*. at 753-54. A parent's right to due process at a termination trial is subject to the balancing test set forth in *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). *Santosky*, 455 U.S. at 754; *L.R.*, 180 Wn. App. at 724. Under this test, the court balances (1) the private interests affected,[6] (2) the risk of erroneous deprivation of the private interest created by the procedures used, and (3) the State's interest in using the challenged procedure. *Mathews*, 424 U.S. at 335.

A. The private interests affected

The Department rightfully concedes that "[t]he strength of the parent's interest under the first factor is undisputed." Suppl. Br. of Dep't at 16 (citing *In re Dependency of M.H.P.*, 184 Wn.2d 741, 760, 364 P.3d 94 (2015)). However, the private interests involved are not limited to those of the parent. As the United States Supreme Court acknowledged in *Santosky*, "until the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship." 455 U.S. at 760. Accordingly, D.E., V.E., and M.E. also share a private interest in preventing the erroneous termination of their mother's parental rights. This is not to say that the child has *no* materially aligned interest with

[6] The Court of Appeals below misstates the first factor of the *Mathews* test as "the parent's interest." *See* Ruling Affirming Order Terminating Parental Rights at 24 (Wash. Oct. 8, 2019). The factor examines the *private* interests, not just *parental* interests. *See Santosky*, 455 U.S. at 754 (citing *Mathews*, 424 U.S. at 335)). As discussed in the "private interests" section below, children also have a concurrent private interest with their parents.

the State's interest in a speedy resolution of cases. But to the extent that the goal of the dependency system is reunification and accurate decisions, the preservation of families is a paramount interest shared by the parents, the child, and ultimately, the Department. *See id*. at 766 (quoting *Lassiter v Dep't of Soc. & Health Servs.*, 452 U.S. 18, 27, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981) ("Since the State has an urgent interest in the welfare of the child, it shares the parent's interest in an accurate and just decision.")).

B. The risk of erroneous deprivation

The second *Mathews* factor arguably is the core controlling factor: whether the procedure creates a risk of erroneous deprivation of the private interest at stake. The Court of Appeals commissioner ruled that "[the lower court's] refusal to dismiss the termination petitions after finding the [Department] had not yet satisfied its burden was a means of ensuring J.J.'s due process rights were protected and that it had the opportunity to consider all relevant evidence." Ruling Affirming Order Terminating Parental Rights at 25 (Wash. Oct. 8, 2019). However, in doing so, the commissioner effectively created a rule that whenever the Department has not met its burden of proof, the trial court can continue the trial for the Department to obtain more evidence and for the respondent to prove their fitness to parent. This is problematic as the burden of proof in a termination trial is on the Department and should never be shifted to the parent. Further, it is the Department's decision to

choose when to file a petition, and the Department must be prepared to carry its burden of proof of clear, cogent, and convincing evidence. Here the lower court continued the trial ostensibly to allow J.J., who did not have the burden of proof, to prove her fitness, when in fact the continuance benefited the Department's case for termination.

As the United States Supreme Court recognized, termination proceedings contain numerous factors that increase the risk of erroneous termination: the evidence is largely controlled by the State, the ultimate decision is based on the subjective determination of one person (the judge), the court has the ability to discount factors that favor the parents, the State can shape the history and future of the child through placement and visitation, and the State has access to experts and social workers who are also employed by the State. *Santosky*, 455 U.S. at 762-63. All of these factors are exacerbated by the fact that the majority of cases involve persons who are poor, uneducated, and/or minorities, leaving an opening for class and racial bias. *Id*.

The Court of Appeals commissioner below relies solely on *In re Dependency of T.R.*, 108 Wn. App. 149, 29 P.3d 1275 (2001) for the resolution of this particular due process issue. In that case, the parties proceeded to the termination trial, at the end of which the trial court orally ruled that the Department had proved all of the statutory termination factors. *Id*. at 155. However, the judge reserved the right to

consider a guardianship. *Id*. A week later he issued a decision formalizing his ruling that the State had proved all of the statutory factors. The parties then attempted to implement a guardianship, but when that did not work, the State sought again to terminate. Although the mother's attorney argued that the mother's situation had changed since the previous findings of fact, the judge relied on the previous findings of fact and terminated the parental rights. *Id*. at 157.

The Court of Appeals affirmed, holding that under the *Mathews* factors due process had been satisfied. As to the "risk of erroneous deprivation" factor, the Court of Appeals found that there was no risk of error because, although over a year had passed since trial, the status hearings showed that the mother still had not fixed her parental deficiencies. *Id*. at 159. The Court of Appeals did note that "[w]hether a further hearing is required depends upon the facts and circumstances of each case." *Id*. at 160.

T.R. is materially distinguishable from the present case. First, the court in *T.R.* found that the State had proved all of the statutory termination factors prior to the parties' attempting to implement a guardianship. Accordingly, the Court of Appeals found that "the risk of erroneous deprivation depends upon the likelihood that parental deficiencies *established at trial* had been remedied." *Id*. at 158 (emphasis added). Because the deficiencies had not been remedied, there was no due process violation. In contrast, here the trial court orally ruled that the Department had *not*

proved all of the statutory termination factors and so parental unfitness had not been established at trial. *T.R.* thus does not apply to the present case.

Second, in *T.R.*, the mother had over a year to work on remedying her parental deficiencies when the trial court found that the State had provided all of the necessary services per the statutory factor. In contrast, in the present case, J.J. was given only 2 months to obtain services that the court found the Department had not adequately provided her throughout the dependency. Although the present case did have a supplemental evidentiary hearing, a 2-month continuance was not sufficient time to provide services that the court found the Department had not adequately provided over the course of an approximately 30-month dependency.

The Department attempts to distinguish the present case from *In re Welfare of Shantay C.J.*, 121 Wn. App. 926, 91 P.3d 909 (2004). In that case, at the end of the termination trial, the court held that three of the six statutory factors had been met but declined to rule on the others. *Id*. at 932. The court told the parties it was taking the other three factors "under advisement" and then continued the trial and ordered more services for the parents. *Id*. The parents did not comply with the services required during the continuance, and the State asked the court to strike the continuance order. *Id*. at 934. At the next hearing, the parents were not allowed to present additional evidence or address the court. *Id*. The court terminated the parental rights. *Id*.

Applying the *Mathews* factors, the Court of Appeals found a due process violation because of the risk of erroneous deprivation. The Court of Appeals could not determine if the trial court terminated parental rights because of the statutory factors or because the parents did not fully comply with the conditions of the continuance. *Id*. at 937. Accordingly, the Court of Appeals held that the trial court was required to take more evidence and enter full findings of fact prior to termination. *Id*. at 940.

The Department argues that in *Shantay C.J.*, the Court of Appeals reversed because the parents could not present new evidence and that because the trial court here did allow for J.J. to present new evidence, due process is satisfied. But *Shantay C.J.* is not dispositive, and allowing for more evidence does not conclusively mean there was not a due process violation. The judge in *Shantay, C.J.* had not explicitly ruled, as in the present case, that the State had not met its burden by clear, cogent, and convincing evidence, and the Court of Appeals was unsure if the termination was based on the failure to comply with the conditions of the continuance. There is a material difference between a court continuing a trial while "taking the matter under advisement," *id*. at 932, and a court continuing a trial after making a determinative finding that the State has not met its burden by clear, cogent, and convincing evidence.

Here, at the conclusion of trial, the trial court was not required to immediately decide whether to terminate J.J.'s parental rights. However, when the trial court stated, "*I cannot make a finding at this moment in time by clear, cogent and convincing evidence* that all necessary services have been offered or that there is no reasonable likelihood of her correcting them within the immediate future," it did make a decision: that the Department had not met its burden of proof. 4 VRP (Nov. 16, 2018) at 431 (emphasis added). The proper remedy was not to continue the trial for the Department to collect more evidence against the mother and shift the burden to the mother to show she was fit to parent. The proper remedy was to dismiss the termination petition as the Department did not meet the burden of proof required.[7] This in no way precluded the Department from offering further services and filing another termination petition when and if the Department *could* meet the burden of proof. *See Santosky*, 455 U.S. at 764 ("[N]atural parents have no 'double jeopardy'

[7] The Department relies on *DGHI Enterprises v. Pacific Cities, Inc*., 137 Wn.2d 933, 977 P.2d 1231 (1999) for the holding that a judge's oral ruling is not binding on subsequent proceedings. That case involved an oral ruling in a commercial lease dispute where the judge died before he could sign the findings of fact and conclusions of law. *Id*. at 937-38. This court held that the newly assigned judge could not just sign the findings of fact and conclusions of law, although the former judge had laid them out on the record with intent to sign at a later date, because the intent to sign the findings was not binding on the deceased judge. *Id*. at 943-44. However, J.J. does not ask for a judge to be bound by a prior oral ruling at a subsequent hearing. She asks for a termination petition to be dismissed when the judge orally rules the Department did not meet the burden of proof and that the case not be set for a subsequent hearing where the Department can present more evidence against a parent. Further, the present case concerns parental rights, not a commercial lease, and the due process concerns necessitate the need for holding the Department to its burden of proof.

defense against repeated state termination efforts. If the State initially fails to win termination . . . it always can try once again to cut off the parents' rights after gathering more or better evidence.").

It is not equitable or just for the Department to be granted a continuance that enables it to obtain more evidence in order to meet its burden of proof when it already controls the narrative and services to be provided. *See Santosky*, 455 U.S. at 763 ("The State's ability to assemble its case almost inevitably dwarfs the parents' ability to mount a defense."). When the Department failed to meet its burden of proof and the trial court granted the Department a continuance to gather more evidence in a condensed timeline, that action created a risk of erroneous deprivation of the parent's rights to parent. Such a procedure deprives the parent of a full opportunity to take advantage of services that were not initially given. Therefore, this factor weighs in favor of finding the trial court violated J.J.'s right to due process.

C. The State's interest in the challenged procedure

There is no dispute that the State has a strong interest in the speedy and fiscally responsible resolution of cases. There is also no dispute that the State has an interest in assisting children in finding their permanent placements as quickly as possible. *See In re Welfare of C.B.*, 134 Wn. App. 942, 951, 143 P.3d 846 (2006). However, a petition for termination of parental rights should be filed *only* when it has been shown that the efforts to cure parental deficiencies have been unsuccessful and

additional services will not remedy those deficiencies in the foreseeable future. *S.G.*, 140 Wn. App. at 470. The "'best interest of the child' standard is not a compelling state interest that overrules a parent's fundamental right to raise her children." *In re Welfare of L.N.B.-L.*, 157 Wn. App. 215, 257, 237 P.3d 944 (2010) (citing *In re Custody of Smith*, 137 Wn.2d 1, 20, 969 P.2d 21 (1998)).

The analysis of whether to terminate parental rights is a two-step process. First the trial court must find the Department has proved all of the statutory factors by clear, cogent, and convincing evidence, and only then does the trial court turn to whether termination is in the best interests of the child by a preponderance of the evidence. *In re Welfare of A.B.*, 168 Wn.2d 908, 911, 232 P.3d 1104 (2010); *S.G.*, 140 Wn. App. at 467. The trial court did not follow this two-step process in the present case.

In determining that the burden of proof in termination cases must be clear, cogent, and convincing evidence, the United States Supreme Court determined that holding the State to a burden higher than a preponderance of the evidence burden is consistent with both the parens patriae interest in the welfare of the child and the interest in reducing the cost of the proceedings. *Santosky*, 455 U.S. at 766. This is because the parens patriae interest at fact-finding "favors preservation, not severance, of natural familial bonds." *Id*. at 767. Further, "[a]ny *parens patriae* interest in terminating the natural parents' rights arises only at the

dispositional phase, *after* the parents have been found unfit." *Id*. at 767 n.17. It follows that *holding* the Department to its burden of proof and ensuring that the Department proves parental unfitness *prior* to considering the best interests of the children also helps to further these important state interests because, until the Department meets the burden to prove unfitness of the parent, its interests align with the parent, the children, and the preservation of the family unit.

In the present case, the trial court found that the Department failed to meet the burden of proving the statutory factors and parental unfitness that the Department must prove *before* the court can consider the best interests of the children. However, the trial court, without making a finding that J.J. was an unfit parent, placed the burden on the mother, at a subsequent reopening of the trial, to present evidence to prove her fitness to parent. The court used the incorrect standard when it continued the trial as being in the best interests of the children, stating, "[P]ermanency is in these *children's best interest*, and that's why I need to keep this on a relatively short timeline." 4 VRP (Nov. 16, 2018) at 434 (emphasis added). Then at a review hearing after the trial had ended, the court again erred when it used the best interest of the children standard and placed the burden on the mother stating that the mother was to be "diligent" about getting insurance and accessing services because "we have children who are in foster care and in a preadopt home and are stable." 5 VRP (Nov. 29, 2018) at 466-67. Focusing on the best interests of the children prior to the

Department's proving parental unfitness is contrary to *A.B.*, 168 Wn.2d 908, RCW 13.34.180, and RCW 13.34.190.

Because holding the Department to its burden of proof is consistent with the State's parens patriae interests, we hold that the failure to hold the Department to its burden of proof and continuing a trial in the children's best interests when the Department had not proved current unfitness is contrary to the State's interests and weighs in favor of finding a due process violation.

Because all three *Mathews* factors weigh in favor of finding a due process violation, we hold that the trial court violated J.J.'s right to due process when it continued the trial, instead of dismissing, after finding that the Department had not met its burden of proof.

CONCLUSION

We reverse the Court of Appeals and hold that the trial court violated J.J.'s right to due process when it continued the trial after ruling that the Department did not meet its burden of proof. We dismiss the termination petition.

Whitener, J.

Stephens, C.J.

González, J.

Johnson, J.

Gordon McCloud, J.

Madsen, J.

Yu, J.

Owens, J.

Montoya-Lewis, J.