

No. 47177-9-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

In re the Welfare of D.D.W. and T.D.W.,

Minor children.

J.B. (Mother),

Respondent.

Brief of Appellant/Motion for Accelerated Review

Clark County Superior Court
Cause Nos. 13-7-00748-9 and 13-7-00749-7

The Honorable Suzan Clark, Judge

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A. ASSIGNMENTS OF ERROR

1. The trial court erred when, in J.B.'s absence and without her express permission, it allowed defense counsel to withdraw as counsel before the start of J.B.'s termination of parental rights trial.

2. The trial court denied J.B.'s right to counsel at the termination of parental rights trial by hearing the trial without the legal representation J.B. requested and was entitled to.

3. All of the findings of fact and conclusions of law regarding termination of the parent-child relationship were entered in error as J.B.'s right to parent were improperly terminated as J.B. was denied her right to counsel at the termination of parental rights trial.

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

Whether J.B.'s right to legal representation at a termination of parental rights trial was violated when, in J.B.'s absence and without her express permission, the court allowed her court-appointed counsel to withdraw as counsel before the start of her termination of parental rights trial?

C. STATEMENT OF THE CASE

1. Withdrawal of defense counsel

The Department¹ filed a petition to terminate J.B.'s parental rights in her two children, D.D.W. and T.D.W. CP 1-5.² J.B. requested the appointment of counsel. CP 37. Mr. Sonju was originally appointed as counsel³ but later was replaced by Douglas Elcock.⁴ CP 37, 38-40.

The termination trial was heard on October 24, 2014. RP⁵ 1-125. On October 10, Elcock filed a Motion and Declaration Permitting the Withdrawal of Court Appointed Counsel. CP 113-18. Before the start of the trial, he asked the court's permission to withdraw as J.B.'s counsel. RP 3-5. J.B. was not present. RP 1.

Elcock told the court he had met with J.B. and J.B.'s guardian ad litem, attorney Darcy Scholts, on September 10, 2014 for about three hours. RP 3. To prepare for the meeting, he reviewed a large volume of discovery. RP 3. During the meeting, he elicited J.B.'s point of view on the case. RP 3. He spoke with J.B. briefly again on October 1. He mailed J.B. material on the case and sought additional input from her through phone calls, letters, and email. RP 3-4. By an October 9 email, Elcock

¹ Department of Child and Family Services, RP 68.

² The Clerk's Papers (CP) cited to are from the court file of D.D.W.

³ November 1, 2013, CP 37

⁴ December 17, 2013, CP 38-40

⁵ There is a single volume of verbatim for the appeal.

told J.B. they needed to discuss the case her options, an her decision and that he would proceed with trial if she elected to but he could not do it without her participation. RP 4; CP 118. Elcock did not hear from J.B. He continued to prepare the case for trial. For example, he filed with the Department an Affirmative Defense and a Request for Admissions. RP 4.

In making his motion to withdraw, Elcock told Judge Clark he felt he could not present a case without having established a relationship with J.B. so he could understood “how she wants me to argue the case.” RP 4-5. The Department did not object to Elcock’s withdrawal. RP 5. The court, in its oral ruling, provided no details why it was allowing Elcock to withdraw. RP 5. In its signed order allowing withdrawal, the court only noted counsel showed “good cause.” CP 168-69.

The court also allowed GAL Scholts to withdraw due to lack of contact. RP 6. The court had appointed Scholts as J.B’s guardian ad litem in the dependency. RP 5-6. The purpose of the appointment was for the GAL to facilitate communication between J.B. and trial counsel. RP 5-6. Scholts told the court that at the September meeting with Elcock, J.B. told them she did not want to relinquish her parental rights. RP 6.

2. Trial testimony

The court heard the following evidence at the termination trial without objection.⁶

Daughter, D.D.W., and son, T.D.W., than 10 and 6 respectively, came into the Department's care after their mother, J.B. took D.D.W. to a hospital emergency room and asked that D.D.W. have a mental health assessment. RP 73-74. When a nurse interviewed D.D.W., D.D.W. told the nurse J.B. had threatened to kill her. RP 74. The hospital called the police and the police removed the children from J.B.'s care and placed them in the Department's care. RP 74. The Department placed the children in foster care. RP 104-05.

The children told social workers that J.B. was upset about some missing money and she blamed D.D.W. J.B. held a knife to D.D.W.'s throat and said she would kill her if the money was not returned. Later that night, she drove the children to a field and showed them where she would place their bodies. RP 75.

The Department filed a Dependency Petition on May 7, 2012, and an Amended Dependency Petition on October 10, 2012. RP 74; Trial Exhibits 1 and 2.

⁶ No one was in court to object on J.B.'s behalf.

Before the current instance, the family had, in 2009 and 2010, three Department intakes. RP 72-73. In one instance, J.B. called the Department because the children were out of control. RP 73. The Department voluntarily provided assistance from a specialist to work with the family on skills in the home. J.B. did not complete the service. She participated in a few sessions and then closed the case. RP 73. After removing the children in the current instance, but before the dependency trial, the Department offered J.B. a mental health assessment and parenting classes but J.B. did not participate. RP 86.

The court heard the contested dependency trial and found both children dependent by a written order filed December 18, 2012. RP 86-87; Trial Exhibit 3. The court found that the children were abused or neglected and had no parent capable of adequately caring for their needs.⁷ Trial Exhibit 3. Counsel represented J.B. at the dependency trial and throughout the dependency proceedings. Trial Exhibit 3.

The court entered a disposition order with the filing of the Order of Dependency. Trial Exhibit 3. By the disposition order, the court required J.B. to participate in these services: psychological evaluation; anger management evaluation; and parenting classes. If either the psychological

⁷ RCW 13.34.030(b) and (c)

or the anger management evaluation recommended additional services, she must do those services too. Trial Exhibit 3.

Throughout the dependency, Kevin Storm was the assigned social worker. RP 71. Immediately after Storm's May 12, 2012, assignment to the case, he and J.B. talked over the phone numerous times and twice in person. RP 115. The conversations rarely went well as J.B. would get mad and swear at Storm. RP 71, 80-81. She also left him angry after-hour voice mails. RP 80.

Storm resorted to sending J.B. monthly letters. RP 81. He included a bus pass in the letter so she could access services. RP 81, 88. In the letters, he provided her information such as how the children were doing, how to access services, and how to visit the children. RP 88-89; Trial Exhibits 12-30.

Storm assumed J.B. got the letters because she once left him an angry voice mail complaining that she had not received her bus pass. RP 89. Storm also received address updates on J.B. from a contact at the Vancouver Housing Authority. RP 89. J.B. received her Section 8 housing through the Housing Authority. RP 99.

J.B. participated in services. She did her psychological evaluation with Dr. Jeffrey Lee in August 2013. RP 16, 20, 21. Lee found J.B. difficult to diagnose. RP 26. He made a provisional finding she had a

delusion disorder, persecuting type. RP 26. The diagnosis was provisional in the sense that to make a full diagnosis, Lee would need, for example, to talk to a prior employer to see if J.B. had similar persecuting delusions in another area of her life. RP 43. Per Lee, J.B.'s disorder caused her to perceive that everyone was out to get her to include her attorney and her treatment providers. RP 41-42. Lee did not find that J.B. had any cognitive disorders. RP 41.

Lee found that J.B. did not seem to understand the need to engage in services to get her children back. RP 37. J.B. told Lee she would do services after she got the children back and moved to Portland, Oregon. Also, J.B. did not understand that she, as the adult, needed to be flexible in her relationship with D.D.W. Instead, J.B. placed the burden of establishing a healthy relationship with her young daughter on her daughter. RP 37.

Lee was concerned that J.B. lacked the ability to maintain stability and to engage with her children because her focus was not on reunification with her children but on whether Department reports were correct. RP 26. J.B. also did not seem to comprehend the magnitude of what her children had reported and its impact on the parent-child relationship. RP 27.

Lee was also concerned about the level of blame J.B. placed on her children, particularly D.D.W. RP 32. J.B. saw D.D.W. as defiant and

high-needs. RP 34. She said D.D.W. stole, ran away, lied, blamed others, struggled in school, had learning problems, and no type of disciplinary strategy ever worked with her. RP 34. She described T.D.W. as less problematic but she said he had difficulty sitting still and paying attention. RP 34.

For maximum benefit, Lee recommended J.B. engage in individual therapy. RP 46, 91. Individual therapy made more sense than group therapy because J.B. suffered from social anxiety. She needed to feel safe and not judged. She she was more likely to get that in a one-on-one setting. RP 92. Lee also thought family therapy would be beneficial to remediate problems relating to the parent-child relationship. RP 46. He hoped that the individual and family therapy treatment providers could work with each other to get the maximum benefit for the family. RP 48.

Lee had a concern that J.B., given her delusions, would not trust her treatment provider because she would believe the provider was on the side of the Department and not an advocate for her. RP 46, 48. To be effective, any provider must likely work with J.B. for a long time just to establish rapport. RP 43.

Storm referred J.B. to individual therapy at the Wellness Project. RP 91. J.B. attended twice. RP 92. J.B. did not attend family therapy. RP 93.

Lee characterized the prognosis for reunification as “very poor.” RP 49. He remarked upon a study that found children who had been in state custody for over three years faced a risk of maltreatment 400 times greater than when a child was returned to a parent sooner. RP 51. He doubted J.B. could change in time to beat the fast-approaching three-year threshold for return of the children to her care. RP 51.

Also in August 2013, J.B. did her anger management evaluation. RP 94. The evaluator recommended J.B. engage in one-on-one therapy because of her social anxiety and delusions. RP 95. The original evaluator moved so Storm referred J.B. to another local anger management treatment provider. RP 96. J.B. did not engage in treatment with that provider. RP 97.

J.B. attended some parenting classes. RP 98. Per Storm, her counselor described J.B.’s behavior in therapy as “odd.” RP 98. For instance, during a group therapy session, J.B. told the group she had her daughter with her and that her daughter was a spoiled high-needs child. RP 98-99. J.B. demonstrated nothing she learned in parenting classes because after the children were removed, she never visited them. RP 35, 99, 103. J.B. told Dr. Lee she did not visit the children because she was scared and it was very painful for her as the children had never been away

from home. RP 35. J.B. never asked Storm about the children's medical or educational appointments. RP 99.

Per Storm, J.B. was not always honest with the Housing Authority as she lead her case worker to believe the children were coming home soon. RP 99. As long as the Housing Authority believed the children were coming home, J.B. was entitled to live in a larger home and have a larger utility grant each month. RP 99-102.

Storm never knew J.B. to be employed during the dependency. RP 101.

From Storm's perspective, J.B. was "entrenched in delusions and unable to function." RP 85. He felt termination of parental rights was in the best interest of the children. RP 111-12.

Child and family therapist Heather Peddie worked with T.D.W. for 10 months. RP 52- 5. Initially T.D.W. presented as very shy with little affect. RP 57. T.D.W.'s diagnosis was anxiety disorder not otherwise specified and features of post traumatic stress disorder (PTSD). RP 57. Because of his PTSD, T.D.W. was hypervigilant of his surroundings, anxious about what was happening around him, and experienced exaggerated startled responses. RP 60. From her perspective, T.D.W.'s reactions reinforced that T.D.W. was been traumatized. RP 60. Peddie worked with T.D.W. to manage his symptoms of anxiety, to develop

calming skills, to communicate his emotions properly, and to stop sneaking food. RP 57.

T.D.W. told Peddie his mom threatened to stab him with a knife as she was holding a knife. She threatened to drown him in a bathtub. And she threatened to drop him in a field. RP 59-60. Peddie thought T.D.W.'s story seemed credible. RP 61. During their sessions, T.D.W. expressed no interest in visiting his mom. RP 63.

Peddie believed that because T.D.W. was easily traumatized, he was particularly in need of stability. RP 64. She thought being rooted would increase T.D.W.'s resiliency and ability to do things in life he wanted and needed to do. RP 65. To be rooted, T.D.W. needed a permanent home. RP 66. Peddie explained that children T.D.W.'s age did not gauge time by a clock but by feelings in their body and changes in the seasons. Six months would feel like a long time to T.D.W. RP 65.

By the time Peddie finished treating T.D.W., he could communicate his emotions more clearly and his anxiety symptoms were not affecting his daily life. RP 66.

Storm's opinion was that J.B. made no progress toward demonstrating that she benefited from any services. She demonstrated no new skills or insight into her behavior that contributed to the harm to her children. RP 102-03. She showed no remorse. RP 103.

By the date of the termination trial, the children had been out of J.B.'s care for 2.5 years. The children lived together in a rural area with an adoptive family. RP 105. The family had farm animals. Storm described D.D.W. as a wonderful, sweet, cooperative diligent child who liked to please her caregivers. RP 104. She worked hard at school and did chores at home. RP 104.

Storm believed the children needed a permanent home. RP 106. Termination of parental rights would allow adoption to go forward. RP 110. Storm did not think J.B. was fit to parent because she made no progress and showed no willingness to make progress. RP 111. J.B. had not visited the children during the 30 months they had been in the Department's care. RP 111.

The children's CASA guardian ad litem, Kelly Burgad, also believed termination was in the children's best interest. RP 121. The children blossomed in foster care. RP 116. They were happy and more confident. RP 116. T.D.W. had ADHD and some anxiety issues but nothing major. RP 117. The children were bonded to the foster parents. RP 118. D.D.W. was never aggressive, destructive, or sneaky. She did not steal things. RP 117. Burgad believed the children needed permanency. RP 119.

After presenting the unchallenged evidence, the Department waived closing argument. RP 121. The court immediately announced its finding that termination of parental rights was in the best interest of D.D.W. and T.D.W. RP 121-24.

The court later entered written findings of fact and conclusions to support its findings. CP 174-78.

D. ARGUMENT

THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT ALLOWED DEFENSE COUNSEL TO WITHDRAW AS COUNSEL IN J.B.'S ABSENCE BEFORE THE START OF THE TERMINATION TRIAL.

The trial court committed reversible error when it allowed defense counsel to withdraw his representation of J.B. before the start of trial and without J.B.'s permission.

Preservation of the family unit is a fundamental constitutional right protected by the Fourteenth Amendment. *Quilloin v. Walcott*, 434 U.S. 246, 98 S.Ct. 549, 54 L.Ed.2d 511 (1978). Parental termination proceedings are accorded strict due process protections. *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972).

Due process protections include the right to appointed counsel for indigent parents facing termination of parental rights. RCW 13.34.090(2);

In re Dependency of Grove, 127 Wn.2d 221, 232, 897 P.2d 1252 (1995). The right derives from the due process guarantees of Article I, Section 3 of the Washington Constitution and the Fourteenth Amendment. *In re Welfare of Luscier*, 84 Wn.2d 135, 138, 524 P.2d 906 (1974). The right to the custody, control, and companionship of one's children is a fundamental right that the State may not abridge without the complete protection of due process. *Id.* at 136–37. “There can be no doubt that the full panoply of due process safeguards applies to deprivation hearings.” *Id.* at 137. *In re Welfare of Myricks*, 85 Wn.2d 252, 254–55, 533 P.2d 841 (1975). *In re Welfare of J.M.*, 130 Wn. App. 912, 921, 125 P.3d 245 (2005).

A parent facing termination of parental rights can waive her right to counsel in any of three ways: (1) voluntarily relinquishment, (2) waiver by conduct, or (3) forfeiture through “extremely dilatory conduct.” *In re Welfare of G.E.*, 116 Wn. App. 326, 334-38, 65 P.3d 1219 (2003). Neither the court’s oral ruling nor its written order specified how J.B. ostensibly waived her right to counsel.

The record does not support that J.B. voluntarily relinquished her right to counsel. J.B. requested counsel when she received notice of the Department’s intent to terminate her parental rights. The court appointed counsel. Nothing in the record suggests J.B. later made an affirmative request to proceed to trial without attorney presentation. A waiver of the

right to counsel in termination proceedings must be expressed on the record and be knowingly and voluntarily made. *G.E.*, 116 Wn. App. at 333.

Nor does the record support waiver by conduct. If a parent engages in dilatory tactics or hinders a termination proceeding, a court may find that the parent waived her right to counsel by conduct. *G.E.*, 116 Wn. App. at 334-35. For example, in *In re Dependency of A.G.*, 93 Wn. App. 268, 278, 968 P.2d 424 (1998), defense counsel asked to withdraw on the first day of a termination trial because the mother did not appear, her whereabouts were unknown, she knew when and where the termination trial was being held, and counsel did not know how the client wished to proceed. The trial court allowed counsel to withdraw and the withdrawal was affirmed on appeal. The court found that allowing counsel to withdraw at the beginning of trial did not violate the mother's due process rights because the mother's inaction was the cause. *A.G.*, 93 Wn. App. at 277-78. The court reasoned that appointed counsel "could not effectively or ethically represent her." *A.G.*, 93 Wn. App. at 278.

The record here does not support J.B. waived her right by conduct. J.B. wanted an attorney. She twice had had contact with her attorney prior to trial. The first of the two appointments lasted three hours. During those three hours, surely defense counsel gleaned J.B.'s impression of the case

and why J.B. thought it was wrong for the State to terminate her rights. Dr. Lee diagnosed J.B. with social anxiety. Coming to court and sitting through a termination trial would be next to impossible for J.B. Given her anxiety, even meeting with her attorney would be difficult. As attorney Elcock had reviewed the discovery, he knew of J.B.'s social anxiety diagnosis. Elcock should not have been taken aback by J.B.'s inability to be a more effective communicator.

Unlike the trial court in *A.G.* the court here did not find Elcock could not effectively or ethically represent J.B. Instead, the record is silent on the court's reason for allowing Elcock to withdraw. Elcock claimed no ethical concerns. He just did not know how J.B. wanted him to argue the case. Elcock knew J.B. wanted her parental rights preserved. Presumably, as counsel was appointed by the trial court, he had the requisite knowledge and trial skills to raise objections, argue the evidence did not meet the RCW 13.34.180 and RCW 13.34.190 elements for termination, and strenuously advocate against the termination of his client's J.B.'s legal rights in her children.

Finally, a parent can forfeit her right to counsel irrespective of her intent to have professional representation. *G.E.*, 116 Wn. App. 337. But conduct resulting in forfeiture must be more severe than conduct sufficient to warrant waiver by conduct. A parent's conduct must be "extremely

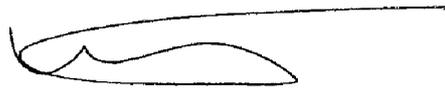
dilatory” to result in forfeiture. *G.E.*, 116 Wn. App. 337. For example, a person who is abusive toward her attorney may forfeit her right to counsel. Nothing in the record suggests J.B. forfeited her right to counsel and the trial court made no finding she did so.

E. CONCLUSION

The trial court erred when it allowed J.B.’s appointed counsel to withdraw as counsel at the start of the termination trial without J.B.’s explicit permission. The denial of representation deprived J.B. the counsel she is guaranteed. As a consequence, the termination of J.B.’s parental rights in D.D.W. and T.D.W. must be reversed.

Dated this 6th day of May 2015.

Respectfully submitted,



LISA E. TABBUT, WSBA #21344
Attorney for Appellant J.B.

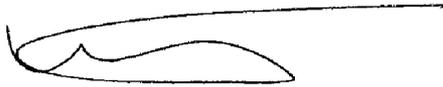
CERTIFICATE OF SERVICE

Lisa E. Tabbut declares as follows:

I certify that on May 6, 2015, efiled the Brief of Appellant/Motion for Accelerated Review with (1) the Court of Appeals, Division Two; (2) Assistant Attorney General Matthew Etter at matt.etter@atg.wa.gov and by mail at Office of Attorney General, 1220 Main St., Ste. 510, Vancouver, WA, 98660-2964; and (3) emailed the brief to mother J.B.

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

Signed May 6, 2015, in Winthrop, Washington.

A handwritten signature in black ink, appearing to read 'Lisa E. Tabbut', written over a horizontal line.

Lisa E. Tabbut, WSBA No. 21344
Attorney for Appellant J.B.

COWLITZ COUNTY ASSIGNED COUNSEL

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