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STATE OF WASHINGTON

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**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

In re the Dependency of:

D.D.W. and T.D.W.,

Minor Children.

BRIEF OF RESPONDENT

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I. INTRODUCTION

This appeal involves the welfare of two children – D.D.W., a 13-year-old girl, and T.D.W., her 9-year-old brother. The children have been in the custody of the Department of Social and Health Services, and in foster care, for more than three years.

They were taken into protective custody in early May 2012 after D.D.W. disclosed to medical and law enforcement personnel that her mother, J.B., put a knife to her throat and threatened to kill her. The mother then drove to a vacant field and showed both D.D.W. and T.D.W. where she planned to put their bodies.

A dependency was established and the mother was offered an array of services, including mental health treatment, in an attempt to assist her in correcting her parenting deficiencies and in reuniting with her children. She participated in two evaluations and in some limited services, but she refused to engage in the recommended treatment, refused to communicate with the Department, and refused to visit her children the entire time they were in foster care.

An attorney was appointed to represent her in the termination action, but the mother refused to cooperate with him in preparing for trial. Because her attorney did not know the mother's position on the issues before the court, he did not believe he was able to effectively represent her

at trial. Consequently, he moved to withdraw. The mother did not object. She knew the day, time and place of the hearing on the withdrawal motion and of the trial, but she did not appear for either. Her attorney's motion to withdraw was granted at the beginning of the termination trial.

The Department then proceeded with its case on the merits. At the end of trial, the court terminated the mother's parental rights. She appeals, claiming that her right to counsel was violated when, without her express permission, the trial court granted her attorney's motion to withdraw. Her argument is without merit. The termination order should be affirmed.

II. RESTATEMENT OF THE ISSUE

Does a parent waive or forfeit her right to counsel when she repeatedly refuses to participate in trial preparations; fails to articulate her position to her attorney; fails, after proper notice, to object to her attorney's consequent motion to withdraw; and fails to appear for both the motion hearing and the termination trial?

III. STATEMENT OF THE CASE

A. Facts Supporting The Order Terminating Parental Rights

D.D.W. and T.D.W. were ten and six years old when they were removed from their mother's care on May 4, 2012. RP at 71. The mother had taken the children to a Vancouver hospital emergency room at 1:00 a.m., insisting something was wrong with her daughter, D.D.W., and

said she wanted to have some type of mental health assessment done on D.D.W. RP at 73-73; Ex. 3.

When a hospital nurse asked D.D.W. why she thought she was there, the child told her that her mother had accused her of stealing money, demanded she return it, and then told the child to bring her a knife. After D.D.W. gave her mother the knife, the mother pulled back the child's head, put the knife to her throat and threatened to kill her if she didn't get the money back. RP at 75; Ex. 3. Later that night, the mother drove the children around in a car and showed them the field where she said she would place their bodies. RP at 75; Ex. 3. Hospital staff called law enforcement and the children were placed in the Department's custody. Ex. 3.

After the children were placed in foster care, but before dependency was established, T.D.W. told his therapist that his mother had threatened to stab him with a knife; he said she made this threat while she was holding a knife. RP at 61. He also said his mother threatened to drown him in the bathtub and drop him off in a field. RP at 61. The therapist testified that these disclosures were spontaneous and credible. RP at 61.

Dependency was established after a two-day contested hearing, at which the mother did not appear. Ex. 3.¹ The dependency and disposition order required the mother to maintain regular, weekly contact with her social worker and to keep the Department apprised of her current address and telephone number. It also required her to: (1) complete a psychological evaluation and follow all recommendations; (2) regularly attend individual counseling; (3) complete an anger management evaluation and follow all recommendations; and (4) regularly attend and participate in a parenting class. Ex. 3.

The mother did not complete the psychological evaluation until August 2013, more than a year after the dependency petition was filed. RP at 21, 74. The evaluating psychologist, Jeffrey Lee, testified that the mother has a delusional disorder, persecutory type.² RP at 26. Dr. Lee testified that the diagnosis was “provisional” because there was insufficient data to suggest that her delusions impacted all areas of her life. RP at 26, 43. With regard to the dependency action, he described her as perceiving that “everyone is against her, her attorneys are against her, her

¹ The mother unsuccessfully appealed the order of dependency as to each child. Court of Appeals Cause Nos. 44421-6-II and 44431-3-II; Supreme Court Cause No. 89284-9.

² The mother’s statement that Dr. Lee diagnosed her with “social anxiety” is not supported by the record. Brief of Appellant (Br. Appellant) at 16. Dr. Lee testified the mother had “a lot of social anxiety – I mean she – it’s hard for her to be in a group,” and he, therefore, recommended individual therapy. RP at 92. Her “social anxiety” is not a diagnosis and Dr. Lee said nothing about the mother not being able to attend court hearings.

case worker is against her. Treatment providers are against her – all the treatment providers in Clark County are working with and in cahoots with [the Department] and so she’s . . . afraid to go to them.” RP at 42-43.

Dr. Lee also testified that the mother presents her child, D.D.W., “as so demanding and so oppositional and so defiant that all parts of her life are falling apart because of [D.D.W.] and her behaviors.” RP at 44. “[T]he child is the focus of all the problems in her life.” RP at 44.

The social worker, Kevin Storm, testified that the mother was “entrenched in her delusions and unable to function.” RP at 85. He said she described D.D.W. as a “monster child” who was violent toward her brother and who would steal and destroy property. RP at 85. The mother told him that the family was evicted from their apartment because D.D.W. had vandalized property, but when the social worker checked with the housing authority, this turned out not to be true. RP at 86. And none of the behaviors the mother complained about were seen in D.D.W. during the 30 months she was in foster care. RP at 104, 118. D.D.W. was described by the social worker as “a very wonderful child, very sweet and cooperative. She really likes to please her care givers and she’s a diligent child. She works hard at school . . . she’s just an amazing young lady.” The Court Appointed Special Advocate (CASA) said that D.D.W. was very withdrawn, quiet and intimidated when she first came into care, but

that both children have changed a lot; “they have blossomed and they are happy.” RP at 116.

Dr. Lee did not have information about whether D.D.W. was demanding or not, but said even if she were demanding, he would expect a parent to seek services, such as family therapy, to address any issues. RP at 45. But this mother was unwilling to engage in any service that would help alleviate the problems. RP at 36, 45. “She really placed the burden and responsibility on [D.D.W.]” RP at 38.

Dr. Lee recommended two types of treatment: individual therapy and family therapy. RP at 46. The mother went to individual therapy just twice; she never attended family therapy. RP at 92, 93.

The mother also participated in an anger management evaluation. RP at 94. The evaluator recommended one-on-one treatment. RP at 95. But the mother never engaged in that treatment. RP at 96-97.

Her anger was an issue in her relationship with the social worker throughout the dependency. RP at 79. He testified that the mother was uncooperative from the first time he talked with her. RP at 79. She refused to have contact with him, so their communication was almost exclusively through his monthly letters to her, Exs. 10 through 30, and her after-hours voicemail messages to him. RP at 80. Her messages were angry, sarcastic and threatening. RP at 80.

She took a parenting class, but was never able to apply the parenting skills she learned because she refused to visit her children and expressed no interest in how they were doing. RP at 98-99.

From the time the children entered foster care in May 2012 to the time of the termination trial, two and one-half years later, the mother made no progress in addressing her parenting deficiencies. RP at 102, 111. At the time of the termination trial she was unable to meet the children's basic needs, and she continued to pose a threat to their safety. RP at 50, 107, 119.

She was described by the social worker as "a very mentally ill person to the point where she has made threats to murder her own children and has not shown the willingness to address that issue and make any progress on that whatsoever. And the fact that she has never visited her children in the last almost thirty months . . . there's no way to measure if she's made any progress at all." RP at 111.

The children, meanwhile, "have moved on." RP at 109. They were placed together in the same foster-adopt home. RP at 119. The testimony was that these children need stability, security and permanency. RP at 66, 106, 120.

When the Department finished presenting its case, the trial court had heard testimony from four witnesses – the Department social worker,

the psychologist who evaluated the mother, T.D.W.'s therapist and the CASA – and had considered 30 exhibits. The trial court found that the Department had proved the statutory elements necessary for termination and the court terminated the mother's parental rights. *See* RP at 122-24 (Oral Ruling); CP at 161-65.³

The mother was not present and was not represented at trial.

B. Facts Relating To The Withdrawal Of The Mother's Attorney

At the beginning of trial, the mother's court-appointed attorney, Douglas Elcock, was permitted to withdraw. CP at 155-56.

Throughout the proceedings the mother had difficulty trusting, cooperating and communicating with her appointed counsel. RP at 6, 8, 42. Even before the dependency fact finding hearing, she had fired two attorneys. RP at 7, 8. The Department brought this to the dependency court's attention, and asked the court to appoint a Guardian Ad Litem (GAL) to assist the mother in communicating and cooperating with her counsel. RP at 5. The dependency court appointed attorney-GAL Darcy Scholts to serve in that capacity in the dependency, and then appointed her again in the termination action. RP at 5-6; CP at 34.⁴ Although she had both counsel and a GAL, the mother had difficulty functioning in court;

³ The parental rights of the children's fathers were terminated October 4, 2013 Exs 7 and 8.

⁴ The basis of the GAL appointment was not incompetency on the mother's part, and the trial court never found the mother to be incapacitated. RP at 8

“Most of the time she [did] not appear.” RP at 7 (statement of GAL Scholts). Her contact with the GAL became more and more sporadic as the proceedings continued – to a point where, in October 2014, the GAL had had little communication with her. RP at 6.

Mr. Elcock represented the mother both in the dependency, *see, e.g.*, Ex. 9, and in the termination action. CP at 37-39. In the termination action, he filed an Answer and Affirmative Defenses, CP at 117-121; made discovery requests, CP at 93-94; filed motions, CP at 62-64, 90-92; sent Requests for Admissions, RP at 4; and responded to pre-trial evidentiary motions, CP at 52.

The termination trial was scheduled for October 29-30, 2014. CP at 75. In early September 2014, Mr. Elcock began his trial preparation. He reviewed most of the 1,500 pages of discovery provided to him by the Department. CP at 103. Then, on September 10, 2014, he and GAL Scholts met with the mother for about three hours to begin discussing the pending trial and the issues to be confronted. RP at 3; CP at 103. The purpose of the meeting was to review the discovery documents and “in particular to try to get . . . [the mother’s] point of view on the case.” RP at 3. The mother apparently indicated that she did not want to voluntarily relinquish her parental rights, but her position on the involuntary termination was not expressed. RP at 6.

Mr. Elcock told the mother that they needed to “gear up for trial” and scheduled additional telephone conversations for the following week; by then, however, “she was unavailable and her address had changed.” RP at 3. He sent her a letter and documents on September 23, but she did not respond until October 1, when she emailed Mr. Elcock and provided him with a new mailing address – a P.O. Box number in Oregon. CP at 104. He responded to her email that same day, underscoring “the need for [her] immediate and active participation in the case in preparation for trial.” CP at 104. The following day he re-sent the letter and documents to her new address. CP at 104.

Mr. Elcock finally was able to reach the mother by telephone on October 7, 2014. They discussed options and the need for her to be in daily contact with him as the case preparation proceeded. She agreed to be available by phone to discuss the case further. CP at 104. She then missed her appointment with him the following day. RP at 2-3; CP at 104.

Mr. Elcock continued to telephone her and to send her emails, “asking her to participate with me so we can mount a defense if she wants to contest the termination.” RP at 4. She did not respond. RP at 4.

On October 9, Mr. Elcock sent the mother an email stating in part: “We need to discuss your case options and your decision. I will honor you[r] decision to proceed with trial if you so elect but I cannot do it

without your participation. I need an immediate response or I will be forced to withdraw. I need your assistance.” CP at 107. Still the mother did not respond. RP at 4.

On October 10, 2014, Mr. Elcock filed a motion asking the court for permission to withdraw. CP at 102-07. The mother was provided a copy of the motion by email on October 9 and was also served by certified mail and regular mail. CP at 106, 125-26, 146-47. Mr. Elcock notified the mother before the other parties “in hopes that subsequent client contact would alleviate the need to proceed with the motion.” CP at 125.

The hearing on the motion was set for October 27, two days before trial. The mother did not appear. CP at 145. The trial court declined to rule on the motion at that time, reserving its ruling “until the day of trial to allow mother a chance to appear.” CP at 145. But she did not appear for trial. RP at 1.

Mr. Elcock told the trial court that he did not know how the mother wanted him to argue the case and, because of that, he wanted to withdraw. RP at 5. The trial court found the facts stated in his motion and declaration to be true and to constitute good cause, and it granted the motion. RP at 5; CP at 155-56. The trial court also dismissed GAL Scholts prior to trial. CP at 158-59.

The mother did not contact Mr. Elcock again until late December -- some two months after the trial -- to learn whether her parental rights had been terminated. CP at 178. She told him she wanted to appeal, and this Court granted her motion to extend the time for filing her notice of appeal to February 3, 2015.

IV. ARGUMENT

The mother argues that the trial court committed reversible error when it permitted her court-appointed counsel to withdraw without her express permission. Brief of Appellant (Br. Appellant) at 13. Her argument is not supported by law or by the facts of this case.

Although a parent has a fundamental liberty interest in the care, custody and control of her child, *In re Welfare of Sumey*, 94 Wn.2d 757, 762, 621 P.2d 108 (1980), this right is not absolute. *Sumey*, 94 Wn.2d at 762; *In re Welfare of M.R.H.*, 145 Wn. App. 10, 29, 188 P.3d 510 (2008). In termination cases, the parent's legal rights are balanced against the child's right to physical and mental health, safety, and basic nurture -- which includes the right to a safe, stable, and permanent home and a speedy resolution of the dependency proceeding. RCW 13.34.020; *In re Welfare of A.G.*, 155 Wn. App. 578, 589, 229 P.3d 935 (2010). Ultimately, where the rights of the child and the rights of the parent conflict, the rights and safety of the child must prevail.

RCW 13.34.020: *In re Welfare of Sego*, 82 Wn.2d 736, 738, 513 P.2d 831 (1973); *In re Dependency of T.R.*, 108 Wn. App. 149, 154, 29 P.3d 1275 (2001).

To protect the significant interests of parents in termination proceedings, Washington law guarantees parents the right to counsel. RCW 13.34.090(2); *In re Dependency of Grove*, 127 Wn.2d 221, 232, 897 P.2d 1252 (1995); *In re Dependency of V.V.R.*, 134 Wn. App. 573, 581, 141 P.3d 85 (2006). RCW 13.34.090(2) provides:

At all stages of a proceeding in which a child is alleged to be dependent, the child's parent . . . has the right to be represented by counsel, and if indigent, to have counsel appointed for him or her by the court. Unless waived in court, counsel shall be provided to the child's parent. . . . if such person (a) has appeared in the proceeding or requested the court to appoint counsel and (b) is financially unable to obtain counsel because of indigency.

Like the fundamental right itself, the right to counsel is not absolute, and may be waived or forfeited. *V.V.R.*, 134 Wn. App. at 581-82.

A parent may lose her right to counsel by: (1) voluntarily relinquishing it, (2) waiving it through conduct, such as inaction, and (3) forfeiting it through “extremely dilatory conduct.” *In re Welfare of G.E.*, 116 Wn. App. 326, 334, 65 P.3d 1219 (2003) (citing *City of Tacoma v. Bishop*, 82 Wn. App. 850, 859, 920 P.2d 214 (1996)).

A voluntary relinquishment requires a knowing and voluntary waiver and is usually indicated by an affirmative, verbal request of the parent in court, after the court has informed the parent of the consequences of proceeding without counsel. *GE*, 116 Wn. App. at 334. The Department acknowledges that that the mother here did not voluntarily relinquish her right to counsel.

Instead, the mother waived or forfeited that right by her own actions and inactions.

Two cases – *In re Dependency of A.G.*, 93 Wn. App. 268, 968 P.2d 424 (1999), and *In re Dependency of E.P.*, 136 Wn. App. 401, 149 P.3d 440 (2006)⁵ – are directly on point and require a determination that the mother waived or forfeited her right to counsel.

In *A.G.*, as in this case, the mother’s attorney was allowed to withdraw at the beginning of the termination trial. The mother in *A.G.*, like the mother here, was required to keep the Department apprised of her address and telephone number. She failed to do that. Her attorney had written letters to the mother and called her telephone number, but she did not respond. “She did not provide any explanation for her failure to respond to the efforts of her attorney or DCFS, even though she knew a

⁵ The Supreme Court granted review in *E.P.*, see *In re Przespolewski*, 161 Wn 2d 1014, 171 P.3d 1057 (2007), but dismissed the appeal when the parties settled the case.

termination proceeding was set.” *A.G.*, 93 Wn. App. At 278. After the mother’s attorney explained his efforts to contact and engage the mother, the trial court granted his motion to withdraw.

Contrary to the mother’s argument, Br. Appellant at 16, there is nothing in the *A.G.* decision to suggest the trial court made a specific finding that the mother’s attorney could not effectively or ethically represent the mother. *See A.G.*, 93 Wn. App. at 274-75 (“Noting his ‘above and beyond’ efforts, the trial court granted counsel’s request and excused him from further proceedings.”) It was the Court of Appeals that concluded the mother’s attorney had “ably represented her . . . until the termination proceeding, but because of [the mother’s] own inaction, he could not effectively or ethically represent her through the termination trial.” *A.G.*, 93 Wn. App. at 278. Without explicitly stating it, the *A.G.* decision appears to hold that the mother waived her right to an attorney by her own conduct – her inaction.

The attorney for the mother in *E.P.* also was allowed to withdraw at the beginning of the termination trial. As in this case, the attorney sent letters to the mother, but she did not respond. He told the trial court that he had “absolutely no idea what her position is.” *E.P.*, 136 Wn. App. at 404. The trial court’s rationale for granting the attorney’s motion to withdraw is not reflected in the Court of Appeals

decision. However, the appellate court's decision is clear that the mother's failure to communicate with her attorney put the attorney in the same position as the attorney in *A.G.* – he “could not effectively or ethically represent her in the termination trial.” *E.P.*, 136 Wn. App. at 406.

The mother's failure to stay involved in the legal process and failure to keep in contact with her attorney, constituted “extremely dilatory” conduct, sufficient to justify forfeiture of her right to counsel. *Id.*

The facts of this case are indistinguishable from those of *A.G.* and *E.P.* Like the mothers in those cases, this mother here had repeated opportunities to let her attorney know her position on the issues before the court in the termination action. Like the mothers in *A.G.* and *E.P.*, she did not respond to her attorney's pleas for collaboration or communication. She missed appointments and ignored her attorney's efforts to learn of her position. Her attorney had little choice but to seek an order authorizing withdrawal – there was no way he could effectively represent her without her help. Even when he moved to withdraw, her attorney, and then the trial court, provided her an opportunity to stop the withdrawal. The mother rejected their offers.

The mother argues that attorney Elcock knew she wanted her parental rights preserved, Br. Appellant at 16, but this argument is not supported by the record. Mr. Elcock repeatedly told her he did not know what her position was. For example, he told the court that he contacted her to ask “her to participate with me so we can mount a defense *if she wants to contest the termination.*” RP at 4 (emphasis added). When he contacted her about his intent to withdraw, he wrote: “I will honor you[r] decision to proceed with trial *if you so elect* but I cannot do it without your participation. I need an immediate response or I will be forced to withdraw. I need your assistance.” CP at 107 (emphasis added). His declaration in support of the motion to withdraw states that the mother’s “assistance was and is still required . . . *if she intends to defend against the pending termination trial.*” CP at 105 (emphasis added). The record shows that Mr. Elcock did not know what his client wanted. Without that knowledge, he could not effectively represent her.

The mother unfairly blames Mr. Elcock for not intuiting that she opposed the termination and for not representing that position at trial. Br. Appellant at 15-16. But her consistent rejection of her attorney’s diligent efforts to engage her in the process equally supports a finding that she did not want to contest the termination. *See, e.g., In re Welfare of Parzino*, 22 Wn. App. 88, 587 P.2d 201 (1978) (where a parent in a

termination proceeding does not maintain contact with her attorney, the attorney “can only assume that she would want him to resist the petition, although from her conduct it would appear that may not be the case” and the attorney cannot represent her in her absence).

Without her input and assistance, Mr. Elcock could not effectively represent her. The trial court properly found the facts stated in Mr. Elcock’s motion and declaration to be true and it properly allowed him to withdraw. She lost her right to counsel through waiver by inaction or through forfeiture due to her extremely dilatory conduct.

The trial court correctly moved forward with the trial, despite the mother’s absence. Her children also have rights in these proceedings. RCW 13.34.020. And those rights “cannot be put on hold interminably because a parent is absent from the courtroom and has failed to contact . . . her attorney.” *In re Dependency of C.R.B.*, 62 Wn. App. 608, 616, 814 P.2d 1197 (1991).

Both *A.G.* and *E.P.* held that such a hearing comports with due process. The parents in those cases, like the mother here, were afforded meaningful hearings, despite the absence of an attorney and the presence of the parent. *E.P.*, 136 Wn. App. at 407.

It certainly would have been preferable if [the mother] had been able to present her side of the case. But she had notice and chose

not to appear. Her attorney could not represent her because he did not even know . . . what position she would want to take.

A.G., 93 Wn. App. at 279.

The Department proved its case by clear, cogent and convincing evidence. CP at 164 (Conclusions of Law). The trial court's orders allowing Mr. Elcock to withdraw and terminating the mother's parental rights should be affirmed.

V. CONCLUSION

For the reasons stated above, the court should affirm the trial court's order terminating the mother's parental rights.

RESPECTFULLY SUBMITTED this 5th day of June, 2015.

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