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Supreme Court No. _____
Court of Appeals No. 24098-3-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re the Welfare of E.P., a minor,

STATE of WASHINGTON/DSHS,

Respondent

v.

RENE PRZESPOLEWSKI,

Petitioner.

APPEAL FROM THE SUPERIOR COURT OF CHELAN COUNTY

The Honorable Bart Vandergrift, Judge

PETITION FOR REVIEW

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TABLE OF CONTENTS

A. IDENTITY OF PETITIONER.....1

B. COURT OF APPEALS DECISION.....1

C. ISSUES PRESENTED FOR REVIEW1

D. STATEMENT OF THE CASE.....2

E. REASONS WHY REVIEW SHOULD BE ACCEPTED.....7

F. ARGUMENT.....7

1. THIS COURT AND ALL DIVISIONS OF THE COURT OF APPEALS HAVE CONSISTENTLY RULED THAT PARENTS ARE ENTITLED TO COUNSEL IN PARENTAL DEPRIVATION PROCEEDINGS. DIVISION THREE’S RULING THAT PETITIONER FORFEITED HER RIGHT TO COUNSEL CONFLICTS WITH THESE DECISIONS.....7

2. THE DEPRIVATION OF COUNSEL RESULTED IN AN UNACCEPTABLY HIGH RISK OF ERROR AT THE TERMINATION TRIAL.....12

3. THE “TRIAL” FAILED TO ESTABLISH THE STATUTORY REQUIREMENTS FOR TERMINATION OF PARENTAL RIGHTS.....18

G. CONCLUSION19

TABLE OF AUTHORITIES

WASHINGTON CASES

In re the Dependency of A.G., 93 Wn. App. 268, 968 P.2d 424 (1998)	10, 11
In re the Dependency of C.R.B., 62 Wn. App. 608, 814 P.2d 1197 (1991)	7, 12, 13, 14
In re the Welfare of E.P., _ Wn. App. _, _ P.2d _ (Dec. 21, 2006)....	1, 17
In re the Dependency of Grove, 127 Wn.2d 221, 897 P.2d 1252 (1995)	8
In re the Dependency of G.E., 116 Wn. App. 912, 65 P.3d 1219 (2003)	8
In re the Welfare of J.M., 130 Wn. App. 912, 1251 P.3d 245 (2005)	8, 17
In re Luscier, 84 Wn.2d. 135, 524 P. 2d 906 (1974)	8, 13
In re the Dependency of Moseley, 34 Wn. App. 179, 660 P.2d 315, <u>rev. denied.</u> , 99 Wn.2d 1018 (1983).....	8
In re the Welfare of Ott, 37 Wn. App. 234, 679 P.2d 372 (1976)	16
In re Petrie, 40 Wn.2d 809, 246 P.2d 465 (1952)	7, 10
In re the Dependency of Ramsey, 134 Wn. App. 573, 141 P.3d 85 (2006)	9
In re Sego, 82 Wn.2d 736, 513 P.2d 831 (1973).....	18

State v. Lee , 87 Wn.2d 932, 558 P.2d 236 (1976)	16
Tacoma v. Bishop, 82 Wn. App. 830 920 P.2d 214 (1996).....	8, 9

FEDERAL CASES

United States v. Goldberg, 67 F.3d 1092 (3 rd Cir. 1995).....	8, 9, 12
--	----------

RULES, STATUTES

RAP 13.4(b).....	7, 19
RCW5.44.010.....	16
RCW 13.34.020.....	14
RCW 13.34.090(1).....	1,8
RCW 13.34.090(2).....	8

UNITED STATES SUPREME COURT CASES

Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed. 705 (1967).....	12
Santosky v. Kramer, 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982).....	13, 14
Stanley v. Illinois, 405 U.S. 645, 31 L.Ed.2d 599, 102 S.Ct. 1388 (1982).....	7

CONSTITUTIONAL PROVISIONS

WA Const., Article 1, sec. 3.....	1,7
U.S. Const., Fourteenth Amendment.....	1, 7

A. IDENTITY OF PETITIONER

Petitioner Rene Michelle Przespolewski, the appellant below, asks this Court to review the decision of the court of appeals referred to in Section B.

B. COURT OF APPEALS DECISION

Ms. Przespolewski seeks review of the published Court of Appeals decision in In re the Dependency of: E.P., ___ Wn. App. ___, ___ P.2d ___ (filed December 21, 2006). A copy of the decision is attached as appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. The Juvenile Court Act provides that any party to a parental termination proceeding has the right to counsel, introduce evidence, to be heard, and to examine witnesses. RCW 13.34.090(1)(2). The right to counsel in parental deprivation proceedings is also based on Article 1, sec. 3 of the Washington Constitution, and the fourteenth amendment to the U.S. Constitution. By allowing trial counsel to withdraw on the day of trial, did the trial court violate Ms. Przespolewski's due process right to counsel?

2. Whether Ms. Przespolewski forfeited her right to counsel by inconsistently attending court dates and sporadically communicating with counsel.
3. During trial, non-certified copies of dependency documents were admitted, State's witnesses were not subject to cross-examination, State's witnesses were allowed to relay damaging hearsay information, the guardian ad litem's report was admitted after the close of evidence, and no evidence was presented on Ms. Przespolewski's behalf. Did the deprivation of counsel result in an unacceptably high risk of error?
4. Whether the flawed "trial" established the statutory requirements for termination of Ms. Przespolewski's parental rights.

D. STATEMENT OF THE CASE

The facts are set forth in the Brief of Appellant at 3-6. (Appendix B) In summary, Ms. Przespolewski gave birth to E.P. on July 12, 2004, while she was incarcerated. The Department of Social and Health Services (DSHS) subsequently filed a dependency petition alleging no parent capable of caring for the infant. Br. of App. at 3-4.

At the shelter care hearing on July 14, 2004, Ms. Przespolewski requested counsel and actively participated in the hearing, questioning the

court about the frequency of visitation and whether she would be allowed to nurse her son. (7-14-04 RP 19, 23-24) The dependency period proved frustrating and confusing for Ms. Przespolewski: she had many questions about the dependency process, but her appointed attorney failed to adequately communicate with her, and the scant visitation with her infant was extremely distressing. (8-11-04 RP 7) Ms. Przespolewski told the court:

Sir, I'm just really having a hard time understanding all this legality that's being – I'm not obviously a lawyer in this case. But every time I call my lawyer—I feel like I'm hitting – And I'm trying to do the best I can for – for my child . . . But how do I go about that if I don't understand what I'm doing . . . And I've asked for the last two months (inaudible) visit me and he's not visiting me. I'm not getting any visits . . . I don't understand so many things.

(9/8/04 RP 9-10)

The trial judge admonished counsel for his failure to communicate with Ms. Przespolewski, and was told to immediately visit his client in jail and confirm his visit with the court. (9/8/04 RP 10-13) The record does not indicate whether Ms. Przespolewski's lawyer ever answered her questions. At some point after the court's admonition, counsel withdrew from the case.

Ms. Przespolewski's attendance at dependency court dates was sporadic after her release from jail, but when she did appear it was clear

that she wished to contest termination of her parental rights. Unfortunately, her second lawyer moved to withdraw several times during the dependency. At a January 12, 2005, dependency review hearing, counsel asked to withdraw for lack of contact. (1/12/05 RP 4) The court ruled that if Ms. Przespolewski showed up for trial, counsel would be reappointed. (1/12/05 RP 15)

Counsel asked to withdraw again at a review hearing in February, even though he had been in contact with Ms. Przespolewski a few weeks earlier. (2-23-05 RP 9) He told the court that Ms. Przespolewski had recently resurfaced, was participating in AA/NA, and that she would be expecting him to zealously represent her at the termination hearing. (2-23-05 RP 5, 6-7) Even the assistant attorney general noted that Ms. Przespolewski had shown up for a court date in November, as well as a trial setting two weeks prior "with the intent of becoming involved in the case and asking for visitation." (2-23-05 RP 6-7) The court denied counsel's request to withdraw.

Trial counsel moved to withdraw a third time on March 30, 2005, when Ms. Przespolewski failed to show for the termination trial, claiming he had no idea whether she was opposed to termination of her parental rights. (3/30/05 RP 13, 14) The court permitted counsel to withdraw,

made no inquiries as to Ms. Przespolwski's whereabouts, and proceeded with the termination trial in her absence and unrepresented by counsel.

During the trial, the court admitted non-certified copies of court documents as evidence, and after evidence was closed, accepted the guardian ad litem's report. (3/30/05 RP 17, 18, 59, CP 18-22) Without objection, a State social worker testified about the contents of a psychological assessment by a State psychologist and relayed hearsay information regarding Ms. Przespolewski's attitude about drug treatment. (3/30/05 RP 29-30) None of the adverse witnesses were called to testify.

Further, neither of the State's two witnesses was subject to cross-examination and no evidence was presented on Ms. Przespolewski's behalf. Despite these weaknesses in the State's case, the court found the Department had sufficiently established the requisite statutory elements for termination of Ms. Przespolewski's parental rights. (3/30/05 RP 60-61, CP 12-16)

In her initial brief, Ms. Przespolewski argued that the juvenile court violated her due process right by proceeding to trial without securing her presence and without representation of counsel, resulting in an unacceptably high risk of error. Br. of App. at 7-23. However, a court of appeals Commissioner ruled that Ms. Przespolewski forfeited her right to counsel by her failure to stay in touch with counsel. Comm. ruling at 7.

(Appendix C). The Commissioner also found that despite the deprivation of counsel, Ms. Przespolewski received a fair hearing on the merits because unlike a simple default hearing, the Court heard testimony from two social workers and reviewed the guardian ad litem report. Comm. ruling at 9. (“Due process was satisfied because Ms. Przespolewski failed to exercise her opportunity to be heard and the decision to terminate her parental rights was made after a hearing on the merits”.)

Ms. Przespolewski’s motion to modify the Commissioner’s ruling was granted on April 7, 2006. (Appendix D) In their ruling, filed December 21, 2006, the majority of the panel followed the Commissioner’s decision, finding Ms. Przespolewski’s “extremely dilatory conduct” resulted in forfeiture of her right to counsel and that even though unrepresented, she received a fair trial:

[T]here was a meaningful hearing. The court took testimony, reviewed the documentary evidence, and made detailed findings on the substantive issues required to be proved by the State under RCW 13.34.180 and RCW 13.34.190.

(Slip Op. at 4-5, 7)

The Honorable John Schultheis dissented, concluding Ms. Przespolewski’s conduct did not warrant forfeiture of counsel, and the deprivation of counsel resulted in a significant risk of error. (Dissent, Slip Op. at 4-6) This petition timely follows.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The court of appeals decision conflicts with decisions from this Court and other divisions of the court of appeals, including In re Luscier, infra, In re Ramsey, infra, In re C.R.B., infra, and In re J.M., infra. The court's decision also violates Ms. Przespolewski's due process right to counsel, thus raising significant questions of law under the state and federal constitutions. For all these reasons, this court should accept review. RAP 13.4(b)(1)-(4).

F. ARGUMENT

1. THIS COURT AND ALL DIVISIONS OF THIS STATE'S COURT OF APPEALS HAVE CONSISTENTLY RULED THAT PARENTS ARE ENTITLED TO COUNSEL IN PARENTAL DEPRIVATION PROCEEDINGS. DIVISION THREE'S RULING THAT PETITIONER FORFEITED HER RIGHT TO COUNSEL CONFLICTS WITH THESE PRIOR DECISIONS.

The Due Process clauses of the state and federal constitutions protect a parent's right to the custody, care, and companionship of his/her children. U.S. Const. amend. 14; Const. art. 1, sec. 3; Stanley v. Illinois, 405 U.S. 645, 651, 31 L.Ed.2d 599, 102 S.Ct. 1388 (1982) ("When the state moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures"); In re Dependency of C.R.B., 62 Wn. App. 608, 614-15, 814 P.2d 1197 (1991). Basic due process requires notice and a sufficient time to prepare. In re Petrie, 40 Wn.2d

809, 812, 246 P.2d 465 (1952); In re Moseley, 34 Wn. App. 179, 184, 660 P.2d 315, rev. denied, 99 Wn.2d 1018 (1983).

Due process also requires the provision of counsel at parental termination hearings. RCW 13.34.090(1)(2)¹ (statutes attached as appendix E). This right derives from the constitutional guarantees of due process under the fourteenth amendment to the United States Constitution and article 1, section 3 of the Washington Constitution. In re Luscier, 84 Wn.2d 135, 137-38, 524 P.2d 906 (1974); In re the Dependency of Grove, 127 Wn.2d 221, 232, 897 P.2d 1252 (1995), In re Welfare of J.M., 130 Wn. App. 912, 921, 125 P.3d 245 (2005).

However, the right to counsel may be waived under three circumstances: (1) voluntary relinquishment; (2) conduct; or (3) forfeiture through “extremely dilatory conduct.” In re the Dependency of G.E., 116 Wn. App. 326, 334, 65 P.3d 1219 (2003) (quoting City of Tacoma v. Bishop, 82 Wn. App. 850, 859, 920 P.2d 214 (1996) (citing United States v. Goldberg, 67 F.3d 1092, 1099-1102 (3rd Cir. 1995)).

Waiver by relinquishment is defined as an “intentional and

¹ RCW 13.34.090(1) provides: “Any party has a right to be represented by an attorney in all proceedings under this chapter, to introduce evidence, to be heard in his or own behalf, to examine witnesses, to receive a decision based solely on the evidence adduced at the hearing, and to an un-biased fact-finder.”

RCW 13.34.090(2) provides in part: “At all stages of a proceeding in which a child is alleged to be dependent, the child’s parent, guardian, or legal custodian has the right to be represented by counsel, and if indigent, to have counsel appointed for him or her by the court.”

voluntary relinquishment of a known right” and typically involves requests to proceed pro se. In this situation, the court is required to caution the defendant about the risks of proceeding pro se. Bishop, 82 Wn. App. at 855-57 (citations omitted).

Forfeiture, the result of “extremely dilatory conduct”, lies at the other end of the spectrum, and can result in the loss of a right even if a defendant was not warned of the consequences of relinquishing the right. Bishop, 82 Wn. App. at 856. Examples of conduct that may result in forfeiture of counsel include a client’s abusive behavior toward counsel, asking an attorney to engage in unethical conduct, death threats, or assault against counsel. Goldberg, 67 F.3d at 1099 (citations omitted).

Division Two recently emphasized the severity of conduct required to justify forfeiture: “Because forfeiture results in loss of a right regardless of intent, a party must engage in extremely severe and dilatory conduct to establish forfeiture. Because of the harsh result, forfeiture applies in only very limited circumstances.” In re the Dependency of Ramsey, 134 Wn. App. 573, 582, 141 P.3d 85 (2006) (citations omitted).

“Waiver by conduct” is a “hybrid situation”, combining elements of waiver and forfeiture, and involves conduct less extreme than required for forfeiture. Id. Waiver by conduct requires that the defendant receive warning about the consequences of proceeding pro se. Id. Because the

trial court never warned Ms. Przespolewski about the consequences of proceeding pro se, she neither relinquished nor waived her right to counsel.

The remaining question is whether Ms. Przespolewski forfeited her right to counsel. Comparing her case to In re the Dependency of A.G., 93 Wn. App. 268, 968 P.2d 424 (1998), the court of appeals erroneously concluded that Ms. Przespolewski forfeited her right to counsel by failing to attend a shelter care review hearing in August 2004, a dependency review hearing in January 2005, and failing to communicate with counsel for several weeks prior to trial. (Slip op. at 4-5) The majority reasoned that because of her inaction, “Ms. Przespolewski’s lawyer could not effectively or ethically represent her in the termination trial.” Slip op. at 5.

The majority’s reliance on In re A.G. is misplaced. Unlike Ms. Przespolewski who periodically attended court dates and stayed in sporadic contact with counsel, including several weeks before trial, the mother in In re A.G. did nothing to indicate she wished to keep her child. After service of the termination petition, she failed to show for any court dates and failed to contact her attorney or caseworker for six months prior to trial. In re A.G., 93 Wn. App. at 274, 278. Further, despite counsel’s “above and beyond” efforts to find his client during the dependency, he was unsuccessful, and therefore had no idea whether she wanted to contest

the termination of her parental rights. Id. at 273-75. The appellate court held that the mother's due process rights were not violated by allowing counsel to withdraw because her complete and total inaction justified forfeiture of her right to counsel. Id. at 279.

The facts in this case are critically distinguishable. Just five weeks before trial, counsel had been in contact with Ms. Przespolewski, knew where she was living, that she was participating in services, and would be expecting zealous representation at trial. (2/23/05 RP 5) In his request for a continuance at the February 23, 2005 review hearing, counsel reported that Ms. Przespolewski very much wanted to care for her child:

Now that the mother's whereabouts are known and her intention is to engage in services including intensive drug and alcohol treatment, and also based upon the fact that the mother has been attending AA meetings and NA meetings, and has obtained a sponsor, has an appointment for re-assessment for ADATSA funding for treatment, and in every way intends to mother this child...

(CP 31-32) The record is clear that Ms. Przespolewski did not desire termination of her parental rights. Moreover, unlike the mother in In re A.G., Ms. Przespolewski attended a number of court dates and consistently requested increased visitation with her son. (Petition at 2-4)

In sum, the record does not support the extreme remedy of forfeiture. Although Ms. Przespolewski's contact with counsel was

sporadic, she had been in fairly recent contact with counsel before trial. Compare, In re C.R.B., 62 Wn. App. at 17 (finding counsel “appeared” for mother at termination hearing because “[mother] communicated her intention of contesting the termination to her attorney only two months earlier.”)(emphasis added). And although Ms. Przespolewski did not consistently attend court dates, she had attended a hearing just weeks before trial. (2-23-05 RP 6-7) Ms. Przespolewski’s conduct simply did not warrant the drastic remedy of forfeiture.

2. THE DEPRIVATION OF COUNSEL RESULTED IN AN UNACCEPTABLY HIGH RISK OF ERROR AT THE TERMINATION TRIAL.

The unwarranted deprivation of counsel discussed in argument 1, resulted in an unacceptably high risk of error. The right to counsel is considered so fundamental in our adversarial system that its deprivation can never be deemed harmless. Chapman v. California, 386 U.S. 18, 23, 87 S.Ct. 824, 17 L.Ed. 705 (1967). “It is well settled that the erroneous deprivation of a criminal defendant’s fundamental right to the assistance of counsel is per se reversible error.” Goldberg, 67 F.3d at 1103.

A Columbia Law Review study cited in one of this Court’s leading opinions on the right to counsel, cautioned:

Since there is no evidence indicating that the average respondent who can retain counsel is better or less

neglectful than one who cannot, the conclusion seems inescapable that a significant number of cases against unrepresented parents result in findings of neglect solely because of the absence of counsel. In other words, assuming a basic faith in the adversary system as a method of bringing the truth to light, a significant number of neglect findings (followed in many cases by taking a child from his parents) against unrepresented indigents are probably erroneous. It would be hard to think of a system of law which works more to the oppression of the poor than the denial of appointed counsel to indigents in neglect proceedings.

In re Luscier, 84 Wn. 2d at 137-138 (citing Child Neglect: Due Process for the Parent, 70 Colum. L.Rev. 465, 476 (1970)).

In evaluating due process violations, Washington courts apply a three-prong test: (1) the parent's interests; (2) the risk of error created by the procedure used by the State; and (3) the State's interest. Santosky v. Kramer, 455 U.S. 745, 754, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982); In re Dependency of C.R.B., 62 Wn. App at 614-15. (citations omitted).

Applying the three-prong test to these facts, the trial court's denial of counsel was constitutional error. Ms. Przespolewski's interest was fundamental and "commanding", as the proceeding ultimately denied her parental rights to her child. Santosky, 455 U.S. at 758; C.R.B., at 615. The child also has an interest in preventing the erroneous termination of its relationship with its natural parents. See, Santosky, 455 U.S. at 765. ("the parents and the child share an interest in avoiding erroneous termination").

Thus, Ms. Przespolewski's and E.P.'s rights require deference absent a significant countervailing interest.

The State's interests are twofold: a *parens patriae* interest in preserving and promoting the welfare of the child, and providing a speedy resolution to a dependency proceeding.² (appendix E) Requiring counsel to represent Ms. Przespolewski at the termination trial would not have impaired the State's interest in a speedy resolution of the case or the welfare of the child. In fact, given E.P.'s interest in preventing the erroneous termination of his right to the love and companionship of his mother, and the significant likelihood of error in a trial without counsel, it was in his best interests that his mother be provided counsel at trial. The State must concede that no particular exigency justified the deprivation of counsel in this case.

The most troubling aspect of this case is the risk of error created by the court's failure to provide counsel to Ms. Przespolewski. In evaluating this prong, the majority erroneously concluded that Ms. Przespolewski received a "meaningful" hearing, writing, "The record reflects the court considered the case on its merits and held the State to the requisite burden of proof on all issues. The risk of error was not unconscionably high."

² See RCW 13.34.020 ("The right of a child to basic nurturing includes the right to a safe, stable, and permanent home and a speedy resolution of any proceeding under this chapter.")

Slip Op. at 7.

But the court's conclusion lacks any factual record to support it. Contrary to the majority's interpretation, the record discloses nothing close to a meaningful and fair hearing. First, it is not clear that Ms. Przespolewski ever understood the dependency and termination processes as the record is replete with examples of her lack of knowledge and confusion, as well as counsel's failure to adequately communicate with her. See Petition at 3-4, see, also, Dissent at 4 (noting Ms. Przespolewski's confusion at an early hearing, resulting in the admonition of counsel to communicate with his client). Compounding the problem is that sometime after first appointed counsel was admonished for his failure to communicate with Ms. Przespolewski, he withdrew from the case.

The first act of Ms. Przespolewski's next attorney was to withdraw. (1-12-05 RP 4) In total, he moved to withdraw on three separate occasions in less than three months. (1-12-05 RP 4, 2-23-05 RP 9, 3-30-05 RP 13) It is unclear whether Ms. Przespolewski received notice of her attorneys' multiple motions to withdraw, and the dissent aptly commented that such "revolving representation is disturbing." (Dissent at 5)

Next, the trial court allowed counsel to withdraw on the day of trial even though he had recently been in touch with his client and learned that

she had been participating in AA and NA. (3-30-05 RP 15) But the trial court did not require counsel to provide this information to the court or any other evidence to support Ms. Przespolewski's defense.

Moreover, without the assistance of counsel, Ms. Przespolewski had no one to challenge the admission of improper evidence. The record discloses that numerous objections would have been proper. For example, the State offered non-certified copies of court documents as evidence, including three exhibits related to the dependency. Nevertheless, the court admitted them, stating, "hearing no objection the court will admit 1 through 4". (3-30-05 RP 18) Objections to these documents would have been proper under RCW 5.44.010³ (appendix E); State v. Lee, 87 Wn.2d 932, 937-39, 558 P.2d 236 (1976). Additionally, the guardian ad litem's report was erroneously admitted after evidence was closed. (3-30-05 RP 59) See, In re Welfare of Ott, 37 Wn. App. 234, 240, 679 P.2d 372 (1984).

Further, counsel could have cross-examined the State's witnesses and objected to hearsay testimony. A State social worker was allowed to testify, without objection, about the contents of a psychological assessment and recommendations of a State evaluator. (3/30/05 RP 29)

³ RCW 5.44.010 provides in pertinent part: The records and proceedings of any court of the United States . . . shall be admissible in evidence in all cases in this state when duly certified by the attestation of the clerk . . . or other officer having charge of the records of such court, with the seal of such court affixed.

But no attorney was available to make a hearsay objection to the damaging information. See, In re J.M., 130 Wn. App. at 924 (reversal required where counsel failed to make a hearsay objection to relevant but damaging psychological reports). This same social worker also relayed hearsay information regarding Ms. Przespolewski's participation in services. (3-30-05 RP 32, 35) None of the adverse witnesses were present in court.

Additionally, the State's witnesses were not subject to the crucial rigors of cross-examination. The dissent in In re E.P. aptly noted, "it would be impossible to determine how the State's witnesses would have held up under cross-examination had counsel been present and if evidence had been presented on behalf of Ms. P." Dissent at 6.

Fundamental fairness requires an opportunity to test the opinions and subjective accounts of the witnesses. Ms. Przespolewski was denied the benefit of these protections. Without such testing by counsel, "we can only speculate as to what weaknesses in the State's case or strengths in [the parent's] case might have been revealed." In re J.M., 62 Wn. App. at 251.

In sum, the termination "trial" did not satisfy minimal due process requirements. "The potential loss of a significant and constitutionally protected liberty interest requires a meaningful hearing. This means, at a minimum, the opportunity to argue the strength of one's own position and

to attack the State's position." Id. Ms. Przespolewski was deprived of all these protections and the risk of error was unacceptably high.

This Court should reverse the court of appeals decision and remand for a new and fair hearing, where Ms. Przespolewski is accorded her due process right to assistance of counsel.

3. THE "TRIAL" FAILED TO ESTABLISH THE STATUTORY REQUIREMENTS FOR TERMINATION OF PARENTAL RIGHTS.

Arguments 1 and 2 show that Ms. Przespolewski was denied her due process right to counsel and a meaningful hearing. These due process violations render it nearly impossible for this Court to evaluate the sufficiency of the evidence. The State's burden of proof is strict: it must prove its case by clear, cogent, and convincing evidence. In re Sego, 82 Wn.2d 736, 739, 513 P.2d 831 (1973) (ultimate fact in issue must be shown to be highly probable).

In this case, it is not possible to evaluate the "facts" under the "highly probable" standard when the State's evidence and witnesses were not subject to scrutiny and testing by counsel. While the State may have provided some evidence supporting termination, such evidence was inherently unreliable without undergoing the rigors of the adversarial process. Accordingly, as in her initial brief, Ms. Przespolewski asserts that insufficient evidence supports the trial court's findings and

conclusions. Br. of App. at 1-2 (assignment of error 4), 22-23. The only remedy is a new trial.

E. CONCLUSION

For the reasons stated above, this Court should accept review.

RAP 13.4(b).

Dated this 12 day of January, 2007.

Respectfully submitted,


Maurina A Ladich #24338
Attorney for Petitioner

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

In re the Welfare of:)
)
 E.P.) No. 24098-3-III
)
) CERTIFICATE
) OF MAILING
 RENE M. PRZESPOLEWSKI,)
)
)
)
) Appellant.)

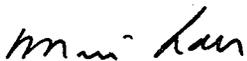
I certify under penalty of perjury under the laws of the State of Washington that on January 12, 2007, I mailed copies of Appellant's Supplemental Brief in this matter to:

David Wayne Coe
Attorney at Law
Office of the Attorney General
18 S. Mission St., Ste 300
Wenatchee, WA 98801-2203

and

Ms. Rene Przespolewski
CHELAN COUNTY REGIONAL JUSTICE CENTER
401 Washington St. Level 2
Wenatchee, WA 98801

Signed at Spokane, Washington on January 12, 2007.


Maurina A. Ladich #24338
Attorney for Appellant

APPENDIX A

FILED

DEC 21 2006

In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In re the Dependency of:)	No. 24098-3-III
)	
E.P.,)	Division Three
)	
A minor.)	PUBLISHED OPINION

KATO, J. — By statute derived from due process guaranties, indigent parents have the right to counsel in termination proceedings. RCW 13.34.090(2); *In re Welfare of J.M.*, 130 Wn. App. 912, 921, 125 P.3d 245 (2005). That right, however, may be forfeited. *In re Welfare of G.E.*, 116 Wn. App. 326, 334, 65 P.3d 1219 (2003). In the circumstances here, R.P. forfeited her right to counsel. We accordingly affirm the termination of her parental rights.

While incarcerated, Ms. P. gave birth to E.P. on July 12, 2004. The Department of Social and Health Services (DSHS) filed a dependency action. On July 14, a shelter care hearing was held, where the court told Ms. P. to stay involved in the legal process and to give notification of address changes so she could be contacted. At her request, the court appointed counsel, Anthony Zinman, and advised her of the right to notice of all hearings as well as the right

to present evidence. As of September 8, when a shelter care review was held, she was still represented by Mr. Zinman.

On September 15, E.P. was declared dependent. Some time before January 12, 2005, when a dependency review hearing was held, Mr. Zinman had apparently withdrawn as counsel for Ms. P. and N. Smith Hagopian, who also represented her husband in the proceedings, had been appointed as her new lawyer. At the January 12 hearing, Mr. Hagopian asked to withdraw as counsel for both because of lack of contact. On January 4, 2005, he had mailed a notice of intent to withdraw as counsel for Ms. P. and her husband, effective January 14, 2005. Although initially allowing Mr. Hagopian to withdraw, the court reversed itself and kept him on as her counsel. The termination trial was set for March 30.

On February 23, counsel moved to postpone the termination hearing because Ms. P. had "resurfaced" even though he had lost contact with her over the past few weeks. Report of Proceedings (RP) (Feb. 23, 2005) at 5. It was his "sense . . . that she will be very engaged just before the actual termination trial date, such that I will be asked by her to represent her interests at that hearing, in a zealous manner." *Id.* The court denied the continuance. Mr. Hagopian then reiterated to the court he had lost contact with his client and asked to withdraw as counsel. The court also denied this request.

Ms. P. failed to appear for the March 30 termination trial. Counsel again sought to withdraw. In support, Mr. Hagopian advised the court that she had not communicated with him even though he had located her address and sent letters there, which were unreturned. He stated, "I have absolutely no idea what her position is relative to today, and am – thinking that my presence here would be a waste of time and potentially obstructionist. So I'm asking for opportunity and permission to withdraw." RP (Mar. 30, 2005) at 14. Counsel was allowed to withdraw.

The court proceeded with the termination trial in Ms. P.'s absence and unrepresented by counsel. After taking testimony and reviewing the documentary evidence, the court terminated her parental rights. This appeal follows.

Ms. P. contends the court violated her due process right to counsel by allowing her lawyer to withdraw at the beginning of the termination trial. Parents have the statutory right to counsel in child dependency and termination of parental rights proceedings. RCW 13.34.090(2); *G.E.*, 116 Wn. App. at 331-32. But the right may be waived. *Id.* at 334.

In reviewing whether a parent waived the statutory right to counsel under RCW 13.34.090, the court in *G.E.* was guided by the three ways a criminal defendant may waive the right. A parent may "(1) voluntarily relinquish the right,

(2) waive it by conduct, or (3) forfeit it through 'extremely dilatory conduct.'" 116 Wn. App. at 334 (quoting *City of Tacoma v. Bishop*, 82 Wn. App. 850, 858-59, 920 P.2d 214 (1996) (citing *United States v. Goldberg*, 67 F.3d 1092, 1099-1102 (3d Cir. 1995))).

The record does not show that Ms. P. voluntarily relinquished her right to counsel or waived it by conduct. The inquiry, then, is whether she forfeited the right. A parent can forfeit the right to counsel by extremely dilatory conduct. *G.E.*, 116 Wn. App. at 334. Forfeiture can occur even if Ms. P. was not warned about the consequences of her actions. *Bishop*, 82 Wn. App. at 859.

In *In re Dependency of A.G.*, 93 Wn. App. 268, 968 P.2d 424 (1998), the trial court allowed the mother's counsel to withdraw at the beginning of the termination hearing and the mother's parental rights were terminated in her absence. The A.G. court held that, because of her inaction, the mother's due process rights were not violated. She made no effort to appear for hearings, including the termination trial, and her whereabouts were unknown. She had not been in contact with her lawyer or DSHS's Division of Child and Family Services for many months before it filed the termination action. Due to the mother's own inaction, the court noted the lawyer "could not effectively or ethically represent her through the termination trial." *Id.* at 278.

Here, Ms. P. appeared at the shelter care hearing on July 14, 2004. She did not appear for shelter care review on August 11, but was apparently present for the review on September 8. She did not appear for the dependency review hearing on January 12, 2005. On February 23, her lawyer sought a continuance of the termination trial date because Ms. P. had “resurfaced” and, even though he had lost contact with her over the past several weeks, his “sense” was that she would ask him to represent her in a zealous manner. RP (Feb. 23, 2005) at 5. But the record belies his belief and reflects Ms. P. did not communicate with him. Indeed, Mr. Hagopian represented to the court prior to the start of the termination trial that he had no idea what the mother’s position was relative to termination of her parental rights. As in *A.G.*, because of her inaction, Ms. P.’s lawyer could not effectively or ethically represent her in the termination trial.

“[A] child’s right to a stable home cannot be put on hold interminably because a parent is absent from the courtroom and has failed to contact his or her attorney.” *In re Dependency of C.R.B.*, 62 Wn. App. 608, 616, 814 P.2d 1197 (1991). Under the circumstances here, Ms. P.’s failure to act was extremely dilatory and sufficient to justify forfeiture of her right to counsel. See *A.G.*, 93 Wn. App. at 278-80.

Ms. P. nevertheless contends the court should have appointed another lawyer for her after Mr. Hagopian withdrew. But she forfeited her right to counsel so the court was not required to appoint a third lawyer.

She also claims the court erred by denying her motion for a continuance of the termination trial. Such decisions are within the court's discretion and will not be disturbed absent abuse of that discretion. *In re Schuoler*, 106 Wn.2d 500, 723 P.2d 1103 (1986). On February 23, 2005, Ms. P.'s lawyer sought the continuance because he needed more time for the hearing than he originally thought the court had set aside. Advised to the contrary, her lawyer then argued that Ms. P. still needed the continuance so she could be more ready "in terms of services that she's engaged in, before March 30th." RP (Feb. 23, 2005) at 6. DSHS advised the court that she had not been engaged in services even though she said she was going to get involved. *Id.* at 7. Finding insufficient grounds to grant the continuance, the court denied her motion. The record reflects the court relied on tenable reasons for denying the continuance, so it did not abuse its discretion.

Ms. P. contends the court erred by holding the termination trial in her absence because the one-sided nature of the hearing made the risk of error unconscionably high. Moreover, she claims the court's findings and conclusions do not support termination of her parental rights because she was not present

and could not present evidence. Notice and an opportunity to be heard are the essential requisites of procedural due process. *A.G.*, 93 Wn. App. at 278 (citing *Burman v. State*, 50 Wn. App. 433, 440, 749 P.2d 708, *review denied*, 110 Wn.2d 1029 (1988)). Among the elements the court analyzes in determining whether a procedure adequately protects due process rights is the risk of error. *A.G.*, 93 Wn. App. at 278. In termination proceedings, the risk of error in a default proceeding that does not reach the merits of a case is a significant burden on the competing interests of the parent, the child, and the State. *C.R.B.*, 62 Wn. App. 608.

Here, however, there was a meaningful hearing. The court took testimony, reviewed the documentary evidence, and made detailed findings on the substantive issues required to be proved by the State under RCW 13.34.180 and RCW 13.34.190. The record reflects the court considered the case on its merits and held the State to the requisite burden of proof on all issues. The risk of error was not unconscionably high. Ms. P. had notice and chose not to appear. Her lawyer could not effectively represent her because he had no communication with her and no idea what her position was. The court's findings are supported by the evidence and they in turn support its conclusions.

No. 24098-3-III
In re Dependency of E. P.

Affirmed.

Kato J.

Kato, J.

I CONCUR:

Sweeney, C.J.

Sweeney, C.J.

No. 24098-3-III

SCHULTHEIS, J. (dissenting) — Because I believe that the risk of error was unacceptably high here based on a denial of R.P.'s right to counsel, I must respectfully dissent.

In Washington, parents have a statutory right to counsel in proceedings to terminate their parental rights. *In re Welfare of G.E.*, 116 Wn. App. 326, 331-32, 65 P.3d 1219 (2003) (citing RCW 13.34.090(2); *In re Dependency of Grove*, 127 Wn.2d 221, 232, 897 P.2d 1252 (1995)). The statute requires that counsel be provided to an indigent parent who has appeared or requested the appointment of counsel “[u]nless waived in court.” RCW 13.34.090(2).

A parent may (1) waive the right to counsel by voluntarily relinquishing it, (2) waive the right by conduct, or (3) forfeit it through “extremely dilatory conduct.” *G.E.*, 116 Wn. App. at 334 (quoting *City of Tacoma v. Bishop*, 82 Wn. App. 850, 859, 920 P.2d 214 (1996) (citing *United States v. Goldberg*, 67 F.3d 1092, 1099-1102 (3rd Cir. 1995))). The first type of waiver requires a knowing, intelligent, and voluntary relinquishment of a known right, usually shown by an affirmative request. *Bishop*, 82 Wn. App. at 858.

Forfeiture results in the loss of a right based on the defendant's extremely dilatory conduct, regardless of the defendant's knowledge of the right or intent to relinquish it. *Id.* at 858-59. Waiver by conduct, a hybrid of waiver and forfeiture, requires that the defendant be advised of the consequences of his actions and can be based on conduct less dilatory than required for forfeiture. *Id.* at 859. The first type of waiver obviously does not apply here.

Ms. P. was not warned concerning the maintenance of her right to counsel. At the first hearing when counsel was appointed, Ms. P. was advised she had the right to notice of the hearings at her last known address, the right to present evidence, that her attorney has subpoena power, and the right to an impartial judge. Notably, the judge told her that it was important that she not "disappear" or "drop out of sight" and "immediately notify anybody involved of any change of address so they know how to get a hold of you."

Report of Proceedings (RP) (July 14, 2004) at 17. But that admonition was given in the context of the time limitations associated with the action.

She was advised not to move without giving a forwarding address because she would only receive notice of hearings at her last known address. But she was not warned that her conduct would result in the withdrawal of her counsel and that thereafter nobody would advocate her position.

In fact, Ms. P. was specifically advised that her entitlement to counsel was conditioned only upon her timely completion of paperwork.

Service of a notice of intent to withdraw under CR 71(c) is not sufficient for the warning required to be set forth in the record. *See G.E.*, 116 Wn. App. at 337; *Bishop*, 82 Wn. App. at 859. Such a notice would be inappropriate and misleading under these circumstances. CR 71(b) requires an order of the court for withdrawal of appointed counsel and notice of the motion to withdraw and the date and place the motion will be heard.

Moreover, the record is insufficient to show that Ms. P.'s conduct was extremely dilatory to invoke forfeiture. *See Bishop*, 82 Wn. App. at 860; *G.E.*, 116 Wn. App. at 337.

The majority cites *In re Dependency of A.G.*, 93 Wn. App. 268, 968 P.2d 424 (1998). There, the State filed a termination petition and the motion was served by publication and abode service. At a preliminary hearing, the mother's counsel advised that the mother had not contacted him since she was served. *A.G.*, 93 Wn. App. at 274. He said that he would continue to try to contact her before the fact-finding hearing that was scheduled more than a month later. At that hearing, the mother's attorney recounted his "above and beyond" efforts to reach his client, and the court ultimately granted his motion to withdraw. *Id.* The hearing proceeded on the merits. The appellate court held that while the mother had a right to counsel, her due process rights were not violated by allowing counsel to withdraw at the beginning of trial because the mother's own inaction caused the withdrawal. *Id.* at 278. The mother had notice of the termination proceeding,

but she did not appear at the trial and appointed counsel “could not effectively or ethically represent her.” *Id.*

The majority opinion states that counsel for Ms. P. could not assume that she wanted to contest the proceedings. The record tells another story. Just five weeks earlier, counsel told the court that his client was “very engaged” and he expected that he would be asked to zealously represent Ms. P. at the termination hearing. RP (Feb. 23, 2005) at 5. Counsel responded by asking to be removed from the case; nonetheless, he said he understood her wishes in no uncertain terms.

Counsel in *A.G.* demonstrated “above and beyond efforts” to find his client and advocate the interests of his client, only if he knew what they were, but he could not, since he had been out of contact for six months. *Id.* at 273-75. The record in this case only shows counsel’s half-hearted efforts over five weeks to effect service of a withdrawal notice to “general delivery”—which would be ineffective in any event unless it complied with CR 71(b). RP (Jan. 12, 2005) at 16. Counsel’s greatest efforts, as they were documented, involved withdrawal.

Most troubling, there is a significant risk of error in this case. At one of the earliest hearings, Ms. P. told the judge that she did not understand the proceedings. The judge admonished counsel to work things out with his client and to report back the following week. There is no record of a confirmation of her understanding.

The continued difficulties with counsel only add to the risk. Ms. P.'s first attorney withdrew sometime after the trial judge admonished him. The first act of the next attorney who represented her (at least as reflected in the record on appeal) was to make a motion to withdraw. The record before this court shows that the trial court allowed counsel to withdraw on three separate occasions in less than six months. This revolving representation is disturbing.

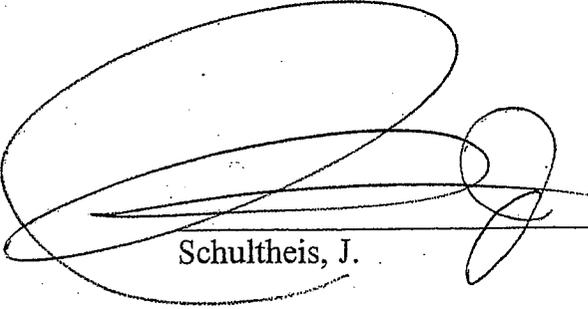
Further, the trial court allowed counsel to withdraw on the day before trial when just weeks before, counsel suggested that he had evidence that Ms. P. had been attending Alcoholics Anonymous and Narcotics Anonymous meetings. The trial court did not require, nor did counsel offer, to provide the evidence to the court. If the trial court had denied the motion to withdraw, counsel could have presented some evidence of Ms. P.'s attempts to comply with the State's program requirements.

Moreover, counsel could have objected to evidence and other irregularities at trial. During the hearing, the State proffered noncertified copies of court documents as evidence, including three exhibits related to the uncontested dependency, and the trial court announced, "[Exhibits] [o]ne through four have been offered. Is there any objection? Even though they're not certified, hearing no objection the court will admit 1 through 4." RP (Mar. 30, 2005) at 18. An objection would have been entirely proper. *See State v. Lee*, 87 Wn.2d 932, 937-39, 558 P.2d 236 (1976); CR 44; RCW 5.44.010. But Ms. P. had no counsel present to object. The guardian ad litem's report was also

allowed to be admitted after evidence was closed, during argument. *See In re Welfare of Ott*, 37 Wn. App. 234, 240, 679 P.2d 372 (1984).

In *In re Welfare of J.M.*, 130 Wn. App. 912, 925, 125 P.3d 245 (2005), this court held that a parent was actually prejudiced by the failure of due process for ineffective assistance of counsel because “[w]e can only speculate as to what weaknesses in the State’s case or strengths in [the parent’s] case might have been revealed by competent counsel.” I would hold that it would be impossible to determine how the State’s witnesses would have held up under cross-examination had counsel been present and if evidence had been presented on behalf of Ms. P.

In summary, I am troubled that the trial court allowed the mother’s attorneys to withdraw at least three times during the course of their brief representation of Ms. P., including on the day of trial. I would find the risk of error in these proceedings to be significant. I do not believe that the record supports a determination that Ms. P. forfeited her right to counsel or that she was warned that her conduct could be deemed a waiver of her right to counsel. And it is unclear whether she was given notice of her attorneys’ numerous motions to withdraw. I would conclude that Ms. P. was prejudiced by the loss of her right to counsel.



Schultheis, J.

APPENDIX B