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**SUPREME COURT OF THE STATE OF WASHINGTON**

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IN RE THE DEPENDENCY OF:

E.P.,

A Minor Child.

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**ANSWER TO PETITION FOR REVIEW**

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**ORIGINAL**

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## I. IDENTITY OF ANSWERING PARTY

The Department of Social and Health Services, the respondent and the guardian of E.P., a two-and-one-half year old boy who has been in foster care his entire life and whose welfare is the subject of this appeal, asks this Court to deny review of the court of appeals decision, *In re Dependency of E.P.*, \_\_\_ Wn. App. \_\_\_, 149 P.3d 440 (2006). The decision affirms an order terminating the parent-child relationship between E.P. and his mother. A copy of the decision is attached in Appendix A.

## II. RESTATEMENT OF THE ISSUES

This case is not appropriate for review by the Court under the considerations governing acceptance of review. RAP 13.4(b). If review were granted, the issues presented would be:

1. Based on the facts of this case, did the juvenile court err when it determined that the mother's failure to engage in services, to appear at the termination hearing, and to contact her counsel about her position in the case justified an order permitting her court-appointed counsel to withdraw?
2. Were the due process rights of the mother violated by proceeding with a termination hearing in her absence and in the absence of counsel, when the mother, who was properly served, failed to appear at the termination hearing, had not engaged in the services offered, and had not contacted her court-appointed counsel to inform him of her position on the termination action?

### III. RESTATEMENT OF THE CASE

E.P., the child who is the subject of this appeal, will be three years old on July 12. At the time of his birth, on July 12, 2004, both his mother and his presumed father were in jail.<sup>1</sup> RP 23 (3-30-05); Ex. 1.<sup>2</sup> A dependency petition was filed July 13, 2004, and a shelter care hearing was held the next day. The mother was represented by appointed counsel at the shelter care hearing. RP 4 (7-14-04).<sup>3</sup> During the shelter care hearing the trial court explained the dependency process, the importance of participating in the process (“to not drop out of sight”) and in services, and the legal rights of parents in the process. RP 12-22 (7-14-04).

The child was placed in the Department’s custody for placement in foster care at the close of the shelter care hearing. RP 22 (7-14-04). He was later found to be dependent, Ex. 2. He remains in a pre-adoptive home, pending resolution of this appeal. RP 3 (6-8-05).

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<sup>1</sup> The mother and presumed father were married and have two other children who are in the custody of a relative. Ex. 1. The parents have only supervised visits with these older children. CP 19. The mother’s husband was determined not to be the father of E.P. and was dismissed from the action in January 2005. Ex. 4. The mother does not know who the father of the child is. RP 24 (3-30-07); Ex. 1 at 3-4.

<sup>2</sup> Exhibit 1 is the petition for dependency. The allegations contained in the petition were not disputed by the mother and were adopted as findings of fact in the Agreed Order of Dependency. Ex. 2.

<sup>3</sup> The trial court explained that it was “local practice when these cases get filed to just go ahead and appoint attorneys” and then review the need for the appointment at the hearing. RP 17-18 (7-14-04).

The child's mother was 42 years old at the time he was born. Ex. 1. She is a drug addict who used drugs – including heroin, cocaine and marijuana – “horrendously” during her pregnancy with E.P. Ex. 1 at 3. The mother's long history of drug and alcohol abuse began at age 14. RP 30 (3-30-05). Prior to E.P.'s birth she had attempted substance abuse treatment two or three times, but quickly ended her participation each time. CP 19; RP 30 (3-30-05).

During the dependency action, the Department offered numerous services aimed at assisting the mother in overcoming her parenting deficiencies, including her extensive history of drug abuse and addiction, her problem with impulse control, and her antisocial personality disorder. RP 29 (3-30-05). These services included drug and alcohol evaluation and treatment, participation in random drug tests, and a psychological evaluation and recommended treatment. Ex. 3 at 7; RP 27-29 (3-30-05).

The mother was incarcerated from E.P.'s birth until November 12, 2004. RP 31 (3-30-05). While she was incarcerated she participated in a psychological evaluation and had three visits with E.P.<sup>4</sup> The Department made arrangements for weekly visits, beginning November 16, upon the mother's release from jail. RP 38 (3-30-05). However, on November 12, 2004, the day of her release, the mother relapsed and began using alcohol,

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<sup>4</sup> The number of visits was impeded by the jail's policies. RP 7 (8-11-04).

methamphetamine and heroin. RP 31 (3-30-05). On November 16, 2004, she called the child's social worker to cancel her first visit outside the jail, saying that she had used heroin that morning, was "a mess" and didn't feel she should visit with E.P. RP 38 (3-30-05). The visit was cancelled and the social worker never heard from the mother again. RP 38-39 (3-30-05).

The mother was at the DSHS office building several times between November 16, 2004, and early March 2005, seeking financial assistance. RP 49-56 (3-30-05). Although the child's social worker was in the same building as the financial benefits unit, the mother did not attempt to contact the social worker about participating in court-ordered services or even to ask about E.P. RP 38-39, 56 (3-30-05).

In mid-January 2005, the mother appeared at a hearing to set the termination trial date. RP 6 (2-23-05). She indicated an intent to participate in services and was informed of the steps she needed to take to schedule services and to schedule visits with E.P. It was at this hearing that the date of March 30, 2005, was set for the termination trial. RP 11 (2-23-05). The mother was not heard from, by the Department or by her attorney, again.

On February 23, 2005, the court heard a motion by the mother's trial counsel to allow for more time for the trial, because the mother had resurfaced and counsel believed a longer trial might be necessary. RP 5

(2-23-05). The court agreed to a longer trial, stating “My intent would be to get it started that day and if we aren’t done we will just find – you know, more time to finish it up.” RP 5 (2-23-05). The mother’s attorney then argued for a continuance so that the mother could “be more ready in terms of the services that she’s engaged in, before March 30<sup>th</sup>.” RP 6 (2-23-05). Although the mother had not contacted the Department since November 16, had not engaged in any services since she was released from jail, and had only appeared for the setting hearing in January, the mother’s attorney stated, “My sense is that she will be very engaged just before the actual termination trial date, such that I will be asked to represent her interests at the hearing, in a zealous manner.” RP 5 (2-23-05). The court denied the motion for a continuance. RP 9 (2-23-05).

At the end of the hearing, the mother’s attorney told the court that he had once again lost contact with the mother and asked for permission to withdraw. RP 9 (2-23-05). That request was denied.

The mother did not appear for the termination trial on March 30, 2005. Her attorney was present at the beginning of the trial, but renewed his request to withdraw. RP 13 (3-30-05). He explained that he had filed and sent a notice of intent to withdraw to the mother on January 4, 2005. That letter was returned unclaimed. RP 14 (3-30-05). He learned that the mother was staying with her mother, E.P.’s grandmother, and sent the

notice to the grandmother's address on February 18, 2005, and, again, on March 3, 2005. Neither of those notices was returned.<sup>5</sup> RP 14 (3-30-05). The attorney stated that the mother "has not made any effort to contact me." He continued:

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 14 (3-30-05).

The court summed up the request as follows:

So you're in a position that whatever choice you make may be at odds with what she really wants.

The attorney agreed. The court then granted the motion and excused the attorney. *Id.*

The trial proceeded on the merits, without the mother and without her counsel. After considering the evidence of the Department social worker, the DSHS financial benefits worker and E.P.'s guardian ad litem, the trial court found that the Department had proven the statutory elements necessary for termination of parental rights, as set forth in RCW 13.34.180(1)(a) through (f), by clear, cogent and convincing evidence, and

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<sup>5</sup> The grandmother had been in contact with the attorney several times, apparently providing updates about the mother, but the mother herself did not contact the attorney. RP 14 (3-30-05).

had proved that termination was in the best interests of the child. RP 57-60 (3-30-05).

The mother appealed the termination order, claiming the trial court should not have granted her attorney's motion to withdraw on the day of the termination trial, and that proceeding with the trial in her absence or the absence of her counsel violated her right to procedural due process. The court appeals affirmed the trial court's orders. *In re Dependency of E.P.*, \_\_\_ Wn. App. \_\_\_, 149 P.3d 440 (2006). The mother now seeks review of that decision.

#### **IV. ARGUMENT WHY REVIEW SHOULD BE DENIED**

The mother argues that review should be accepted for two reasons. First, she claims the court of appeals decision approving the withdrawal of her court-appointed counsel conflicts with other Washington appellate decisions. Pet. at 7-12. Second, she claims that proceeding with a termination trial in her absence, or in the absence of counsel appointed to represent her, violated her constitutional right to due process, and thus raises a significant issue of constitutional law. Pet. at 12-18.

The court of appeals decision is based on well settled law, properly applied to the particular facts of this case. The decision is entirely consistent with appellate decisions of this Court and the court of appeals. Whether the mother's due process right to a meaningful hearing was met

is a fact-specific application of existing, established constitutional principles. No significant issue of constitutional law is involved in this appeal that requires the determination of this Court. Accordingly, the mother's petition for review should be denied. RAP 13.4(b).

**A. The Court of Appeals Decision Affirming the Order Granting the Motion of Counsel to Withdraw, When He Was Unable to Effectively Or Ethically Represent His Client, Is Consistent With Washington Appellate Decisions**

The mother does not disagree with the law stated in the court of appeals decision. Instead, she argues that the court did not correctly apply that law to the facts of her case. *See* Pet. at 11 (attempting to distinguish the facts of this case from those of the mother in *In re Dependency of A.G.*, 93 Wn. App. 268, 968 P.2d 424 (1998), and claiming "the record does not support the extreme remedy"). The court of appeals decision in *E.P.* correctly states the law and the law stated is consistent with other appellate decisions.

As the court of appeals noted, a parent has the right to be represented by counsel at all stages of a termination proceeding. *E.P.*, 149 P.3d at 441 ¶1. *See* RCW 13.34.090(1); *In re Dependency of Grove*, 127 Wn.2d 221, 228, 897 P.2d 1252 (1995). The statutory right derives from art. I, § 3 of the state constitution. *In re Welfare of Myricks*, 85 Wn.2d 252, 255, 533 P.2d 841 (1975); *In re Welfare of Luscier*, 84 Wn.2d 135,

138, 524 P.2d 906 (1974).<sup>6</sup> In Washington, there is a presumption that an indigent parent in a dependency or termination case will be provided counsel at public expense. *In re Welfare of G.E.*, 116 Wn. App. 326, 333, 65 P.3d 1219 (2003).

This right to counsel is not absolute; it is not self-executing; and it may be waived or forfeited. *In re Dependency of V.R.R.*, \_\_\_ Wn.2d \_\_\_, 141 P.3d 85 (2006); *A.G.*, 93 Wn. App. 268; *In re Dependency of M.S.*, 98 Wn. App. 91, 988 P.2d 488 (1999).

A parent can lose the right to counsel by (1) voluntarily and knowingly relinquishing that right; (2) waiving it by certain conduct; or (3) forfeiting it through extremely dilatory conduct. *E.P.*, 149 P.3d at 442 ¶8; *V.R.R.*, 141 P.3d at 89 ¶20; *G.E.*, 116 Wn. App. at 334; *City of Tacoma v. Bishop*, 82 Wn. App. 850, 858-59, 920 P.2d 214 (1996).

In *E.P.*, the court of appeals held the mother forfeited her right to counsel through extremely dilatory conduct. Unlike a voluntary waiver or

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<sup>6</sup> *In re Luscier* held the right was based on both art. I, § 3, of the state constitution and on the Fourteenth Amendment of the United States Constitution. *Luscier*, 84 Wn.2d at 138. Seven years after *Luscier* was decided, the United States Supreme Court held that the constitutional right to counsel is guaranteed only in cases where the indigent litigant is threatened with loss of liberty. *Lassiter v. Dep't of Soc. Servs. of Durham Cy.*, 452 U.S. 18, 26, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1991). In all other cases, and specifically in termination of parental rights cases, the right to counsel in every case is not guaranteed, but must be decided on a case-by-case basis, using the test set forth in *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). *Lassiter*, 452 U.S. at 27. See Susan Calkins, *Ineffective Assistance of Counsel in Parental-Rights Termination Cases: The Challenge for Appellate Courts*, 6 J. App. Prac. & Process 179 (2004) at 187-93; *In re Adoption of K.A.S.*, 499 N.W.2d 558, 561-63 (N.D. 1993); and *In re Welfare of G.E.*, 116 Wn. App. 326, 332 n.2, 65 P.3d 1219 (2003), for an overview of the law before and after *Lassiter*.

waiver through conduct, the parent need not first be informed of the consequences of acting without an attorney. *G.E.*, 116 Wn. App. at 337. A forfeiture results from extremely dilatory conduct, not from a reasoned choice.

The court of appeals in *E.P.* compared the mother's conduct to that of the mother in *A.G.* In *A.G.* the court-appointed counsel for the mother asked to withdraw, because he had not been in contact with his client for some time, despite his efforts to reach her. *A.G.*, 93 Wn. App. at 274. The trial court granted the attorney's motion to withdraw at the beginning of the termination hearing, and the court proceeded with a trial on the merits. On appeal, the trial court's orders were affirmed. The court of appeals noted that the mother had 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 with the social worker assigned to the case for many months before the termination proceeding. The court of appeals held that due to her own inaction, her lawyer "could not effectively or ethically represent her through the termination trial." *A.G.*, 93 Wn. App. at 278. *See also 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).

The court of appeals in this case noted that E.P.’s mother failed to appear for hearings and failed to appear at the termination trial. The decision states:

On February 23, her lawyer sought a continuance of the trial date because [the mother] 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. But the record belies his belief and reflects [the mother] did not communicate with him. Indeed, [the lawyer] 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, [the mother’s] lawyer could not effectively or ethically represent her in the termination trial.

*E.P.*, 149 P.3d at 443 ¶11 (citation omitted).

The court of appeals, quoting *In re Dependency of C.R.B.*, 62 Wn. App. 608, 616, 814 P.2d 1197 (1991), also held that “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.” Under the circumstances of this case, the court of appeals correctly held that the mother’s failure to act was extremely dilatory and sufficient to justify forfeiture of her right to counsel. *E.P.*, 149 P.3d at 443 ¶12.

The mother argues the court should have instead looked at *V.R.R.*, or *In re Dependency of J.M.*, 130 Wn. App. 912, 125 P.3d 245 (2005) (both holding the parent's attorney's performance at termination ineffective when counsel did not challenge the evidence presented in support of termination, even though the client was not present). The *V.R.R.* and *J.M.* cases are distinguishable because of a singular difference in the facts. In each of those cases, the parent was in contact with his or her attorney, attempted to attend the termination trial, and had made his or her position on termination known to counsel prior to the trial.

The court of appeals in *E.P.* was faced with a different situation – one in which the mother failed to participate even to the extent of letting her attorney know her position on the termination petition. Because of the mother's extremely dilatory conduct, her attorney was unable to effectively or ethically represent her at trial. The court of appeals correctly determined that she forfeited her right to counsel. Its decision on this issue does not provide a basis for review under RAP 13.4(b)(1)-(2).

**B. The Trial on the Merits in the Absence of the Mother and in the Absence of Counsel Did Not Violate the Mother's Right to Procedural Due Process**

The mother argues that the court of appeals affirmance of the termination order raises a significant issue of constitutional law sufficient to justify review by this Court under RAP 13.4(b)(3). She claims that the

trial court's failure to appoint new counsel for her or to require her counsel to represent her at the termination trial deprived her of her right to procedural due process. Pet. 12. The mother does not raise a new constitutional question that needs to be resolved by this Court. The law is well settled on this issue. Instead, her claim is that the court of appeals did not properly apply the law to the specific facts of this case.

The essential requirements of procedural due process are notice and an opportunity for a meaningful hearing. *Myricks*, 85 Wn.2d at 254; *M.S.*, 98 Wn. App. at 94; *A.G.*, 93 Wn. App. at 279. In determining whether a procedure adequately protects a parent's due process rights in a juvenile dependency or termination proceeding, the court balances three factors: (1) the private interests at stake, (2) the government's interest, and (3) the risk that the procedures used will lead to an erroneous decision. *Lassiter*, 452 U.S. at 27; *M.S.* 98 Wn. App. at 94.

The parent, the child and the state all share an interest in an accurate and just decision in proceedings to terminate the parent-child relationship. *Lassiter*, 452 U.S. at 27. The child also has "the right to establish a strong, stable, safe, and permanent home in a timely manner." *A.G.*, 93 Wn. App. at 279. The only dispute in this case involves the "risk of error" factor. Pet. at 14; *E.P.*, 149 P.3d at 443 ¶15. The mother argues that the risk of error is unconscionably high when a parent fails to appear

to defend herself or when the court does not order an attorney to represent her interests. Pet. at 14.

In order to minimize the risk of error in cases where the parent does not appear at the termination trial, a trial court must hold a hearing on the merits. A default proceeding is not sufficient protection against the risk of error. Due process requires that a hearing be held on the merits of the termination petition. *C.R.B.*, 62 Wn. App. at 614-15; *A.G.*, 93 Wn. App. at 279.

Additionally, the parent has a right to notice of the hearing, a right to present evidence, and a right to representation. *A.G.*, 93 Wn. App. at 279; RCW 13.34.190(1). However, these rights are not self-executing. *See M.S.*, 98 Wn. App. at 96. The parent's failure to respond to notices of a proceeding to terminate parental rights does not prevent the state from obtaining a judgment permanently terminating that parent's rights. *A.G.*, 93 Wn. App. at 280. As the court stated in *A.G.*:

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 where she was or what position she would want to take.

The child has a right to a safe, stable, and permanent home, and to a speedy resolution of the termination proceeding. RCW 13.34.020. When the rights of the child and the parent conflict, the rights and safety

of the child should prevail. *Id.* Moreover, the rights of the child cannot be put on hold indefinitely because the mother fails to appear for hearings and fails to contact her attorney. *C.R.B.*, 62 Wn. App. at 616.

The court of appeals in *E.P.* determined that the mother's due process rights had not been violated. The trial court provided the mother with counsel at state expense as soon as the dependency petition was filed. RP 17-18 (7-14-04). The mother was continuously represented; however, she chose not to contact her attorney. She did not respond to his letters stating that he intended to withdraw. She did not appear at hearings to assist him in the defense of the case. She did not let him know whether she had a position on the termination petition. Her conduct indicated that she was not concerned about the outcome of the proceeding.

At the trial on the merits the state presented ample evidence to meet its burden of proof by clear, cogent and convincing evidence. Although it would have been preferable if the mother had presented her evidence, she chose not to take advantage of that opportunity. In light of the evidence presented regarding the mother's failure to engage in services to address her serious and long-standing drug addiction and psychological problems, her failure to even ask about her infant son for months after she was released from jail, and her history of poor parenting of her other

children, any risk of harm in reaching an erroneous decision in this case because of the mother's failure to participate in the hearing was minimal.

The law governing the constitutional issue raised by the mother is clear and was properly applied by the court of appeals.

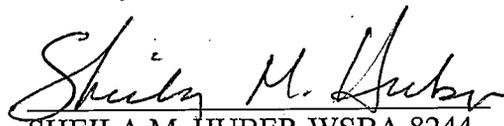
The only remaining issue raised by the mother is whether the court of appeals erred in determining that there is sufficient evidence to support the trial court's findings of fact. Review on this issue alone is not justified under RAP 13.4(b).

#### V. CONCLUSION

The mother's petition for review fails to meet the criteria required for granting review under RAP 13.4(b). The Department respectfully asks the court to deny the mother's petition for review.

RESPECTFULLY SUBMITTED this 15th day of February 2007.

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## **Appendix A**

In re Dependency of E.P. Wash.App. Div. 3, 2006.  
Court of Appeals of Washington, Division 3.  
In re the DEPENDENCY of E.P., A minor.  
No. 24098-3-III.

Dec. 21, 2006.

**Background:** In a child dependency proceeding, the Superior Court, Chelan County, Bart Vandegrift, J., allowed mother's counsel to withdraw just before termination hearing and then terminated her parental rights. Mother appealed.

**Holdings:** The Court of Appeals, Kato, J., held that:

- (1) mother forfeited her right to counsel through extremely dilatory conduct;
- (2) denial of mother's motion for continuance of termination trial was not an abuse of discretion; and
- (3) because trial court held meaningful hearing in mother's absence, there was no due process violation.

Affirmed.

Schultheis, J., filed dissenting opinion.

West Headnotes

[1] Infants 211  205

211 Infants

211VIII Dependent, Neglected, and Delinquent Children

211VIII(D) Proceedings

211k205 k. Counsel or Guardian Ad Litem.

Most Cited Cases

Mother forfeited her statutory right to counsel at hearing on termination of her parental rights through extremely dilatory conduct; although mother had attended some previous hearings during course of proceeding, counsel had no idea what her position was prior to start of termination trial, and thus could not effectively or ethically represent her. U.S.C.A. Const.Amend. 14; West's RCWA 13.34.090(2).

[2] Infants 211  205

211 Infants

211VIII Dependent, Neglected, and Delinquent Children

211VIII(D) Proceedings

211k205 k. Counsel or Guardian Ad Litem.

Most Cited Cases

Parents have the statutory right to counsel in child dependency and termination of parental rights proceedings, but the right may be waived. U.S.C.A. Const.Amend. 14; West's RCWA 13.34.090(2).

[3] Infants 211  205

211 Infants

211VIII Dependent, Neglected, and Delinquent Children

211VIII(D) Proceedings

211k205 k. Counsel or Guardian Ad Litem.

Most Cited Cases

A parent may waive the statutory right to counsel in child dependency and termination of parental rights proceedings by (1) voluntarily relinquishing the right, (2) waiving it by conduct, or (3) forfeiting it through extremely dilatory conduct. U.S.C.A. Const.Amend. 14; West's RCWA 13.34.090(2).

[4] Infants 211  205

211 Infants

211VIII Dependent, Neglected, and Delinquent Children

211VIII(D) Proceedings

211k205 k. Counsel or Guardian Ad Litem.

Most Cited Cases

A parent may forfeit the statutory right to counsel in child dependency and termination of parental rights proceedings by extremely dilatory conduct even when that parent is not warned about the consequences of his or her actions. U.S.C.A. Const.Amend. 14; West's RCWA 13.34.090(2).

[5] Infants 211  204

211 Infants

211VIII Dependent, Neglected, and Delinquent Children

211VIII(D) Proceedings

211k204 k. Time for Hearing. Most Cited

Cases

Denial of mother's motion for continuance of trial on termination of her parental rights was not an abuse of discretion; mother's counsel argued that mother needed more time to engage in services provided her by Department of Social and Health Services (DSHS), but DSHS advised court that she had not been so engaged.

**[6] Constitutional Law 92 274(5)**

92 Constitutional Law

92XII Due Process of Law

92k274 Deprivation of Personal Rights in General

92k274(5) k. Privacy; Marriage, Family, and Sexual Matters. Most Cited Cases

**Infants 211 203**

211 Infants

211VIII Dependent, Neglected, and Delinquent Children

211VIII(D) Proceedings

211k203 k. Hearing in General. Most Cited Cases

Because trial court held meaningful hearing on termination of mother's parental rights in her absence, which was by choice and despite provision of notice of hearing, risk of error in holding hearing in mother's absence was not unconscionably high, and thus there was no due process violation; court took testimony, reviewed documentary evidence, made detailed findings on substantive issues required to be proved by state under governing statutes, considered case on its merits, and held state to requisite burden of proof on all issues. U.S.C.A. Const.Amend. 14; West's RCWA 13.34.180, 13.34.190.

**[7] Constitutional Law 92 251.6**

92 Constitutional Law

92XII Due Process of Law

92k251.6 k. Notice and Hearing. Most Cited Cases

Notice and an opportunity to be heard are the essential requisites of procedural due process. U.S.C.A. Const.Amend. 14.

**[8] Constitutional Law 92 251.5**

92 Constitutional Law

92XII Due Process of Law

92k251.5 k. Procedural Due Process in General. Most Cited Cases

Among the elements the court analyzes in determining whether a procedure adequately protects due process rights is the risk of error. U.S.C.A. Const.Amend. 14.

**[9] Constitutional Law 92 274(5)**

92 Constitutional Law

92XII Due Process of Law

92k274 Deprivation of Personal Rights in General

92k274(5) k. Privacy; Marriage, Family, and Sexual Matters. Most Cited Cases

In parental-rights 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 that may therefore violate due process. U.S.C.A. Const.Amend. 14.

\*441 Maurina A. Ladich, Spokane, WA, for Appellant.

David Wayne Coe, Office of Attorney General, Wenatchee, WA, for Respondent.

KATO, J.

¶ 1 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 Wash.App. 912, 921, 125 P.3d 245 (2005). That right, however, may be forfeited. In re Welfare of G.E., 116 Wash.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.

¶ 2 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 \*442 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.

¶ 3 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.

¶ 4 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.

¶ 5 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.

¶ 6 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.

[1][2] ¶ 7 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 Wash.App. at 331-32, 65 P.3d 1219. But the right may be waived. *Id.* at 334, 65 P.3d 1219.

[3] ¶ 8 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 Wash.App. at 334, 65 P.3d 1219 (quoting City of Tacoma v. Bishop, 82 Wash.App. 850, 858-59, 920 P.2d 214 (1996) (citing United States v. Goldberg, 67 F.3d 1092, 1099-1102 (3d Cir.1995))).

[4] ¶ 9 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 Wash.App. at 334, 65 P.3d 1219. Forfeiture can occur even if Ms. P. was not warned about the consequences of her actions. Bishop, 82 Wash.App. at 859, 920 P.2d 214.

¶ 10 In In re Dependency of A.G., 93 Wash.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, \*443 the court noted the lawyer “could not effectively or ethically represent her through the termination trial.” *Id.* at 278, 968 P.2d 424.

¶ 11 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.

¶ 12 “[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 Wash.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 Wash.App. at 278-80, 968 P.2d 424.

¶ 13 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.

[5] ¶ 14 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 Wash.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.

[6][7][8][9] ¶ 15 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 Wash.App. at 278, 968 P.2d 424 (citing Burman v. State, 50 Wash.App. 433, 440, 749 P.2d 708, review denied, 110 Wash.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 Wash.App. at 278, 968 P.2d 424. 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 Wash.App. 608, 814 P.2d 1197.

¶ 16 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\*444 and they in turn support its conclusions.

¶ 17 Affirmed.

I CONCUR: SWEENEY, C.J.  
SCHULTHEIS, J. (dissenting).

¶ 18 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.

¶ 19 In Washington, parents have a statutory right to counsel in proceedings to terminate their parental rights. In re Welfare of G.E., 116 Wash.App. 326, 331-32, 65 P.3d 1219 (2003) (citing RCW 13.34.090(2); In re Dependency of Grove, 127 Wash.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).

¶ 20 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 Wash.App. at 334, 65 P.3d 1219 (quoting City of Tacoma v. Bishop, 82 Wash.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 Wash.App. at 858, 920 P.2d 214. 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, 920 P.2d 214. 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, 920 P.2d 214. The first type of waiver

obviously does not apply here.

¶ 21 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.

¶ 22 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.

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

¶ 24 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 Wash.App. at 337, 65 P.3d 1219; Bishop, 82 Wash.App. at 859, 920 P.2d 214. 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.

¶ 25 Moreover, the record is insufficient to show that Ms. P.'s conduct was extremely dilatory to invoke forfeiture. See Bishop, 82 Wash.App. at 860, 920 P.2d 214; G.E., 116 Wash.App. at 337, 65 P.3d 1219.

¶ 26 The majority cites In re Dependency of A.G., 93 Wash.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 Wash.App. at 274, 968 P.2d 424. 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’” \*445 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, 968 P.2d 424. 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.

¶ 27 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.

¶ 28 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, 968 P.2d 424. 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.

¶ 29 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.

¶ 30 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.

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¶ 31 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.

¶ 32 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 Wash.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 Wash.App. 234, 240, 679 P.2d 372 (1984).

¶ 33 In *In re Welfare of J.M.*, 130 Wash.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.

¶ 34 In summary, I am troubled that the trial court allowed the mother's attorneys to \*446 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.

Wash.App. Div. 3, 2006.

In re Dependency of E.P.  
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END OF DOCUMENT

1 **PROOF OF SERVICE**

2 *Tami L. Richmond*, states and declares as follows:

3 I am a citizen of the United States of America and over the age of 18 years and I am  
4 competent to testify to the matters set forth herein. I certify that I served a copy of this Answer  
5 To Petition For Review on all parties listed below on the date below as follows:

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17  US Mail Postage Prepaid via Consolidated Mail  
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19  Via email

20 I certify under penalty of perjury under the laws of the state of Washington that the  
21 foregoing is true and correct.

22 Dated this 15<sup>th</sup> day of February, 2007, at Olympia, Washington.

23 

24 **TAMI L. RICHMOND**  
25 Legal Assistant  
26