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State of Washington  
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No. 97731-3

NO. 52632-8-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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IN RE THE WELFARE OF:

M.B.,  
Minor Child,

N.B. (FATHER),  
Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR PIERCE COUNTY

Pierce County Cause No. 17-7-02238-5

The Honorable Elizabeth P. Martin, Judge

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BRIEF OF APPELLANT/MOTION FOR ACCELERATED REVIEW

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## **ISSUES AND ASSIGNMENTS OF ERROR**

1. The trial court violated the father's Fourteenth Amendment right to Due Process.
2. The trial court violated the father's Wash. Const. art. I, § 3 right to Due Process.
3. The trial court erred by entering an order terminating the father's parental rights.
4. The trial court erred by holding the termination trial in the father's absence.
5. The trial court erred by entering Finding of Fact 2.9
6. The trial court erred by entering Finding of Fact 2.10.
7. The trial court erred by entering Finding of Fact 2.11.
8. The trial court erred by entering Finding of Fact 2.12.
9. The trial court erred by entering Finding of Fact 2.13.
10. The trial court erred by entering Finding of Fact 2.14(i).
11. The trial court erred by entering Finding of Fact 2.14(ii).
12. The trial court erred by entering Finding of Fact 2.15.
13. The trial court erred by entering Conclusion of Law 3.2.
14. The trial court erred by entering Conclusion of Law 3.3.
15. The trial court erred by entering Conclusion of Law 3.4.

**ISSUE 1:** In order to determine the bounds of procedural due process in a case regarding termination of parental rights, the court must weigh (1) the parent's interest, (2) the risk of error under the procedures used, and (3) the state's interest. Did the trial court violated the father's right to due process by holding a termination trial in his absence when the process rendered him unable to participate in the hearing regarding a fundamental right and the state would only have had to endure a one-week delay in order to enable the father to be present?

16. The violation of the father's right to Due Process requires reversal of the order terminating his parental rights.

17. The state cannot prove that the constitutional error was harmless beyond a reasonable doubt.

**ISSUE 2:** Constitutional error requires reversal of an order terminating parental rights unless the state can establish beyond a reasonable doubt that the error was harmless. Does the violation of the father's right to Due Process require reversal when his inability to participate in the termination trial leaves one able only to speculate as to what weaknesses in the state's case or strengths in his defense case would have been revealed by his participation?

## **FACTS AND PRIOR PROCEEDINGS**

N.B. is the father of M.B., who was born in October 2015. CP 171. But the father did not know that he had a son until the child was six months old. RP 241.<sup>1</sup> By that time, the child had already been found dependent and placed in foster care because he had drugs in his system at birth and the mother's older children were already involved with the Department of Social and Health Services (the department). RP 100-01, 241; Ex. 5, 7.

The mother demonstrated little interest in the child throughout the dependency process. RP 101. She never communicated with the department at all. RP 101. She was eventually determined to have abandoned the child and her parental rights were terminated by default. RP 101; CP 166-70.

The father, on the other hand, worked hard to gain custody of his son. *See* RP 241-69. He was incarcerated when the child was found dependent but began engaging in services to address his drug addiction as soon as he was released, when the child was five months old. RP 145, 241-42.

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<sup>1</sup> The father and paternal grandmother both believed that the child was the father's son soon after his birth, but paternity was not officially established until six months later. RP 241. Even before the DNA test proved paternity, the father expressed interest in caring for the baby and began visiting with him. *See* Ex. 13, p. 6.

The father completed intensive outpatient treatment for his chemical dependency. Ex. 90, p. 6. The father actively engaged in the recovery community, “enthusiastically” participating in Recovery Circle groups, one-on-one recovery coaching, and “fatherhood engagement” classes. Ex. 87. In fact, the father chose to give back to other recovering addicts by becoming a peer counselor and recovery coach as well. Ex. 90, pp. 3-5; RP 249. He also did some public speaking on behalf of Recovery Café, where he engaged in these services. RP 263-64.

The father completed a psychological evaluation with a parenting component. *See* Ex. 86. As recommended, he found a mental health counselor and started attending therapy. Ex. 80. He was open and engaged in his counseling sessions and made significant progress. Ex. 80.

The father also visited with his son consistently. RP 122. His visits progressed from twice to three times per week, and then to twelve hours of visitation per week in the father’s home. RP 242. The child’s guardian *ad litem* and the father’s psychological evaluator agreed that the father and child were comfortable with one another and enjoyed spending time together. RP 216, 302. The father was a “very capable” parent during his time with his son. RP 216.

But the father continued to struggle with substance abuse and eventually relapsed. He stopped attending his therapy sessions and his

DOSA (Drug Offender Sentencing Alternative) sentence was revoked, sending him back to prison in May 2018 for about eight months. RP 157, 255.<sup>2</sup>

The father continued to engage in services during his time in custody. RP 253-56. He participated in the Strength in Families Program as well as AA/NA. RP 253, 265. At the time of the termination trial, he was about to start another parenting program as well as the “Walking the Line” program, which teaches about how to be successful upon release. RP 254.

The father wrote to the social worker, asking for the opportunity to visit with son again and making it clear that he remained committed to his child. Ex. 81. But the case proceeded to a termination trial about five months before the father would have been released. *See RP generally*, RP 255.

The father consistently stated (through counsel) that he wanted to participate in the termination trial. RP 3, 93, 97. But Department of Corrections (DOC) officials would not let him use the “legal phone” at his facility to appear telephonically for the entire termination trial, which was

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<sup>2</sup> The father also spent some short periods in jail for Community Custody violations during the course of the dependency. RP 174. The average length of those jail stays was 12.5 days. RP 174.

expected to last two to three days. RP 4. The father's attorney asked for an order to transport the father for him to attend the trial and the court agreed. *See* RP 9-10.

By the next day, DOC had agreed to transport the father for the trial. *See* RP 16. But, when the trial was supposed to begin five days later, he was still not there. RP 35.

The court admitted that the father's absence was because of a mistake that the court had made on the order for transport. RP 36. But the judge said that she wanted to go forward and take testimony from the two witnesses who were present that day anyway. RP 36.

The father's chemical dependency counselor and mental health counselor both presented their testimony on behalf of the state without the father's physical or telephonic presence. *See* RP 42-83.

On the second day of trial, the father had still not been transported but his attorney provided the court with a letter from DOC, saying that the father could be transported to attend the trial the following week. RP 92; CP 137-38. The father's attorney again told the court that the father had a sincere interest in participating in the trial. RP 93. Father's counsel explained that the delay was because the court's order to transport the father did not say that he should be transported on a certain date or "as soon thereafter as possible." RP 96.

But the court insisted on continuing the trial without the father's participation, noting that they had "made efforts." RP 97.

In all, the state called seven witnesses for whom the father was unable to hear or communicate with his attorney about any of the testimony. *See* RP 43-235.

Finally, on the last day of trial, the father was able to appear telephonically in order to present his own testimony. *See* RP 238-78.

After that, the father was permitted to remain on the phone for a short portion of his attorney's cross-examination of the department's social worker. *See* RP 279-99. The portion of the social worker's testimony that the father heard lasted for thirty-three minutes. *See* CP 157. But the social worker had already presented one hour and nine minutes-worth of testimony that the father was not permitted to hear, including all of the state's direct-examination and part of the father's attorney's cross-examination. *See* CP 153-54.

The father was also permitted to stay on the phone for the guardian *ad litem*'s testimony, which lasted three minutes. *See* CP 156. But he was unable to appear telephonically for the closing arguments by the state or his own attorney. *See* RP 305-35.

The court entered an order terminating the father's parental rights. CP 171-76. This timely appeal follows. CP 177.

## ARGUMENT

**THE TRIAL COURT VIOLATED THE FATHER'S RIGHT TO DUE PROCESS BY HOLDING ALMOST THE ENTIRE THE TERMINATION TRIAL IN HIS ABSENCE, WHEN HE THE COURT WOULD ONLY HAVE HAD TO WAIT A WEEK FOR HIM TO BE ABLE TO PARTICIPATE.**

- A. Termination proceedings implicate a fundamental right of parents and require robust Due Process protections.

Despite his clear desire to participate in the termination trial regarding his son, the father was not permitted to appear either telephonically or in person for the testimony of seven of the state's witnesses or for most of the testimony by the department social worker. *See* RP 43-235. The only witness for whom the father heard the entire testimony was the guardian *at litem*, who testified for three minutes. RP 300-02; CP 156.

The termination court held the majority of the trial without the father's participation even though the judge had information showing that he would could be transported the following week. RP 92; CP 137-38. This was true despite the fact that the delay in transporting the father was due to an error by the trial court itself. RP 96.

Under the circumstances of this case, the termination court violated the father's constitutional right to Due Process by continuing with the trial without his telephonic or physical presence.

A parent has a fundamental due process right to preservation of the family unit. *In re Welfare of R.H.*, 176 Wn. App. 419, 425, 309 P.3d 620 (2013) (citing *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982)); U.S. Const. Amend. XIV; art. I, § 3.

Termination hearings affect a basic constitutional interest and, accordingly, require greater due process protections for parents than dependency proceedings or other proceedings regarding custody of children. *Id.* Due process requires that parents in termination proceedings be afforded notice, an opportunity to be heard and participate in their defense, and the right to be represented by counsel. *In re Welfare of L.R.*, 180 Wn. App. 717, 723, 324 P.3d 737 (2014) (citing *In re Welfare of S.E.*, 63 Wn. App. 244, 250, 820 P.2d 47 (1991)).

To determine whether a parent has received due process, courts apply the balancing test set forth by the United States Supreme Court in *Mathews v. Eldridge*. *Id.* (citing *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976); *In re Dependency of C.R.B.*, 62 Wn. App. 608, 614–15, 814 P.2d 1197 (1991)). The three-part test weighs: (1) the parent's interests, (2) the risk of error presented by the procedures used, and (3) the state's interest. *Id.*

Because of the fundamental liberty interest involved, an incarcerated parent has a right to meaningful participation in a termination

hearing. *State ex rel. Children, Youth & Families Dep't v. Ruth Anne E.*, 126 N.M. 670, 974 P.2d 164, 171 (N.M. Ct. App. 1999). That right must include the opportunity to review and challenge the evidence presented against him/her during the trial. *Id.*

Alleged violations of a parent's right to Due Process are reviewed *de novo*. *Id.*

B. Proper application of the *Mathews* test indicates that the court violated the father's right to Due Process by proceeding with the termination trial in his complete absence.

Applying the *Mathews* test to this case, Due Process prohibited the court from moving forward with the termination trial in the father's complete absence.

Turning, first, to the father's interests at stake, the father has a fundamental liberty interest in the care and custody of his son. *In re Dependency of K.D.S.*, 176 Wn.2d 644, 652, 294 P.3d 695 (2013).

Termination of a parent's rights is "one of the severest of state actions and implicates fundamental interests." *In re Welfare of J.M.*, 130 Wn. App. 912, 921, 125 P.3d 245 (2005).

Considering, second, the risk of error, the risk of erroneous termination is "greatly magnified" when a parent is absent from a termination trial "unless alternative arrangements are made to permit an

incarcerated parent... to consult with his or her attorney, and to confront the witnesses called by the state.” *State ex rel. Children*, 126 N.M. 670.

The parent has the most intimate working knowledge of the facts of his/her case and is in the best position to recognize errors in the state’s evidence. This is particularly true where, as in the father’s case, the defense attorney was not assigned to the case during the lengthy dependency phase. *See* RP 8. Indeed, counsel had never spoken to the father until less than a week before the trial began. RP 8. The risk of error involved in holding the termination trial without the father’s presence was very high.

Finally, looking to the state’s interest in the procedures used at trial, the state has a strong interest in the “speedy resolution of the termination proceeding.” *L.R.*, 180 Wn. App. at 727.

In this case, however, the DOC would have been able to transport the father to attend the trial if it had been postponed by only a week. RP 92; CP 137-38. Indeed, the state had already requested three continuances of the termination trial (for about thirty days each), apparently having determined that brief delays would not significantly affect its interests. *See* CP 83-104. The state was unable to provide any reason why an additional 7-days’ continuance would have affected the state’s interest in any way. *See* RP 91-97.

Weighing the *Mathews* factors, including the father's extremely high interest, the significant risk of error, and the state's low interest in avoiding a weeklong delay, the trial court violated the father's right to Due Process by proceeding with the termination trial in his absence. *of L.R.*, 180 Wn. App. at 723; *Mathews*, 424 U.S. at 335.

In *L.R.*, this court applied the *Mathews* factors to find that an incarcerated mother's right to Due Process had not been violated by her absence from the first day of a termination trial. *L.R.*, 180 Wn. App. 722. In that case, however, the mother only missed the testimony of one witness (the department social worker) and was able to appear telephonically for the remaining two full days of the trial. *Id.* at 722. Additionally, the trial court provided the mother in *L.R.* with the additional procedural protection of recesses after each witness's direct testimony to permit her to consult with her attorney prior to cross-examination. *Id.* at 722. The court also allowed the mother's attorney to re-call the social worker (whose testimony the mother had missed) and conduct another cross-examination with the mother present telephonically. *Id.*

The *L.R.* court relied heavily on the fact that the mother in that case had only been absent from one day of trial and had been afforded additional protections to enable her to consult with her attorney and meaningfully participate in the hearing. *Id.* at 727. The court reasoned that those

procedures minimized the risk of error under the second *Mathews* factor and protected the mother's right to due process. *Id.* at 728.

Even so, the *L.R.* court found it "troubling" that the mother was unable to appear telephonically for the entire trial. *Id.* The court noted that:

This lack of cooperation and effort could lead to a due process violation when interests as fundamental as those involved in termination proceedings are at stake. Under these circumstances, the better practice may have been to continue the trial to allow the parent to attend telephonically.

*Id.*

Courts in other jurisdictions have, similarly, held that, when an incarcerated parent is unable to be physically present at a termination trial, s/he must be afforded some other meaningful way to participate, such as a telephonic appearance or an opportunity to review a transcript of the state's evidence before his/her attorney conducts cross-examination and presents defense evidence. *See e.g. Orville v. Div. of Family Servs.*, 759 A.2d 595, 600 (Del. 2000) (incarcerated mother's right to due process violated when she was permitted to appear telephonically for only a portion of her termination trial); *State ex rel. Children*, 126 N.M. 670 (incarcerated father's right to due process violated by termination court's failure to adopt some procedure to permit him to meaningfully participate despite his absence); *In re Interest of L.V.*, 240 Neb. 404, 417, 482 N.W.2d 250 (1992) (incarcerated father's physical absence from termination trial did not violate

due process because he was given the opportunity to review a transcript of the state's evidence before his attorney conducted cross-examination or presented evidence on his behalf); *In re C.G.*, 954 N.E.2d 910, 920 (Ind. 2011) (incarcerated mother's physical absence did not violate due process because she participated telephonically in the entire hearing); *See also Alex H. v. State Dep't of Health & Soc. Servs.*, 389 P.3d 35, 54 (Alaska 2017); *In re J.E.*, 45 N.E.3d 1243, 1246 (Ind. Ct. App. 2015).

But the father in this case was not afforded any of the protections relied upon in *L.R.* or in the other cases cited above. *See RP generally.* Rather, he completely missed the vast majority of the state's evidence against him and, accordingly, had no opportunity to discuss that evidence with his attorney. While the father was able to present his own telephonic testimony, he had no idea what evidence the state had presented before he did so.

The trial court violated the father's right to Due Process by holding most of the termination trial in his absence. *R.H.*, 176 Wn. App. at 425; *Santosky*, 455 U.S. at 753; *L.R.*, 180 Wn. App. at 727.

C. The violation of the father's right to Due Process requires reversal of the order terminating his parental rights.

Due Process violations during a termination proceeding require reversal unless the state can prove beyond a reasonable doubt that the error

did not affect the outcome. *State v. Lynch*, 178 Wn.2d 487, 494, 309 P.3d 482 (2013).

A failure of Due Process prejudices a parent when the court is left to “only speculate as to what weaknesses in the State’s case or strength in [the parent]’s case might have been revealed” if the parent had been afforded Due Process. *J.M.*, 130 Wn. App. at 925 (reversing a termination order when the parent’s counsel had made no meaningful attempt to challenge the state’s evidence); *See also In re Dependency of G.A.R.*, 137 Wn. App. 1, 8, 150 P.3d 643 (2007).

The state cannot demonstrate that the violation of the father’s right to Due Process was harmless beyond a reasonable doubt in this case because one can do no more than “speculate” as to what weaknesses in the state’s evidence or strength in the father’s evidence would have been revealed if the father had been afforded the opportunity to meaningfully participate in the termination trial.<sup>3</sup> *Id.*

The trial court’s violation of the father’s right to Due Process requires reversal of the order terminating his parental rights. *J.M.*, 130 Wn. App. at 925.

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<sup>3</sup> Because the violation of his right to Due Process rendered the evidence in the case improperly tested and incomplete, the father assigns error to the termination court’s Findings of Fact regarding each contested issue at trial.

**CONCLUSION**

The termination court violated the father's right to Due Process by holding almost the entire termination trial under circumstances in which the father had no opportunity to meaningfully participate. The order terminating the father's parental rights must be vacated.

Respectfully submitted on February 26, 2019.



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Skylar T. Brett, WSBA No. 45475  
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief/Motion for Accelerated Review, postage prepaid, to:

N.B. (father) (DOC #XXXXXX)  
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I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Opening Brief/Motion for Accelerated Review electronically with the Court of Appeals, Division II, through the Court's online filing system.

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

Signed at Seattle, Washington on February 26, 2019.



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Attorney for the Appellant

**LAW OFFICE OF SKYLAR BRETT**

**February 26, 2019 - 6:00 PM**

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