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IN THE SUPEME COURT
OF THE STATE OF WASHINGTON

In re the Welfare of

D.E., 7/05/12
V.E., 6/16/15 &
M.E., 3/06/17,

Minor Children.

SUPPLEMENTAL BRIEFING
BY THE MOTHER, J.J.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY
THE HONORABLE ELIZABETH MARTIN, JUDGE

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I. INTRODUCTION

The mother, J.J., respectfully requests that this Court reverse the orders terminating her parental rights to her three children. This case has an unusual procedural history. In November 2018, after the parties rested and delivered closing arguments, the trial court orally ruled that the state failed to meet its burden of proof. However, instead of dismissing the termination petitions, the court continued the case and ordered the mother to engage in additional services. When the mother failed to comply to the court's satisfaction, the court resumed trial. In January 2019, the court terminated the mother's parental rights.

The trial court expressly considered the children's best interests when making these decisions—in the middle of a termination trial, after orally ruling that the state failed to meet its burden of proof. The court also implied that it would continue the termination trial indefinitely, giving the state as much time as it needed to prove its case. These procedures violated the mother's due process rights. This Court must reverse.

II. ISSUES PRESENTED FOR REVIEW

1. Did the trial court violate the mother's due process rights by refusing to dismiss the termination petitions after finding that the state failed to meet its burden of proof?

2. Did the trial court violate the mother's due process rights by basing its decision about continuing the termination trial on the children's best interests, specifically their need for permanency and their residency in a "preadopt" home?

III. STATEMENT OF THE CASE

J.J. is the mother of three children: seven-year-old D.E., four-year-old V.E., and three-year-old M.E. Ex.s 1, 2, 8. The father of all three children is S.E.[1] *Id*. J.J. loves her children but struggled with poverty, housing insecurity, and transportation issues. RP at 96, 101-02. The department also alleged the she was the victim of domestic violence perpetrated by the father. Ex.s 1, 2, 8.

The state removed D.E. and V.E. from their parents' care in August 2016. Ex.s 1, 2. M.E. was born in March 2017 and removed at birth. Ex.s 7, 8. All three children were found to be dependent, and the department was ordered to provide services to the mother. Ex.s 4, 10. During the dependency, the mother completed some services, but she struggled with transportation. The department remained concerned about domestic violence by the father, as well as the mother's alleged substance use. The department filed termination petitions regarding D.E. and V.E. in November 2017, and M.E. in April 2018.

The termination cases proceeded to trial in November 2018. Both sides presented evidence, rested, and delivered closing arguments. On November 16, 2018, the trial court issued an oral ruling. RP at 427. The

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[1] The father's parental rights were terminated and are not at issue in this appeal.

court expressed concern about the services offered to address the mother's alleged chemical dependency and mental health issues. RP at 428-30.

After weighing these concerns, the trial court judge concluded, "And therefore, I think I cannot make a finding at this moment in time by clear, cogent and convincing evidence that all necessary services have been offered or that there is no reasonable likelihood of her correcting [her deficiencies] within the immediate future." RP at 431. However, the judge went on to clarify that she was not "willing to dismiss this petition because I think there are a lot of issues." *Id*. The court ordered "that this matter be continued without findings." *Id*.

The court ordered a short continuance, to January 2019. RP at 432. The court explicitly based the length of this continuance to the children's best interests, stating, "permanency is in these children's best interest, and that's why I need to keep this on a relatively short timeline." RP at 434.

In addition to continuing the termination trial, the court ordered additional services for the mother. RP at 432-33. The court directed the department to investigate services in Thurston County. *Id*. The court also ordered the mother to provide a urinalysis sample that day. RP at 334-35. The court set another hearing for November 29, 2018, to assess the need for additional services. RP at 442, 449.

The mother participated in the urinalysis test ordered by the court. RP at 457. This test was positive for methamphetamines and amphetamines. RP at 457-58. The mother maintained that this resulted from her sinus medication, but the court did not find this credible. RP at 670; CP 171 at section 2.9.2.

The parties returned to court on November 29, 2018. RP at 456. At that time, the court entered a detailed order outlining services for the mother. CP at 110-11. The department maintained that the mother needed health insurance in order to access some of these services. RP at 458, 473. The trial court emphasized that the mother needed to be "diligent" about getting insurance and accessing services because "we have children who are in foster care and in a preadopt home and are stable." RP at 466-67.

The court held a status hearing on January 15, 2019. RP at 494. The department argued that the mother had not sufficiently engaged in services and asked to reopen the termination trial. RP at 496, 500. The mother's attorney disputed the department's version of the facts. RP at 497, 501-02. The court decided to reopen the termination trial and set a date for January 30, 2019. RP at 505. The court reiterated that the case was on a "fairly tight time frame." RP at 504.

The termination trial resumed on January 30, 2019. RP at 510. The court specified that it reopened the case to "look at whether we proceed to

final findings in this case or whether we continue it further." RP at 514. At the resumed trial, the court heard evidence about the mother's services from November 2018 to January 2019. She participated in some services but missed many appointments. RP at 535-36, 591, 604, 629-30. The trial court granted the state's petitions and terminated the mother's parental rights. CP 169-76, 409-16, 612-19. J.J. appeals.

IV. ARGUMENT

The mother, J.J., asks this Court to reverse the orders terminating her parental rights because the procedures used by the trial court in this case violated due process. This Court reviews alleged due process violations de novo. *Post v. City of Tacoma*, 167 Wn.2d 300, 308, 217 P.3d 1179 (2009).

A. The Trial Court Violated Due Process by Refusing to Dismiss the Termination Petitions when the State Failed to Meet its Burden of Proof.

First, the trial court violated the mother's due process rights by refusing to dismiss the termination petitions even after finding that the state failed to meet its burden of proof. The proper remedy when the state fails to meet its burden at trial is dismissal.

Parents have "a fundamental civil right" to control and custody of their children. *In re Dependency of K.N.J.*, 171 Wn.2d 568, 574, 257 P.3d 522 (2011). For this reason, "[p]rocedures used to terminate the relationship between parent and child must meet the requisites of the due process clause

of the Fourteenth Amendment to the United States Constitution." *Id*. Due process is not diminished just because the state has temporary custody of a child. *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S.Ct. 1388 (1982). "If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs." *Id*.

Here, the procedures at trial violated due process. The trial court orally found that the state failed to meet its burden of proof, stating "I think I cannot make a finding at this moment in time by clear, cogent and convincing evidence that all necessary services have been offered or that there is no reasonable likelihood of her correcting [her deficiencies] within the immediate future." RP at 431. However, the court was not "willing to dismiss this [termination] petition because I think there are a lot of issues." *Id*. The court ordered "that this matter be continued without findings." *Id*.

In other words, the trial court orally ruled that the state failed to meet its burden of proof but then *intentionally held off on entering written findings* in order to give the state more time to meet its burden. RP at 431. The court stated its intention to continue the termination trial indefinitely until the state met its burden, positing the outcome as "whether we proceed to final findings in this case or whether we continue it further." RP at 514. This amounts to a decision that the state will never lose a termination trial

because if it presents insufficient evidence, the court will continue the case until the state wins.

On review, the Court of Appeals Commissioner did not disagree with this characterization but concluded that this procedure satisfied due process. Ruling at 25. According to the Commissioner, the trial court's "refusal to dismiss the termination petitions after finding the State had not yet satisfied its burden was a means of ensuring J.J.'s due process rights were protected and that it had the opportunity to consider all relevant evidence." *Id*. The Commissioner added, "The juvenile court should not be punished for carefully considering the evidence presented and determining it was inadequate to come to a decision." *Id*.

The Commissioner and the trial court both erred by refusing to hold the state to its burden of proof. If the state has "not yet satisfied its burden," then the state has failed to meet its burden and the petitions must be dismissed. The juvenile court should not have the discretion to "consider[] the evidence presented," determine that the state has "not yet satisfied its burden," and then continue the termination trial indefinitely until the state produces sufficient evidence. If the state's evidence was "inadequate," the remedy must be dismissal, not more time to produce adequate evidence.

The Commissioner's Ruling sets a dangerous precedent for cases involving coercive state action. When the state bears the burden of proof

and fails to meet that burden, the remedy must be dismissal. To hold otherwise means that the state can never lose a termination trial; it will instead be given additional time to meet its burden. Coercive state action also distinguishes this case from two of the cases raised by the department, *In re Interest of Pawling,* 101 Wn.2d 392, 395-96, 679 P.2d 916 (1984) and *DGHI Enterprises v. Pac. Cities, Inc.*, 137 Wn.2d 933, 977 P.2d 1231 (1999). Response to Motion for Discretionary Review at 10.

Pawling concerned a private petition to terminate the parental rights of a father, brought by the child's mother and stepfather. 101 Wn.2d at 394. The trial court heard evidence supporting termination but then continued the case several months so that the parties could present evidence about the child's best interests. *Id*. At the subsequent hearing, the court terminated the father's rights. *Id*. at 395. On appeal, the father argued that the trial court violated CR 59, by ordering a new trial without proper findings, and CR 15, by amending its initial oral decision. *Id*. The Court of Appeals held that the trial court acted within its discretion by allowing "additional evidence to be presented as to the best interests of the child even though this matter had not been raised in the pleadings." *Id*.

The department also cites to *DGHI Enterprises*. Response to Motion for Discretionary Review at 10. That case concerned a dispute over a commercial lease between two corporations. *DGHI Enter.s*, 137 Wn.2d at

935-36. A superior court judge heard a 12-day trial and issued an oral decision. *Id*. at 936-37. Tragically, he died before entering written findings. *Id*. at 937. The Washington Supreme Court held that a successor judge could not rely on the deceased judge's oral decision and must instead hear a new trial before entering written orders. *Id*. at 950.

Both of these cases concerned disputes between private parties. Both addressed narrow legal issues (the proper interpretation of CRs 59 and 15) or unusual factual circumstances (the death of a judge before entering written findings). *Pawling* concerned the fundamental right to parent, but in the context of one parent seeking to terminate the rights of another. The state was not involved, the child was not found to be dependent, and the department was not ordered to provide reunification services to the father prior to termination. Neither of these cases involved coercive state action affecting fundamental rights, and thus neither case is dispositive of the due process issue at bar. This Court should hold the state to its burden of proof and reverse.

B. The Trial Court Violated Due Process by Considering the Children's Best Interests in the Middle of a Termination Trial.

Second, the trial court violated the mother's due process rights by expressly considered the children's best interests in the middle of a termination trial, contrary to this Court's decision in *In re Welfare of A.B.*,

168 Wn.2d 908, 911, 232 P.3d 1104 (2010). During a termination trial, the superior court can only consider the children's best interests *after* finding that the state met its burden of proof under RCW 13.34.180(1). RCW 13.34.190(1); *A.B.*, 168 Wn.2d at 911. This two-step process is enshrined in Washington law and rooted in due process. *A.B.*, 168 Wn.2d at 925-26 (citing *Kramer*, 455 U.S. at 759-60).

Parents have a due process right to adjudication of their fitness before courts evaluate the children's best interests. *Id*. This Court was clear in *A.B.*:

> . . . [W]hen a Washington court applies the first step of that scheme, it is obliged to focus on the alleged unfitness of the parent, which must be proved by clear, cogent, and convincing evidence, and when it applies the second step, it focuses on the child's best interests, which need be proved by only a preponderance of the evidence.

Id. at 925. The Court added that it is "premature for the trial court to address the second step before it has resolved the first." *Id*.

Here, the trial court expressly considered the children's best interests before finding the mother unfit and before finding that the state met its burden of proving RCW 13.34.180(1). The court found that the state failed to meet its burden of proof under RCW 13.34.180(1) but refused to "dismiss this petition" and ordered "that this matter be continued without findings." RP at 431. The court found that "permanency is in these

children's best interest, and that's why I need to keep this on a relatively short timeline." RP at 434. The court weighed the mother's access to services against the children's best interests, stating that the mother "could have secured Medicaid" and accessed services "had she been diligent," and "in the meantime, we have children who are in foster care and in a preadopt home and are stable." RP at 466-67. The court decided to resume trial because it found that "we have got children whose permanency is at issue." RP at 498.

In short, the trial court guided the outcome of this termination trial based on the children's best interests, violating due process. *See A.B.*, 168 Wn.2d at 925. The Court of Appeals Commissioner excused the trial court, reasoning that "[e]nsuring the children's best interests is an overarching goal of a termination proceeding." Ruling at 26. The Commissioner elaborated: "In keeping the continuance short in consideration of the best interests of the children, the juvenile court did not violate J.J.'s substantive due process rights, but rather, appropriately weighed J.J.'s interests in an additional opportunity to engage in services against the children's right to a speedy resolution." *Id*.

The Commissioner erred because it was inappropriate and unconstitutional of the trial court to "weigh" the due process rights of the mother against the best interests of the children. During a termination trial,

the court can only consider the children's best interests after determining that a parent is unfit. *A.B.*, 168 Wn.2d at 925. This sequence is mandated by statute and due process, but it did not occur in this case. *See id.*; RCW 13.34.190(1).

The department attempts to distinguish *A.B.* by arguing that "in deciding the length of the continuance, the trial court was not considering whether termination was in the child's best interests." Response to Motion for Discretionary Review at 13. The state's argument fails because this distinction did not exist. The trial court based its decision about the length of the continuance on the children's need for "permanency" because they "are in foster care and in a preadopt home and are stable." In other words, the court based the continuance on the children's alleged need to have the parents' rights terminated so that they could be adopted. This procedure violated the mother's due process rights by considering the children's best interests prior to finding her unfit to parent. *See A.B.*, 168 Wn.2d at 925.

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V. CONCLUSION

J.J., the mother, respectfully requests that this Court reverse the Court of Appeals decision upholding the orders terminating her parental rights.

RESPECTFULLY SUBMITTED this 19th day of May, 2020.

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CERTIFICATE OF SERVICE

I, Stephanie Taplin, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct to the best of my knowledge:

On May 19, 2020, I electronically filed a true and correct copy of this document via the Washington State Appellate Courts' Secure Portal to the Washington Supreme Court. I also served this document as indicated below:

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