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**COURT OF APPEALS, DIVISION II
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.

REPLY BRIEF OF APPELLANT
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. ARGUMENT IN REPLY

The superior court took an unorthodox approach to this termination trial. In November 2018, after the parties rested and delivered closing arguments, the court orally ruled that the state failed to meet its burden of proof. RP at 431. However, instead of dismissing the termination petitions, the court continued the case and ordered the mother to engage in additional services. RP 431-33; CP 105. The court checked back in on the case at several dependency status hearings. RP at 432, 456, 494; CP 110-11. When the mother failed to comply to the court's satisfaction, the court resumed trial. RP at 510. In January 2019, the court terminated the mother's parental rights. RP at 691; CP 169-76, 409-16, 612-19.

The superior 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. RP at 431, 434, 466-67, 498. 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. RP at 514. These procedures violated the mother's due process rights. This Court must reverse.

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A. The Trial Court Violated Due Process by Considering the Children’s Best Interests During the Middle of a Termination Trial.

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). *In re Welfare of A.B. (A.B. I)*, 168 Wn.2d 908, 911, 232 P.3d 1104 (2010). Here, the trial court expressly considered the children’s best interests before the state met its burden of proving RCW 13.34.180(1), violating due process. *See id.* This manifest constitutional error must be reversed by this Court.

The superior court guided the outcome of this termination trial based on the children’s best interests. 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 its response, the state admits that the trial court considered the children's best interests. Response at 45-46. However, the state attempts to distinguish different applications of this standard. The state argues that the court "considered the children's best interest in the context of the appropriate length of a continuance, not whether an order terminating parental rights was in the children's best interest." Response at 46.

This argument fails because it ignores the context of the continuance. Even if it were possible to parse out different applications of the "best interests" standard, that distinction did not occur in this case. The trial court did not order a continuance based on a factor unrelated to the merits—such as a party's illness. Instead, the ordered a continuance when the state failed to meet its burden based on the children's best interests. RP at 431-33. The court determined when to resume the termination trial based on the children's best interests. RP at 466-67, 498. The court declared that the only acceptable outcomes of trial were to "proceed to final findings" or to "continue it further" based on the children's best interests. RP at 514.

The state attempts to create a distinction that was not present in the trial court's decision-making. Instead, the court expressly considered the children's best interests in the middle of the termination trial in order to make decisions that determined the outcome of that trial, violating due process. This Court must reverse.

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

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.*

Here, the procedures at trial violated due process. The trial court orally found that the state failed to meet its burden of proof but refused to dismiss the termination petitions. RP at 431. The court intentionally delayed entering written findings in order to avoid dismissal. *Id.* The court then guided the case towards termination, allowing the state as much time as it needed to gather enough evidence to meet its burden. RP at 514. This amounted to manifest constitutional error, requiring reversal.

In its response, the state attempts to undermine the superior court’s oral decision. Response at 40-42. Relying on two civil cases, the state characterizes the oral decision as a mere “informal opinion” that the court could change or abandon before entering written findings. *Id.* at 41. These cases are not persuasive because they are factually dissimilar and have no bearing on a parent’s due process rights when faced with coercive state action.

First, the state relies on *DGHI Enterprises v. Pac. Cities, Inc.*, 137 Wn.2d 933, 977 P.2d 1231 (1999). Response at 41. 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.

Second, the state relies on *In re Marriage of Harshman*, 18 Wn. App. 116, 567 P.2d 720 (1981), *abrogated on other grounds by Elam v. Elam*, 97 Wn.2d 811, 650 P.2d 213 (1982). Response at 41. That case concerned distribution of property in a divorce. *Harshman*, 18 Wn. App. at 118. The trial court issued an oral decision. *Id.* at 121. Before entry of written findings, the wife moved for reconsideration. *Id.* The husband argued that this motion was not timely because it was filed more than five days after the court's oral decision. *Id.* at 118. The Court of Appeals disagreed and held that pursuant to CR 59, a party has until five days after entry of written orders to file a motion for reconsideration. *Id.* at 120-21.

Both of these cases concerned disputes between private parties over property. Both addressed narrow legal issues (the proper interpretation of CR 59) or unusual factual circumstances (the death of a judge before

entering written findings). Neither case involved coercive state action affecting fundamental rights, and thus neither case is dispositive of the due process issue at bar.

Instead, *In re Dependency of T.R.*, 108 Wn. App. 149, 29 P.3d 1275 (2001), sets out the appropriate legal standard. In that case, the superior court orally decided that the state met its burden of proof under RCW 13.34.180(1). *T.R.*, 108 Wn. App. at 153. However, the court found that a guardianship may be in the child’s best interests. *Id.* The court delayed entry of written findings until the state determined that a guardianship was not viable, then terminated the mother’s rights. *Id.* Far from discounting the importance of oral findings, the Court of Appeals in *T.R.* upheld the termination order specifically because “the trial court made the statutory findings required for termination”—orally, immediately after trial. *Id.*

Here, like in *T.R.*, the trial court’s oral decision was important and should have been dispositive. In *T.R.*, the superior court could delay entry of written findings because it found that the state met its burden of proof. *T.R.*, 108 Wn. App. at 153. Here, the opposite occurred. The trial court erred by delaying written findings in order to shield the state from the consequences of failing to meet its burden of proof. RP at 431.

The state’s counterargument fails because it ignores the trial court’s basis for refusing to enter written findings. The 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.

Such an outcome 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. Imagine if this occurred in a criminal case. Suppose the prosecution failed to meet its burden, but instead of permitting the jury to render a not-guilty verdict, the trial court continued the case indefinitely until the prosecution found sufficient evidence for a conviction. That procedure would clearly violate due process. The same principles apply here, where the state seeks to permanently sever the constitutionally-protected relationship between a parent and her children. This Court should reverse because the procedures in this case violated due process.

II. CONCLUSION

J.J., the mother, respectfully requests that the Court of Appeals reverse the orders terminating her parental rights and remand to the superior court.

RESPECTFULLY SUBMITTED this 9th day of August, 2019.



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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 August 9, 2019, I electronically filed a true and correct copy of this document via the Washington State Appellate Courts' Secure Portal to the Washington Court of Appeals, Division II. I also served this document as indicated below:

Marlo Oesch (X) via email to:
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SIGNED in Tacoma, Washington, on August 9, 2019.



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