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NO. 98043-8

SUPREME COURT OF THE STATE OF WASHINGTON

In re the Welfare of

D.E., V.E., and M.E.,

Minor Children.

**SUPPLEMENTAL BRIEF OF THE DEPARTMENT OF
CHILDREN, YOUTH, AND FAMILIES**

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I. INTRODUCTION

The termination of parental rights involves weighty competing interests. Faced with a difficult and close decision, the trial court in this case exercised its recognized discretion to continue trial, permitting both parties to present additional evidence.

Far from violating principles of due process, recognizing that the trial court has discretion to continue a trial will, in appropriate cases, *decrease* risk of an erroneous decision by ensuring that the trial court has the evidence necessary to make a correct decision. It also honors the paramount concern in any child protective proceeding: the best interests of the children, which includes their statutory right to a speedy and just resolution. While there are important limitations on a trial court's ability to continue a termination of parental rights trial, the trial court here acted well within its discretion in continuing the trial to resolve the close question.

J.J.'s rigid proposed rule, conversely, would require the trial court to always immediately grant or dismiss a termination petition, even where, as here, a gap in evidence is caused in large part by the parent's own failure to cooperate with services. But due process is a flexible concept. J.J.'s inflexible rule finds no support in the case law, would undermine the best interests of the children by significantly delaying resolution, and would

increase the risk of an erroneous decision by forcing trial courts to prematurely make sensitive and hugely consequential decisions.

II. STATEMENT OF THE ISSUE¹

Did the trial court's continuance of the termination trial to obtain additional evidence comport with principles of due process?

III. STATEMENT OF THE CASE

A. The Department's Filing of a Termination Petition Following J.J.'s Persistent Refusal to Engage with Services

J.J. was granted an order of protection against S.E., the father of her children, in March 2016; she described S.E. as "extremely violent," "mentally, verbally, and physically abusive," and neglectful of the children. RP 81-82; Ex. 24.² But J.J. chose not to serve the order. RP 82. In August 2016, an anonymous reporter stated that the children were routinely dirty and lacked food and running water and that he found J.J. passed out in front of the children. Exs. 1, 2; RP 26, 184-85. Law enforcement officers visited the home, found filthy, unsafe conditions, and placed the children (three-year-old D.E. and infant V.E.) in protective custody. *Id.*

¹ J.J. sought also sought discretionary review of the trial court's consideration of "the children's best interests during the middle of a termination trial" and the trial court's consideration of "domestic violence issues." Mot. for Discret. Rev. at 14, 16. This Court granted review "only on the issue of whether the trial court violated the mother's due process rights in continuing the termination trial after concluding that the Department . . . had failed to meet its burden of proof." Order, Apr. 1, 2020.

² S.E. has voluntarily relinquished his parental rights. RP 5.

J.J. entered into an agreed dependency order in November 2016 and agreed that she needed services to move towards reunification, including urinalysis (UA) testing and a parenting assessment. Ex. 4. One month later, J.J. reported to police that S.E. swung a hatchet at her and her car. RP 172. After police forced entry to the home, they encountered filthy conditions and observed a foot-and-a-half long hatchet with paint matching that on J.J.'s car on the blade. RP 178; Ex. 32. Even after the criminal court entered a no contact order, J.J. continued to live with S.E. RP 171, 177, 225-26.

J.J. eventually completed the court-ordered parenting assessment, which concluded that she was in denial of all reported concerns, that she protected S.E. despite the danger to herself and her children, and that she described their relationship as "perfect." RP 26, 37. The provider recommended that J.J. engage in counseling and domestic violence and protective parenting groups. Ex. 27 at 12. J.J. reported diagnoses of bipolar and manic depression, implying ongoing psychiatric care, and the provider recommended she continue to work with her psychiatrist. Ex. 27 at 12.

In March 2017, J.J. gave birth to her third child, M.E.,³ and tested positive for amphetamines, which she blamed on a sinus medication. RP 119. Although J.J. completed a drug and alcohol assessment resulting in

³ The trial court placed M.E. in out-of-home care. RP 186.

no further recommendations, that evaluation was based solely on J.J.'s self-report. Ex. 27 at 4-5; RP 199. Throughout the dependency, J.J. missed approximately twelve mandatory UA tests. RP 130, 194, 198-99, 249-50, 339, 365-66. Notably, in October 2017, J.J. refused to provide a UA sample following a meeting during which the parties discussed the lack of a documented period of sobriety, even though the Department volunteered to transport her. RP 365-66.

The Department filed a termination petition in November 2017, updated in October 2018. CP 1-4, 71-74. In June 2018, another incident of domestic violence occurred: while J.J. and her new boyfriend were sleeping in a car, S.E. broke the windows, attempted to cut the wires, tased J.J.'s boyfriend, and poured gasoline all over the car. Ex. 20, 41; RP 72-73. While J.J. insisted her only issue was stable housing, she was not willing to live in clean and sober housing or domestic violence housing because she insisted she had no such issues. RP 369.

The parties met for a settlement conference in August 2018, resulting in an agreed order requiring J.J. to participate in counseling and domestic violence and protective parenting groups—all on the same day at the same location. Ex. 16; RP 144, 227. However, J.J. failed to follow through, telling the provider she did not need any of the recommended services. Ex. 37; RP 44-45. J.J. also agreed to complete random UAs and

participate in an updated chemical dependency assessment with collateral information upon a missed or positive UA. Ex. 16. J.J. tested negative for substances on the day the agreed order was entered, but she had seven days' notice of the test. RP 338-39. She requested that the second UA be set over two days, resulting in a negative but diluted result. RP 339. J.J. failed to take a subsequent UA or complete a new drug assessment, as required by the agreed order. RP 339-41, 360.

B. Evidence Presented at the Initial Fact-Finding Hearing

During three days of testimony from November 6 through 8, 2018, the Department called seven witnesses. Josette Parker, the parenting assessment provider, testified about her months-long difficulty communicating with J.J., as well as her conclusion that J.J. was not “able to create a safe and nurturing environment free from violence,” and J.J.’s statements to her that she did not need *any* of the recommended services. RP 33-34, 46. Sherriff’s Deputy Camm Clark testified about his observations in responding to the December 2016 incident in which S.E. threatened J.J. with a hatchet, including the “deplorable” conditions in the home. RP 171-77. Social workers Kyle Wiest, Ashton Dart, and Amy Bielefeld testified regarding J.J.’s failure to participate in services and UA testing. RP 179-230, 297-305, 324-50. Guardian ad litem Erika Thompson testified that although she had hoped for reunification, she believed

termination was in the children's best interests because in the 27 months of dependency, J.J. had not made progress to rectify the parental deficiencies and safety concerns. RP 370. She also testified about J.J.'s refusal to take a random UA after a meeting with the Department in October 2017. RP 366.

The state called J.J. as a witness, and she also testified on her own behalf. J.J. denied any domestic violence, including flatly denying the multiple corroborated incidents she had previously reported to law enforcement. RP 382-84. She characterized S.E. as a "really good father," blamed her positive UA test on sinus medication, blamed her failure to attend random UAs on "car issues," and repeatedly contended that she did not need "any" services. RP 78, 80-81, 113, 116-17, 119, 129-31, 134, 154.

C. The Trial Court's Continuance of Trial, Without Objection, to Clarify J.J.'s Mental Health and Substance Abuse Status

Following three days of testimony, the trial court continued the trial "without findings by the Court at this moment," because it needed additional information regarding J.J.'s substance abuse and mental health status. RP 431. In its oral ruling, the court stated: "I don't believe I can make findings without additional information . . . [B]asically, I am continuing this trial." RP 441, 446. Specifically, the trial court needed to know whether J.J. had a substance abuse problem or whether her positive test could have been caused by prescription medication, noting that the fact that her two

most recent UAs were not truly random and diluted, respectively, made that question impossible to answer. RP 428-31. The court also believed that J.J.'s mental health, which the Department did not allege as a deficiency in the termination petition, might constitute a deficiency requiring additional services including a psychiatric evaluation. CP 1-4, 71-74; RP 430-31, 33.

Without that information, the court orally indicated that it could not find that the statutory requirements for termination were met, though it was "not necessarily finding fault with the Department." RP 431, 436. The trial court indicated that it had "a concern as to whether [J.J.] is in fact compliant or is in need of services, and I think we need to get to the heart of that." RP 436. The court told J.J. that the Department could not "do it all for you," and noted: "They can't simply give you a vehicle that operates. They can't simply give you a house. They can make referrals, and indeed, referrals were made. But you have to do your part and take ownership of how we got here." RP 432.

Neither party objected to the court's decision to continue the trial. Counsel for both parties discussed the services and next steps they thought would be appropriate; both agreed to the need for an immediate UA test that same day. J.J.'s attorney stated: "Thank you, Your Honor, for giving our client one last chance." RP 453.

D. J.J.'s Positive Test for Methamphetamines and Amphetamines and Failure to Participate in Services During the Continuance

Two weeks later, the court held a follow-up hearing at which the parties reported a positive result for methamphetamines and amphetamines from J.J.'s random UA test. RP 457-58. The court entered an order requiring services, including a chemical dependency assessment, psychological evaluation, and participation in the protective parenting group. Ex. 51; RP 469, 471. The court noted that J.J. "has to accept some responsibility . . . there is a limit to what the Department can do." RP 466-67, 470.

The trial court reopened the fact-finding hearing almost three months after continuing the trial. At the hearing, the state called additional witnesses. Daniel Ricketts, the technical manager overseeing the UA process, testified that J.J.'s positive UA result could not have been caused by prescription medication and that it indicated her use was in the two or three days preceding the test. RP 541-50. Dr. Robert Sands, J.J.'s psychiatrist, testified that he had diagnosed J.J. with bipolar disorder and substance abuse disorder and prescribed medication, but that J.J. stopped seeing him in April 2016. RP 518-19, 529.

Mary Meigs-Heino, a psychometrician, testified that she was unable to schedule a psychiatric evaluation with J.J. during the continuance, despite multiple follow-up communications and flexibility with scheduling, and

that J.J. had told her the evaluation was “unnecessary.” RP 587-603. Samantha Asbjornsen, the protective parenting group coordinator, testified that J.J. missed two out of three scheduled sessions during the continuance. RP 532-40. Ashton Dart, J.J.’s social worker, testified regarding the Department’s efforts to provide services for J.J., as well as transportation assistance. RP 609-19, 623-27. Erika Thompson, the children’s guardian ad litem, testified regarding her conclusion that termination was in the children’s best interests because they had been in care for more than two years and J.J. had shown “little to no improvement”; she stated that the children “have been languishing now, waiting for action to happen that has not happened, and it’s definitely in their best interest to have permanency achieved so they can move on with their lives.” RP 645-48.

J.J.’s counsel called one witness, J.J., who testified via telephone. RP 652. J.J. was not present at the hearing despite having been notified of the date by her attorney. RP 643, 652. She denied that she had or had ever had a drug or alcohol problem and described her positive methamphetamine result as “completely impossible” and said it must have been caused by her sinus medication. RP 669-70.

E. The Trial Court’s Order Terminating J.J.’s Parental Rights

Following the hearing, the trial court made findings of fact and granted the termination petition. The court noted that the first three elements

of a termination case under RCW 13.34.180 were uncontested. RP 686-87. The court found that the Department had satisfied its burden as to the fourth element of showing by clear, cogent, and convincing evidence that “services have been expressly and understandably offered,” and that J.J. “has not availed herself of those services.” RP 691. The court noted that despite ordering a chemical dependency evaluation with a choice of providers in multiple locations, and providing notice that insurance would not be an impediment, J.J. “still did not contact” the providers. RP 687-89. Similarly, J.J. failed to appear for both scheduled random UA tests, attended only one of three protective parenting meetings, and did not schedule a mental health assessment despite the Department providing her with gas money and an appointment time to accommodate her schedule. RP 690-91.

The court found with regard to the fifth factor that the Department had shown little likelihood that these conditions could be remedied so that the children could be returned to J.J., finding a “fixed pattern” of J.J.’s “failure to follow through” and of J.J. “blam[ing] the Department” and “pretty much everyone for the position that she finds herself in.” RP 691. As to the sixth factor, the court credited the testimony of the children’s guardian ad litem that continuation of the parent/child relationship would diminish their prospects for early integration into a stable and permanent home, citing the children’s very young age and presence in an adoptive

home, the only home the two younger children had ever known. RP 692-93. Finally, the court found that termination was in the children's best interests. RP 693-94.

The Court of Appeals affirmed the trial court's order, concluding that the trial court's actions did not violate J.J.'s due process rights.

IV. ARGUMENT

Due process is a flexible concept. *In re A.W.*, 182 Wn.2d 689, 701, 344 P.3d 1186 (2015). It demands a case-by-case analysis and does not lend itself to black-and-white application. *Matter of Dependency of E.H.*, 191 Wn.2d 872, 894, 427 P.3d 587 (2018). Instead, it generally requires weighing the constitutional necessity of the suggested procedure in the context of the unique circumstances of a specific case, with the deprivation, if any, protected by appellate review. *In re Dependency of MSR*, 174 Wn.2d 1, 5, 271 P.3d 234 (2012), *as corrected* (May 8, 2012); *Matter of Dependency of S.K-P.*, 200 Wn. App. 86, 118, 401 P.3d 442 (2017), *aff'd sub nom. Matter of Dependency of E.H.*, 191 Wn.2d 872, 427 P.3d 587 (2018).

In this case, after three days of testimony, the trial court faced a difficult and close decision. Exercising its discretion, the trial court continued the trial to allow both parties to submit additional evidence. No party objected. This Court and the Court of Appeals have both approved of

this practice. In appropriate cases, like this one, a continuance decreases the risk of an erroneous decision and fully comports with due process.

A. A Trial Court’s Ability to Continue a Termination Trial Is Constrained By the Abuse of Discretion Standard

As an initial matter, the trial court’s decision to continue a termination trial is meaningfully constrained by the abuse of discretion standard, and courts have concluded that continuing a termination trial to hear additional evidence, so long as both parties receive a full and fair opportunity to be heard, is generally an appropriate exercise of that discretion. The decision to “grant a continuance to allow the admission of further evidence will not be disturbed except for a manifest abuse of discretion.” *Matter of Interest of Pawling*, 101 Wn.2d 392, 396, 679 P.2d 916 (1984). In this case, the trial court acted well within its discretion, but that may not always be true.

As a threshold matter, this Court and the Court of Appeals have, at least implicitly, previously approved of the precise process employed in his case—continuing a termination of parental rights trial, after the presentation of evidence, to receive additional evidence. For example, in *Pawling* the trial court stated that it was “not able to make . . . a finding” that termination was in the best interests of the child and continued the trial for additional testimony. *Id.* at 394. Following additional testimony, the trial court

terminated parental rights. *Id.* at 394-95. This Court affirmed the termination of parental rights, holding that no prejudice was shown, not least because taking more evidence on the child’s best interests would be “of paramount concern to [the parent] as well as to the other parties.” *Id.* at 396.^{4 5} As this Court has emphasized, in holding that a trial court properly agreed to reopen a termination trial even though technically the evidence could have been offered earlier, in a child welfare case “the trial court should seek all the light available.” *Atkinson v. Atkinson*, 38 Wn.2d 769, 771, 231 P.2d 641 (1951). Similarly, the Court of Appeals affirmed a termination of parental rights where the trial court had explicitly found that the Department failed to show it offered necessary services, affirming a continuance to “allow time for the father to engage in services.” *In re Dependency of P.S.F.*, 175 Wn. App. 1046 at *2 (2013) (unpublished opinion).⁶ The court rejected the father’s argument that “after making this finding, the trial court was ‘required’ to dismiss the termination petition.” *Id.* at *3. Rather, the court properly exercised its discretion to “reopen or reconsider its oral decision and take additional evidence,” particularly

⁴ Though the parent did not raise due process, the parent specifically challenged the legitimacy of the continuation under the civil rules. *Id.* at 395.

⁵ See also *In re Welfare of A.B.*, 168 Wn.2d 908, 915-16, 232 P.3d 1104 (2010) (recognizing a trial court’s discretion to not resolve a case after an oral statement that it was “not satisfied that all necessary services have been identified and provided”).

⁶ The Department cites this decision pursuant to GR 14.1.

because it was “plainly in the children’s best interest” to do so. *Id.*; *cf. In re Dependency of T.R.*, 108 Wn. App. 149, 158, 29 P.3d 1275 (2001) (“[T]he statute does not require that termination orders be entered within a specific period after the fact-finding hearing.”).

Each of these cases is consistent with the longstanding rule that a trial judge’s oral decision “has no final or binding effect” and “is no more than a verbal expression of his [or her] informal opinion at that time . . . necessarily subject to further study and consideration, and may be altered, modified, or completely abandoned.” *DGHI Enters. v. Pac. Cities, Inc.*, 137 Wn.2d 933, 944, 977 P.2d 1231 (1999).

Here, the court continued the trial for good reason: faced with a difficult and close decision, the court concluded that it would benefit from more information to make a well-reasoned decision. The trial court felt that it did not have a clear picture of whether drug treatment was a necessary service or whether her positive test might have been caused by sinus medication. RP 428-31. This was in large part due to J.J.’s failure to participate in agreed-upon services, such as random UA testing and a drug assessment. RP 119, 129-31, 366. In ordering the continuance, the court required J.J. to complete an immediate UA test and undergo assessment and treatment upon a positive result. RP 452, 434, 436.

There are, however, meaningful limits to a trial court's discretion to continue a termination trial. For example, in *In re Welfare of Shantay C.J.*, 121 Wn. App. 926, 937, 91 P.3d 909 (2004), the Court of Appeals reversed an order terminating parental rights where the trial court continued the termination trial for additional services but then failed to allow the parents to submit evidence on the results of those services, despite indications of positive change. *Id.* The reversal was based not on the continuance itself, but the failure to allow both parties to submit more evidence. *Id.* Here, by contrast, the court permitted J.J. to submit additional evidence. RP 654-71.

Additionally, there may well be cases where, if the Department clearly fails to satisfy its burden, a decision to continue the trial to provide a second bite at the apple might be a "manifest abuse of discretion." *Pawling*, 101 Wn.2d at 396. But here, the trial court granted the continuance on the basis that "[i]f we can see significant progress from [J.J.] that leads the Court to conclude that there is a likelihood that we could be reunified, then we can move forward. . . . I am giving mother essentially another chance." RP 434. As courts have consistently ruled, granting a continuance to provide the parent with an additional opportunity to demonstrate progress is appropriate where the evidence is close and the trial court concludes it needs additional information to make the correct decision.

B. Due Process Does Not Require an Immediate Decision Where the Trial Court Concludes It Needs Additional Evidence

Contrary to J.J.’s contention, principles of due process do not require an immediate decision in a case where the trial court believes it needs additional evidence to make a correct decision, even where the court expresses uncertainty regarding whether the Department proved its case. To the contrary, such a bright-line rule would increase the risk of an erroneous decision.

The framework for evaluating a procedural due process challenge involves three factors: (1) the private interest; (2) the risk of erroneous deprivation of that interest through the challenged procedures, and the probable value of additional safeguards; and (3) the state’s interest, including the potential burden of additional procedures. *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).

The strength of the parent’s interest under the first factor is undisputed. *See State v. Parvin*, 184 Wn.2d 741, 760, 364 P.3d 94 (2015). But a parent’s right to due process “does not mean a right to unlimited process,” *id.*, and determining the process due requires balancing the parent’s interests with the other two *Mathews* factors. *In re Dependency of MSR*, 174 Wn.2d at 18. Here, these two factors demonstrate that the continuance passed constitutional muster.

Under the second *Mathews* factor, the continuance *decreased* the “constitutionally significant risk of an erroneous deprivation,” *id.*, by permitting the court to hear additional evidence thought necessary to make the correct decision. In a child welfare case, as this Court has noted, “the trial court should seek all the light available.” *Atkinson*, 38 Wn.2d at 771. Due process fundamentally requires that a parent “have the ability to present all relevant evidence for the juvenile court to consider prior to terminating . . . rights,” *In re Welfare of R.H.*, 176 Wn. App. 419, 426, 309 P.3d 620 (2013), and the trial court afforded J.J. that opportunity here.

By contrast, J.J.’s proposed bright line rule requiring an immediate decision would *increase* the risk of an erroneous decision where the trial court believes additional evidence is necessary to make a well-reasoned decision. In some cases, due process may require that the termination petition be dismissed immediately following the close of evidence, where the Department has clearly failed to prove its case and additional evidence would not be necessary to clarify any of the statutory factors. But in cases such as this one, the court’s decision to consider additional evidence to clarify the necessity of certain services—while applying the appropriate standard of proof and allowing the parent the opportunity to submit all relevant evidence—comports with due process. A gap in the evidence, particularly with regard to which services are necessary, is often due in large

part to a parent's reluctance to engage in services. Here, the lack of information regarding J.J.'s substance use was caused at least in part by J.J.'s failure (or outright refusal) to comply with random UA tests, even after testing positive for amphetamines and even when provided with transportation to the test. RP 119, 129-31, 366. Requiring the trial court to respond to these complex situations with an immediate decision would increase the risk of error.

The final *Mathews* factor, the strength of the state's interest, weighs strongly in favor of the trial court's actions and against J.J.'s proposed bright line rule. In a child protective proceeding, the state stands in *parens patriae* for the child, and the child's best interests are the paramount concern in any child welfare proceeding. RCW 13.34.020; *In re Welfare of Seago*, 82 Wn.2d 736, 738, 513 P.3d 831 (1973); *see also Lassiter v. Dep't of Soc. Servs. of Durham County, N.C.*, 452 U.S. 18, 27, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981) (holding that, in termination proceeding, state has "urgent interest in the welfare of the child"). This includes the child's "strong interest" in "the *speedy resolution* of dependency and termination proceedings." *Parvin*, 184 Wn.2d at 762 (emphasis added) (citing RCW 13.34.020) ("[T]he State has an interest in ensuring such a speedy resolution to ensure that children do not remain in legal limbo—with the

mental and emotional strain that entails—for any longer than is necessary.”).

The paramount concern of insuring a speedy and just resolution for the children weighs strongly against requiring an immediate decision on petitions in close cases where the court believes a short continuance will enable it to obtain additional evidence from both parties necessary for a well-reasoned decision. Requiring otherwise would introduce unnecessary delay that would impede the children’s ability to achieve permanency. As the trial court noted: “One of the tensions we have in this case . . . is the length of time that’s already passed and the needs of the children and the need of the children for permanency. An indefinite starting over from square one is not very realistic.” RP 460.

Despite the trial court repeatedly urging her to take advantage of the additional opportunity to engage in services and move towards reunification, J.J. failed to do so, instead continuing her “fixed pattern,” as the trial court found, of total denial of fundamental concerns for the children’s safety. RP 691-93. The trial court’s decision to continue the termination trial properly held the Department to the required burden of proof, allowed J.J. a full and fair opportunity to present all admissible evidence in her favor, reduced the risk of an erroneous decision, and honored the children’s best interests.

V. CONCLUSION

The Department respectfully requests that the Court affirm the decision of the Court of Appeals affirming the trial court's order granting the termination petition.

RESPECTFULLY SUBMITTED this 19th day of May 2020.

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SOLICITOR GENERAL OFFICE

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