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No. 98825-1

THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE THE DEPENDENCY OF B.S.,

STATE OF WASHINGTON,

Respondent,

v.

S.W.,

Petitioner.

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

PETITIONER'S SUPPLEMENTAL BRIEF

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A. INTRODUCTION

B.S. was taken away from his mother's care when he was just three days old. Although his mother, Ms. W., had recently made positive changes in her life and was capable of parenting B.S., the Department removed B.S. because she had previously lost custody of her older children. As a result, Ms. W. had no opportunity to parent B.S.

Even though the court at B.S.'s dependency trial acknowledged the lack of evidence that B.S. was at risk, the court held it was "bound" under the doctrine of collateral estoppel by the termination orders for Ms. W's older children. The court stated "there is no way there would be sufficient evidence" for the court to find B.S. a dependent child, "but for" these prior termination findings.

A determination that a child is dependent is fact-specific. A previous order finding a parent unfit to parent one child does not establish the parent is incapable of safely parenting a different child. The trial court incorrectly concluded that, pursuant to collateral estoppel, S.W. was not capable of caring for B.S. because her parental rights to her older children had been terminated.

Collateral estoppel does not apply to prior parental rights litigation and works a substantial injustice when so applied. Further, given the circumstances of B.S.'s case – as well as those of other similarly situated

siblings whose parents have prior termination histories – the court’s application of collateral estoppel violates due process.

B. ISSUES FOR WHICH REVIEW HAS BEEN GRANTED

1. The doctrine of collateral estoppel will only be applied if all four elements are satisfied, including: 1) the identical issue has been decided in previous litigation; and 2) applying the doctrine will not result in injustice. Where these elements were not met, did the juvenile court err when it applied collateral estoppel to termination findings concerning older siblings for the purposes of determining whether a younger sibling was a dependent child under RCW 13.34.030(6)(c)? Does the application of this doctrine work an injustice where the cases involve separate children with different needs, where a parent’s fitness is assessed at different points in time, where the statutory elements are different, and where the previous case is not final?

2. A parent has a fundamental liberty interest in the care, custody and control of her child. To establish a dependency under RCW 13.34.030(6)(c), the State bears the burden to prove there is a danger of substantial damage to the child. The juvenile court found that collateral estoppel applied to the findings from a prior termination trial, and it was “bound” by the prior court’s findings regarding B.S.’s older siblings. Does the application of collateral estoppel under these circumstances

unconstitutionally relieve the State of its burden to prove a child is dependent, in violation of due process?

C. STATEMENT OF THE CASE

1. Ms. W. gives birth to B.S., a healthy baby boy.

Ms. W. is the mother of B.S., who is now two and a half years old.

CP 19. B.S. was healthy at birth, and was delivered by Caesarian-section.

CP 580. Ms. W was excited about her pregnancy with B.S. and had prepared for his arrival. CP 580-81. In the days following the birth, hospital staff members noted Ms. W. was “appropriate” with B.S. and that she had all of the supplies needed to bring her baby home. B.S.’s toxicology screen at birth was negative. CP 581.¹

Ms. W. suffered from pain from her abdominal incision following B.S.’s Caesarian delivery, and the nursing staff recorded Ms. W.’s requests for frequent pain medication in her chart. CP 580-81. Hospital staff members placed an “administrative hold” on B.S., purportedly due to their observations of the parents’ conduct in the hospital. CP 580-81.

¹ Hospital staff members noted concern that Mr. S., B.S.’s father, seemed very tired. CP 580-81. The record does not indicate whether fatigue is unusual for new fathers; nor did the Department present any witnesses from the hospital who might be subject to cross-examination on the parents’ conduct. B.S.’s toxicology screen at birth was negative, and doctors found no reason to administer a drug test to Ms. W. CP 581.

The Department of Children, Youth, and Families (the Department) sent a social worker, who informed the hospital that Ms. W. had a previous history with the Department concerning B.S.'s older siblings, who had been removed from her care after her home had flooded. RP 75-76. Ms. W.'s parental rights to her three older children had been terminated a few months before B.S.'s birth, and she was in the process of appealing that case when she went into labor. RP 76-77.

The Department filed a dependency petition three days after B.S.'s birth. CP 578-86; RP 74-75. A social work supervisor for the Department knew of Ms. W.'s pregnancy before B.S.'s birth. RP 74-75.

2. Ms. W. successfully engages in services and visitation with her new baby

After the Department removed B.S. from Ms. W.'s care at the hospital, she began visiting with him regularly. RP 42-43, 57-58. Ms. W. and Mr. S., the father, engaged in consistent visitation with B.S. for the next eight months, until the dependency trial. RP 42-43, 57-58. Ms. W. also voluntarily engaged in counseling. RP 18-21. She wanted to attend parenting classes, but the social worker erred and gave her a referral to classes for parents of older children, rather than for newborns; the Department never provided Ms. W. with the correct referral. RP 22-23.

At the time of the dependency trial, Ms. W. was visiting with B.S. for two hours, twice a week. RP 41-45. Ms. W. and Mr. S. were maintaining their own stable apartment, and had acquired an array of new baby and toddler-equipment in preparation for B.S. to be returned home to them. RP 17-18.

3. Court finds lack of sufficient evidence that B.S. is a dependent child, but erroneously applies collateral estoppel at trial.

In January 2019, a full year after the previous termination trial concerning Ms. W.'s older children, a dependency trial was held regarding B.S. The Department did not call any witnesses to present substantive evidence of Ms. W.'s parenting of B.S. RP 73. Nor did the Department present witnesses from Providence Hospital to explain the reason for the hold on B.S. following his birth.

The Department relied upon the testimony of Department supervisor George Nelson, who never attended a single meeting with Ms. W. or observed her parenting B.S. RP 73. This witness stated he supervised Ms. W.'s social worker in B.S.'s case, as well as the worker in Ms. W.'s previous termination case. RP 71-73. Ms. W.'s hearsay objections to Mr. Nelson's testimony were sustained; the court stated it

would not consider Mr. Nelson’s testimony as substantive evidence. RP 83.²

During the trial, the Department offered to admit 16 exhibits from the previous termination case regarding Ms. W.’s three older children, which was still being litigated on appeal. RP 6-9.³ Ms. W. objected to the admission of the documents from the previous case, but the court admitted them. RP 7-9.

At the conclusion of the trial, the court stated that “but for the fact that you have some findings from this termination case,” the court would not have had sufficient evidence to find B.S. dependent. RP 139. The court stated it was bound by the previous findings under the doctrine of collateral estoppel. CP 22 (FF 2.2.15; FF 2.2.16). The court said that

² The Department also presented brief testimony from a Department employee who transported B.S. to visits. RP 55-65. Neither the visit supervisor nor social worker testified to provide substantive evidence of the visits or of Ms. W.’s compliance with services.

³ The previous case is Matter of Dependency of S.R.P.W., 7 Wn. App.2d 1012 (2019). Ms. W.’s parental rights as to her three older children were terminated in January 2018 – one year before the dependency trial concerning B.S. (findings as to B.S. issued in February 2019). The Court of Appeals affirmed S.P.R.W. ten days before B.S.’s dependency trial – on January 14, 2019. Following a motion for discretionary review in this Court, S.P.R.W. mandated on August 2, 2019. The issue on the first appeal was whether the Department provided services to accommodate Ms. W.’s cognitive disabilities and need for DDA services, as shown by IQ testing.

“absent those findings, there is no way there would be sufficient evidence in this case for the court to find a dependency.” RP 143 (emphasis added).

Ms. W. appealed the order of dependency, but the Court of Appeals affirmed. This Court granted review, noting the juvenile court had placed considerable emphasis on the termination findings and determining this is a matter of substantial public interest. RAP 13.4(b)(4).

D. ARGUMENT

1. In dependency, collateral estoppel does not apply to findings entered in a termination proceeding concerning other siblings for the purposes of determining whether a younger sibling is a dependent child.

Collateral estoppel cannot apply where two of the four of the doctrine’s required elements are not satisfied – 1) the issues are not identical, and 2) the doctrine would work an injustice. Because these two elements are not met here, collateral estoppel does not apply.

a. The doctrine of collateral estoppel precludes the re-litigation of identical issues.

Collateral estoppel is an equitable doctrine designed to preclude re-litigation of already determined causes and to curtail multiplicity of actions between the same parties. Weaver v. City of Everett, 194 Wn.2d 464, 473-74, 450 P.3d 177 (2019) (citing Bordeaux v. Ingersoll Rand Co., 71 Wn.2d 392, 395-96, 429 P.2d 207 (1967)); see also In re Moi, 184

Wn.2d 575, 580, 360 P.3d 811 (2015).⁴ Whether collateral estoppel applies is a question of law reviewed de novo. Weaver, 194 Wn.2d at 473 (citing Christensen v. Grant County Hosp. Dist. No. 1, 152 Wn.2d 299, 306, 96 P.3d 957 (2004)).

Also called issue preclusion, collateral estoppel dictates that where an issue of ultimate fact has been determined by a valid and final judgment, the identical issue cannot be litigated again between the same parties in any future lawsuit. Weaver, 194 Wn.2d at 473 (quoting State v. Dupard, 93 Wn.2d 268, 272, 609 P.2d 961 (1980)) (internal quotation omitted).

For collateral estoppel to apply, the proponent must establish four elements: 1) the issues in both proceedings were identical; 2) the prior proceeding resulted in a final judgment on the merits; 3) the party against whom collateral estoppel is asserted was a party to, or in privity with a party to, the earlier proceeding; and 4) application of collateral estoppel will not work an injustice as applied. Weaver, 194 Wn.2d at 473.

If one of the four elements is not satisfied, collateral estoppel does not apply. Id. at 483. It does not apply to a different set of facts, a

⁴ See also J.M. Weatherwax Lumber Co. v. Ray, 38 Wash. 545, 80 P. 775 (1905); Philip A. Trautman, Claim and Issue Preclusion in Civil Litigation in Washington, 60 Wash. L. Rev. 805 (1985); Restatement (Second) of Judgments ch. 1 (1982)(Am. Law Inst. 1982).

different legal issue, or a case where the party had different incentives to litigate. Trautman, Claim and Issue Preclusion, *supra*, at 833.

- b. Because collateral estoppel may only be applied where the identical issue was litigated in the prior proceeding, the doctrine was improperly applied in B.S.'s dependency case.

Courts strictly construe the requirement that collateral estoppel only applies to those issues which “were actually and necessarily litigated” in the prior action. *E.g.*, Henderson v. Bardahl International Corp., 72 Wn.2d 109, 118, 431 P.2d 961 (1967). Actual litigation and determination of an issue is not enough; the issue must have been material and essential to the first controversy. Trautman, Claim and Issue Preclusion, *supra*, at 833.

“[C]ollateral estoppel is meant to apply only in situations that ‘have remained substantially static, factually and legally.’” Dot Foods, Inc. v. Dep't of Revenue, 185 Wn.2d 239, 256, 372 P.3d 747 (2016) (quoting C.I.R. v. Sunnen, 333 U.S. 591, 599, 68 S.Ct. 715, 92 L.Ed. 898 (1948)).

This makes collateral estoppel particularly unsuited for parental rights proceedings which are, by definition, anything but static. Ruling Granting Review at 3 (“circumstances may change in light of the dynamic nature of ongoing dependency proceedings.”). These proceedings are premised on the understanding that parents are capable of change,

requiring the State to individually assess each parent’s contemporaneous needs and to offer specific tailored services to improve parental fitness. E.g., Matter of I.M.-M., 196 Wn. App. 914, 921-22, 385 P.3d 268 (2016).

Here, the prior termination court made factual and legal findings in January 2018, specific to the older siblings (then approximately six to eight years old). CP 21-24.⁵ The termination findings were based on the circumstances that existed when the court made its decision to terminate. In re Welfare of A.B., 168 Wn.2d 908, 927, 232 P.3d 1104 (2010) (requiring finding of current unfitness for termination of rights).

One year later at B.S.’s dependency trial, the court determined the prior court’s findings regarding the older children were “binding” and therefore established that B.S. was a dependent child. This was despite the fact that the 2018 findings related to different children, who had different needs, was based on a provision of different services to Ms. W., and involved a different time period in Ms. W.’s life. CP 21-24. This does not satisfy the requirement of ensuring the identical issue was addressed in the first trial, as required by the elements of collateral

⁵ The juvenile court incorporated several of the findings of fact from the older siblings’ termination trial into the findings following B.S.’s dependency trial. CP 21-24. Ms. W. assigned error to 15 findings on appeal, including the court’s application of collateral estoppel; its finding it was bound by the prior termination; and its finding that Ms. W.’s services for B.S. would have been identical to her services for her older children. CP 21-24.

estoppel. See Weaver, 194 Wn.2d at 473; Dupard, 93 Wn.2d at 272. The issue at the first trial was Ms. W.’s fitness to parent the older siblings and whether the Department had met its burden under RCW 13.34.180. By definition, the prior court could not enter findings regarding whether there was substantial risk to baby B.S. – a baby who was not born in January 2018, when the prior findings were entered.⁶

Further, Title 13 is child-specific. Matter of K.M.M., 186 Wn.2d 466, 490, 379 P.3d 75 (2016) (courts must consider a parent’s capabilities to parent “the particular child given the child’s specific, individual needs”). “The proper inquiry is whether the parent is able to provide care for the child actually involved, not merely whether parental deficiencies exist in the abstract.” Id. at 492. The older three siblings in Ms. W.’s previous termination case had “many special needs.” In re Matter of the Dependency of S.R.P.W., 7 Wn. App.2d 1012, at *7 (2019). The older siblings were ambulatory, school-aged, and had different parenting needs from B.S., a newborn when removed – and eight months old at trial.

⁶ In a case citing the dependency statute before its amendments, the Court of Appeals wrote, “The trial court’s findings as to [the older siblings] did not obviate the State’s burden to establish by a preponderance of the evidence that [this younger child] was dependent within the meaning of RCW 13.34.030(2). In re Dependency of L.S., 62 Wn. App. 1, 9, 813 P.2d 133, 137 (1991). The Court noted it was irrelevant that experts might have concluded from their evaluations in the previous case that the parents “were equally unable to care for” the new child, since the State had not met its burden. Id. at 10.

There was no evidence presented that B.S. had special parenting needs that Ms. W. was incapable of meeting. Rather, the evidence showed Ms. W. had joyfully prepared for B.S.'s arrival, she was appropriate with him during visits, both in the community and supervised, and there was no evidence of substantial risk to this new and distinct child. RP 56-62.

There was no identity of issues. The first prong of the collateral estoppel test is not met.

- c. It works an injustice to apply collateral estoppel to prior termination findings for the purposes of a subsequent dependency proceeding.

Courts will not apply collateral estoppel where it works an injustice as applied. Weaver, 194 Wn.2d at 473.⁷ “To determine whether collateral estoppel will work an injustice,” this Court asks “whether the party against whom the doctrine is asserted had ‘sufficient motivation for a full and vigorous litigation of the issue’ in a prior proceeding.” Id. at 474 (quoting Hadley v. Maxwell, 144 Wn.2d 306, 315, 27 P.3d 600 (2001)). “[I]t would work an injustice to apply collateral estoppel when “a new determination is warranted in order to take account of an intervening change in the applicable legal context.” In re Estate of

⁷ “Considerable overlap exists between the injustice element of the traditional collateral estoppel analysis and the policy factor of the collateral estoppel analysis unique to prior administrative determinations.” Weaver, 194 Wn.2d at 479.

Hambleton, 181 Wn.2d 802, 835, 335 P.3d 398 (2014) (quoting Restatement (Second) of Judgments § 28(2)(b)(Am. Law Inst. 1982)).

There was, indeed, an intervening change to both the legal issue and factual circumstances making the application of collateral estoppel inequitable here. The addition of B.S. to Ms. W.'s family was a significant change, that was in no way part of the prior findings in the S.P.R.W. termination case. The termination case did not involve Ms. W.'s ability to parent B.S. He had not been born yet. Moreover, Ms. W. had changed since the termination case. Ms. W. testified at B.S.'s 2019 dependency trial about the ways in which her life had improved since the previous trial regarding her older children, including maintaining an apartment and attending counseling which helped her. RP 18-19. She also described how she was "never given a chance" to parent B.S. "because my previous kids got terminated." RP 18.

The application of collateral estoppel is unjust here, where Ms. W. litigated whether the Department had accommodated her cognitive disabilities and her need for tailored parenting services, and was still appealing those issues at the time the trial court declared it was bound by that case. S.P.R.W., 7 Wn. App.2d 1012 (2019). Here, the trial court noted the lack of substantive evidence presented concerning B.S., and found that "absent those [previous] findings, there is no way there would

be sufficient evidence in this case for the court to find a dependency.” RP

143. In these circumstances, collateral estoppel works an injustice.

Further, this Court has often recognized the human capacity for change. See, e.g., Matter of Simmons, 190 Wn.2d 374, 398, 414 P.3d 1111 (2018) (“One’s past does not dictate one’s future.”); Fields v. Dept. of Early Learning, 193 Wn.2d 36, 47, 434 P.3d 999 (2019). Ms. W. had changed and her circumstances had improved since her previous termination case. She was engaged in counseling, had a stable home, and had been visiting successfully with her baby for eight months. RP 18-21, 42-43, 57-58. Despite Ms. W.’s intergenerational history of neglect and trauma, Ms. W. was clearly improving. CP 582.⁸

It would be a substantial injustice to apply this doctrine to a dependency, where the law is focused on improving parental fitness and reuniting children with their parents. RCW 13.34.020; In re Dependency of K.N.J., 171 Wn.2d 568, 577, 257 P.3d 522 (2011). Where courts apply a presumption based on a prior termination, as here, it “serves to reinforce the harmful notion that removal is better for children than reunification.”

⁸ Ms. W.’s first child, conceived at 17, was born after she was abducted, held hostage, and raped while in DSHS custody as a foster child in a group home. CP 582-83. The Department and the courts have repeatedly blamed Ms. W., a victim, for her “failure” to bond with her first child, K.A.W. (now 15), born just before Ms. W. aged out of the foster care system, herself. CP 21 (FF 2.2.6).

Matter of D.H., 195 Wn.2d 710, 736, 464 P.3d 215, 228 (2020) (Madsen, J., dissenting). The emotional, psychological, and physical harm of family separation on children is widely considered to be “catastrophic.” Id. (citing Shanta Trivedi, The Harm of Child Removal, 43 N.Y.U. Rev. L. & Soc. Change 523, 525 (2019)).⁹

Accordingly, where there is no identity of issues, and particularly in the specialized context of dependency law, the application of collateral estoppel works an injustice. In the absence of two of the four required elements required for collateral estoppel, the doctrine does not apply. See Weaver, 194 Wn.2d at 474; L.S., 62 Wn. App. at 9-10.

⁹ See also Allison Eck, Psychological Damage Inflicted by Parent-Child Separation is Deep, Long-Lasting, NOVA Next (June 20, 2018), <https://www.pbs.org/wgbh/nova/article/psychological-damage-inflicted-by-parent-childseparation-is-deep-long-lasting/> [<https://perma.cc/2G3B-K5S6>]; Sara Goudarzi, Separating Families May Cause Lifelong Health Damage, Scientific American (June 20, 2018), <https://www.scientificamerican.com/article/separating-families-maycause-lifelong-health-damage/> [<https://perma.cc/A8ZB-8329>] (long-term effects of family separation on children, including developmental regression, difficulty sleeping, depression, and acute stress). Separation is particularly detrimental to newborns, as here. D.H., supra, at 737 (Madsen, J., dissenting).

2. Given the interests at stake in a dependency and the goal of family reunification, the application of collateral estoppel against parents constitutes a denial of due process and demonstrates the injustice of its application.

- a. Parents are entitled to due process in dependency proceedings.

Parents are entitled to due process in dependency proceedings.

E.g., Matter of Welfare of M.B., 195 Wn.2d 859, 868, 467 P.3d 969 (2020); In re Welfare of Luscier, 84 Wn.2d 135, 137, 524 P.2d 906 (1974) (termination of parental rights cases); In re Myrick, 85 Wn.2d 252, 533 P.2d 841 (1975) (dependency cases); article I, section 3; U.S. Const. amend. XIV.

Parents have a substantial and fundamental interest in raising their children. Stanley v. Illinois, 405 U.S. 645, 651, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972); M.B., 195 Wn.2d at 868. For this reason, presumptions against parents in dependency cases are disfavored. Stanley, 405 U.S. at 656-57.

- b. The burden of proof must remain squarely on the State in a dependency trial.

It is the State's burden to prove the elements under RCW 13.34.030(6) in one of three ways: that the child (1) has been abandoned; (2) has been abused or neglected by a person responsible for his or her care, or (3) has no parent or guardian capable of caring for him or her such

that the child’s current circumstances constitute a risk or substantial damage to the child psychologically or physically. RCW 13.34.030(6); In re Dependency of Schermer, 161 Wn.2d 927, 943, 169 P.3d 452 (2007).

A finding of dependency requires proof of present parental deficiencies. In re Walker, 43 Wn.2d 710, 715, 263 P.2d 956 (1953). In Walker, this Court held, “an existing ability or capacity of parents to adequately and properly care for their children is inconsistent with the status of dependency.” Id.; see also In re Welfare of X.T., 174 Wn. App. 733, 738, 300 P.3d 824 (2013) (court’s broad discretion “does not permit juvenile courts to disregard evidence rules, especially where the deprivation of parental rights is involved.”)

Legislation that authorizes juvenile courts to enter findings in a new dependency case based solely on that parent’s previous termination of parental rights adjudication is constitutionally unsound. In Stanley, the United States Supreme Court examined an Illinois statutory presumption of parental unfitness that applied to unmarried parents. The Court found the statute violated due process, noting that “it is more convenient to presume than to prove.” Id. at 658.¹⁰ This is not “constitutionally

¹⁰ “Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care,...it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand.”

defensible” when the stakes are as high as “the dismemberment of [the] family.” Id. at 652, 658; see also Vivek S. Sankaran, Child Welfare’s Scarlet Letter: How a Prior Termination of Parental Rights Can Permanently Brand a Parent as Unfit, 41 N.Y.U. Rev. L. & Soc. Change 685, 698 (2017) (examining constitutional challenges to “prior TPR” statutes).

Prior parenting history may be relevant in dependency cases; yet, by relying on the doctrine of collateral estoppel – where a court deems it is bound by previous findings of unfitness – a court precludes further litigation and puts a thumb on the scale for the State. This relieves the State of its burden to submit actual evidence that a child is dependent. The court can consider parental history, but the parent’s history cannot be dispositive for purposes of determining whether another sibling is dependent.

- c. The dependency court’s procedures did not comport with due process.

Our constitution guarantees both procedural and substantive due process before the State may lawfully take a person’s life, liberty, or property. M.B., 195 Wn.2d 859 at 867 (citing State v. A.N.J., 168 Wn.2d

Stanley, 405 U.S. at 656-57.

91, 97, 225 P.3d 956 (2010)) (quoting Gideon v. Wainwright, 372 U.S. 335, 344, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963)). As this Court recently discussed, procedural due process requires the State to meet certain minimal constitutional standards before it may lawfully make decisions affecting a person's liberty interests. M.B., 195 Wn.2d at 867 (citing Mathews v. Eldridge, 424 U.S. 319, 332, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976)).

In assessing whether the juvenile court's application of collateral estoppel resulted in a proceeding that comported with due process, this Court should apply the three-part Mathews test. 424 U.S. at 335. This Court must weigh: 1) the private interest affected; 2) the risk of error involved through the procedures used and the probable value of additional procedural safeguards; and 3) the government's interest, including fiscal and administrative burdens. Id.

First, it is well established that the private interest at stake – the right to parent one's children – is “perhaps the oldest of the fundamental liberty interests.” M.B., 195 Wn.2d at 858 (quoting Troxel v. Granville, 530 U.S. 57, 65, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000)). This right “does not evaporate simply because [a parent has] ... lost temporary custody of their child to the State.” Santosky v. Kramer, 455 U.S. 745, 753, 102

S.Ct. 1388, 71 L.Ed.2d 599 (1982) (parents must be provided with “fundamentally fair procedures”).

Second, treating prior findings as binding by collateral estoppel unacceptably increases the risk of error. Proof that a parent is unfit to parent one child does not establish that a different child of the parent is dependent. L.S., 62 Wn. App. at 9-10 (findings on termination for two older children “did not obviate the State's burden to establish by a preponderance of the evidence that L.S. was dependent.”). The juvenile court recognized the paucity of evidence against Ms. W., but for the prior findings, remarking, “I really have to say ... the Department sometimes relies on too little in trying to make their case.” RP 139.

This Court has acknowledged that “the risk of error is already significant in termination proceedings,” due to the imbalance of power between the parties, issues of race and class bias, and the subjective nature of termination findings. M.B., 195 Wn.2d at 869-70 (citing Santosky, 455 U.S. at 762-63).

Here, the court recognized there was insufficient evidence presented to sustain a dependency, yet it erroneously determined it was bound to find B.S. dependent based on previous termination findings pertaining to the older siblings. Eradicating the Department’s burden of

proof for the individual circumstances presented in a dependency case creates “an intolerable risk of error.” See M.B., 195 Wn.2d at 877.

As to the third step of the Mathews analysis, the State has an interest in the welfare of children; however, it does not advance this goal when it separates children from the custody of fit parents. Stanley, 405 U.S. at 652-53 (the “State spites its own articulated goals when it needlessly separates” families). There is also no overriding governmental interest in preventing a trial that complies with due process, other than a financial incentive to prove a case more quickly and cheaply by document production. See, e.g., In re C.R.B., 62 Wn. App. 608, 619, 814 P.2d 1197 (1991) (default order granting termination violated due process). Where fiscal constraints are the only countervailing interest, courts will not excuse a violation of due process. Mathews, 42 U.S. at 348.

The violation of due process requires reversal and remand for proceedings with constitutionally adequate procedures. Due to the risk of error, the court “cannot be confident in the result.” M.B., 195 Wn.2d at 877.

The court’s reliance on collateral estoppel as binding, so that the court did not need to assess Ms. W’s current fitness and ability to care for B.S., constitutes a denial of due process. This Court should hold that juvenile courts may not use prior parenting history as dispositive of risk

when making findings concerning later-born children. Treating prior court decisions on a person's ability to parent as controlling future cases is contrary to the strict requirements of collateral estoppel, undermines the statutory scheme, and works an injustice to parents.

E. CONCLUSION

Ms. W. respectfully asks this Court to reverse the dependency order and remand for further proceedings. This Court should also hold that prior parenting history may not be applied to later dependencies through collateral estoppel.

DATED this 15th day of October, 2020.

s/ Jan Trasen

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE B.S.,
MINOR CHILDREN.

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NO. 98825-1

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