

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON


DIVISION II

IN THE MATTER OF THE
WELFARE OF:

J.S. and D.S.,
Minor children.

Consol. Nos. 53520-3-II
53530-1-II

RULING REVERSING
ORDERS TERMINATING
PARENTAL RIGHTS AND
REMANDING FOR
ADDITIONAL PROCEEDINGS

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BY  TERRY

S.S. and G.S. are the mother and father, respectively, of D.S., born in December 2015, and J.S., born in February 2017. S.S. and G.S. appeal the juvenile court's orders terminating their parental rights to both children.

S.S.¹ argues the Department of Children, Youth and Families² (Department) failed to prove: (1) it offered her all necessary services reasonably available, capable of

¹ S.S. was also known as S.O. in juvenile court documents and proceedings.

² The Department of Children, Youth, and Families has replaced the Department of Social and Health Services as a party to this case. In July 2017, the Washington State Governor signed HB 1661, which moved many of the Department's child-related services to this new agency. Starting July 1, 2018, the Department of Social and Health Services and the Children's Administration and Department of Early Learning ceased to exist and the Department of Children, Youth, and Families took over all functions of both agencies.

correcting her parental deficiencies in the foreseeable future; (2) there was little likelihood conditions could be remedied in the near future so that the children could be returned to her care; (3) continuation of the parent-child relationship clearly diminishes the children's prospects for early integration into a stable and permanent home; (4) she was currently unfit to parent; and (5) termination was in the children's best interests. G.S. argues the Department violated his due process rights by failing to hold an evidentiary hearing after it continued the termination trial, and the juvenile court judge lacked an appearance of fairness. Each parent also adopted arguments made by the other parent under RAP 10.1(g)(2).

This court considered the appeals on an accelerated basis under RAP 18.13A. It reverses the juvenile court and remands for additional termination fact finding proceedings.

FACTS

The Department filed a dependency petition for D.S. in late 2015, when he was born methamphetamine-positive. The Department filed a dependency petition for J.S. when she tested positive for methamphetamine at birth in February 2017. The juvenile court entered dependency orders. The children have lived with a relative for most of their dependencies.

Kimberly Thomas, a Department social worker who started working with the family in late 2016, identified methamphetamine abuse as S.S.'s primary deficiency and mental health as a secondary deficiency. S.S.'s court-ordered service plan included family voluntary services, Promoting First Relationships (PFR), random urinalyses (UAs), a

substance abuse assessment, a psychological evaluation with a parenting assessment, and eventually, an updated psychological evaluation.

S.S. completed random UAs throughout the dependency and tested positive for methamphetamine multiple times. She also refused to take some UAs, which the Department treats as positive UAs. S.S. refused to accept her positive UA results, claiming they resulted from prescription medications.

Thomas identified G.S.'s parental deficiencies as possible substance abuse—based on a positive UA—and his poor parenting judgment. G.S.'s court-ordered services included family volunteer services, PFR, a substance abuse assessment, UAs, a domestic violence assessment, a psychological evaluation, a psychological evaluation with a parenting assessment, Family Preservation Services (FPS), Parenting Protection Group (PPG), and later, Dialectical Behavioral Therapy (DBT).

G.S. tested positive for methamphetamine in August 2018. He never participated in a substance abuse assessment. But he completed a psychological assessment. He also participated in PPG. The final report for this class, however, states that G.S. did not succeed in PPG because of his general denial of safety risks to his children, along with his limited participation, attendance, and homework completion. The Department also referred G.S. for DBT but he did not engage.

The parents visited regularly with the children, with only small gaps. Visitation supervisors and Thomas thought the visits went well. The parents loved the children and they had a strong bond.

Even so, the Department filed termination petitions. The juvenile court held an eleven-day termination trial in early 2019.

Thomas testified that the parents love the children, but that drugs and mental health issues impaired their ability to parent effectively. She believed there was little likelihood that conditions could be remedied in the near future. Kallie Wheeler, the guardian ad litem (GAL) agreed. She began working with the children in December 2016, and never recommended the dependency court make a finding of progress for the parents.

Wheeler opined it was unlikely S.S. could correct her parental deficiencies in the near future because the first step to doing so is acknowledging she has a substance abuse problem, and she never did. Similarly, G.S. has not acknowledged there is a problem. So Wheeler supported termination of parental rights.

On the last day of the termination trial, after the close of evidence, S.S. addressed the court and admitted to being dishonest about her methamphetamine use during the dependency. G.S. also addressed the court and admitted to using methamphetamine at least once, leading to the positive UA.

After the parents spoke, the juvenile court observed, "I think maybe this is the first time in this case that there's been some real honesty or close to honesty." Report of Proceedings (RP) Mar. 5, 2019 at 821. It summarized the statutory requirements for termination, RCW 13.34.180(1)(a) through (f), and orally determined that the Department met the first three requirements (RCW 13.34.180(1)(a)-(c)). It discussed but did not enter any oral conclusions on the remaining factors. It heard closing argument.

After this, S.S. requested the court to “to take the evidence that’s received under advisement” and continue the case for three months to allow S.S. to get treatment. RP Mar. 5, 2019 at 858. G.S. agreed, stating “I would ask the Court, as [S.S.’s attorney] has stated, to take this under advisement.” RP Mar. 5, 2019 at 860-61.

The court continued the case. In the interim, it ordered S.S. and G.S. to undergo chemical dependency assessments and related services. The court suggested that an accurate evaluation of S.S.’s level of abuse and possible need for co-occurring treatment would be helpful moving forward. It also encouraged her to address her mental health through an updated psychological evaluation. It set a hearing for the next month.

On March 18, 2019, the juvenile court reconvened to review the parents’ progress. They reported that G.S. completed a chemical dependency assessment and the evaluator concluded G.S. did not have a substance abuse problem. The physician who performed the parents’ initial psychological evaluations was unavailable to do an updated psychological evaluation of S.S., so Thomas encouraged S.S. to contact Dr. James Manley. S.S. had set up an appointment with Dr. Manley for later in March 2019. But both parents had failed to appear for UAs on March 13, 2019.

The juvenile court ordered S.S. to see Dr. Manley and both parents to complete UAs. The court reiterated that it was trying to “monitor whether or not they will make any progress” and that it was not in the best interests of the children “to wait forever for you all to get your act together and get this done.” RP Mar. 5, 2019 at 877-78. It set another hearing for the next month.

On April 18, 2019, the juvenile court again reconvened. The court noted that the hearing was simultaneously set as a review hearing and a termination proceeding. The parents were not present at the start of the hearing, but counsel for G.S. requested that if the court intended to address termination, he wanted a date set for an evidentiary hearing. Counsel for S.S. made a similar request.

The court stated that it would not take additional testimony or hold an evidentiary hearing. It added, however, that it intended to review pre-hearing documents submitted by the Department detailing post-trial events.

The court recounted that it had continued the termination trial because both parents admitted to problems they had previously adamantly denied. The court believed these acknowledgments were "significant." RP Apr. 18, 2019 at 889. Given the parents' statements, it observed that it had needed more time to consider the children's best interests because of the evident parent-child bonds. The court recognized that termination could be traumatic, and expressed that it did not want to "pull that trigger of termination" if the parents could even "begin to remediate at that late date." RP Apr. 18, 2019 at 889-90. It believed that three issues remained unanswered: (1) are the parents currently unfit, (2) is there any reasonable possibility they could remedy parental deficiencies in any reasonable amount of time, and (3) what is in the children's best interests.

Counsel for the Department updated the court that S.S. and G.S. both failed to appear for several scheduled UAs and also tested methamphetamine-positive.³ S.S.

³ The parents arrived in court during the Department's argument.

tested positive for methamphetamine on March 29, 2019, and G.S. tested positive for methamphetamine on March 21, 22, and 26, 2019. Additionally, S.S. gave birth to another child on April 2, 2019. The Department and the juvenile court did not know about the pregnancy. The child passed away at the hospital shortly after birth. Both S.S. and the newborn tested positive for methamphetamine at the time of birth.

The court also heard from the foster mother, a relative. She stated her intention to adopt the children. She agreed with the GAL's previous testimony that the children stable in her home. She added that she had hoped for a successful reunification but that the children now needed permanence.

The juvenile court informed the parties it intended to grant the Department's termination petitions. It summarized its findings and conclusions on the record. S.S. objected to the juvenile court's consideration of any post-March 5, 2019 evidence because it was not properly introduced. The juvenile court responded that it would not make findings about S.S.'s pregnancy but clarified it considered the parents' failure to participate in the additional services offered and the missed UAs since the initial termination trial.

The Department then asked the court to allow it to take testimony from Thomas about referrals and no-show UAs "for the sake of the record." RP Apr. 18, 2019 at 908. The court granted this request and Thomas testified about her additional efforts to provide services to the parents and their UA history since March 2019. At the end of the hearing, the juvenile court set a presentation hearing date.

And on May 16, 2019, the juvenile court entered its ruling termination the parental rights of S.S. and G.S. S.S. reiterated her objections to proposed findings about events from March 2019 onward, which included references to her pregnancy. The Department responded that the court properly considered additional “evidence that was submitted to the Court as part of the dependency status conference that the Court held in conjunction with the continuance of the termination trial.” RP May 16, 2019 at 917. The Court entered an order that included the objected-to findings.

ANALYSIS

Termination Standards

The juvenile court may order termination of a parent’s rights to his or her child if the Department establishes the six elements in RCW 13.34.180(1)(a) through (f) by clear, cogent, and convincing evidence. RCW 13.34.190(1)(a)(i). Clear, cogent and convincing evidence exists when the ultimate fact in issue is shown to be “highly probable.” *In re the Welfare of Sego*, 82 Wn.2d 736, 739, 513 P.2d 831 (1973) (quoting *Supove v. Densmoor*, 225 Or. 365, 372, 358 P.2d 510 (1961)). The Department also must prove by a preponderance of the evidence that termination of parental rights is in the child’s best interests. RCW 13.34.190(1)(b).

Because the juvenile court has the advantage of observing the witnesses, deference to the court is particularly important in termination proceedings. *In re the Welfare of Aschauer*, 93 Wn.2d 689, 695, 611 P.2d 1245 (1980); *In re Dependency of K.R.*, 128 Wn.2d 129, 144, 904 P.2d 1132 (1995). This court limits its analysis to whether substantial evidence supports the juvenile court’s findings. *Sego*, 82 Wn.2d at 739.

Substantial evidence is evidence sufficient to persuade a fair-minded rational person of the truth of the declared premise. *Bering v. SHARE*, 106 Wn.2d 212, 220, 721 P.2d 918 (1986), *cert. dismissed*, 479 U.S. 1050 (1987). This court does not review credibility determinations or weigh the evidence. *Sego*, 82 Wn.2d at 739-40.

Due Process

G.S. and S.S. argue the juvenile court violated their due process rights in refusing to hold another evidentiary hearing. “The due process clause of the Fourteenth Amendment protects a parent’s right to the custody, care, and companionship of her children.” *In re the Welfare of Key*, 119 Wn.2d 600, 609, 836 P.2d 200 (1992) (citing *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972)). As a result, “[p]arental termination proceedings are accorded strict due process protections.” *In re Interest of Darrow*, 32 Wn. App. 803, 806, 649 P.2d 858, *review denied*, 98 Wn.2d 1008 (1982).

“Due process requires that parents have notice, an opportunity to be heard, and the right to be represented by counsel.” *Key*, 119 Wn.2d at 611 (citing *In re Myricks*, 85 Wn.2d 252, 254, 533 P.2d 841 (1975)). In determining whether a parent has received adequate due process, this court balances: (1) the parent’s interests, (2) the risk of error created by the procedures used, and (3) the State’s interests. *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). Due process violations are reviewed de novo. *In re the Welfare of L.R.*, 180 Wn. App. 717, 723, 324 P.3d 737 (2014).

Additional Evidence

Two opinions that apply *Mathews* under somewhat similar circumstances give insight into the issue whether the juvenile court should have held an evidentiary hearing in April: *In re Dependency of T.R.*, 108 Wn. App. 149, 29 P.3d 1275 (2001), relied on by the Department; and *In re the Welfare of Shantay C.J.*, 121 Wn. App. 926, 91 P.3d 909 (2004), relied on by the parents.

In *T.R.*, Division One held that the juvenile court did not have to take additional evidence before it entered a written termination order 14 months after the termination trial. 108 Wn. App. at 153. Just after the termination trial, the juvenile court orally “made the statutory findings for termination but determined a guardianship, rather than a termination,” was in the child’s best interest. *T.R.*, 108 Wn. App. at 153. But the guardianship fell through and the court then entered a termination order. *T.R.*, 108 Wn. App. at 153.

The court rejected creating a bright line rule that any delay in entering a termination order “automatically requires resumption of trial when entry of a final termination order is postponed.” *T.R.*, 108 Wn. App. at 160. It, instead, held,

Whether a further hearing is required depends upon the facts and circumstances of each case. If circumstances indicate any reasonable possibility that in the interim, parental deficiencies have been corrected so that reunification is possible in the near future, the court should reopen the proceedings. This fully comports with due process: “Fundamental fairness may be maintained in parental rights termination proceedings even when some procedures are mandated only on a case-by-case basis, rather than through rules of general application.”

T.R., 108 Wn. App. at 161 (quoting *Santosky v. Kramer*, 455 U.S. 745, 757, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982)). The *T.R.* court affirmed the termination. It highlighted

that the risk of erroneous deprivation of the mother's parental rights was minimal because the juvenile court had already held a full fact finding and made findings adverse to the mother. It noted that trial evidence does not "evaporate with the passage of time" and added that the termination statute does not give the juvenile court a deadline for entering a written order. *T.R.*, 108 Wn. App. at 158. Because interim review hearings showed the mother remained unfit and nothing suggested a "positive change," the juvenile court's procedures did not violate due process. *T.R.*, 108 Wn. App. at 159.

In *Shantay C.J.*, in contrast, Division Three reversed a termination when the juvenile court entered a termination order about four months after the termination trial, without holding another fact finding hearing. At the end of the original hearing:

The court determined that the State had met its burden as to three of the six factors set forth in RCW 13.34.180(1)(a)-(f), by establishing that the court had personal and subject matter jurisdiction, and that the dispositional orders were appropriate and timely. The court then stated that it was taking the matter under advisement regarding any further findings and conclusions. In a memorandum opinion filed on September 26, 2002, the court restated these findings and granted a continuance of the trial until January 20, 2003. The court explained that this continuance was granted "given the recent efforts of the parents (although belated)" and to give the parents "one last chance to engage in services and make progress." CP at 24, 107. The continuance was contingent on the parents' continued sobriety and their continued adherence to their substance abuse plans and the services outlined in the dispositional orders.

Shantay C.J., 121 Wn. App at 932. After this decision, the parents did not comply with services and the court struck the continuance and entered a written termination order.

Shantay C.J., 121 Wn. App. at 934-35.

Like *T.R.*, the *Shantay C.J.* court focused on the second *Mathews* factor,⁴ the risk of erroneous deprivation of parental rights. 121 Wn. App. at 936-37. It concluded that the juvenile court's procedure violated due process. Specifically,

Because the court did not enter findings after the September 2002 trial—and did not take additional evidence before terminating the parental rights—the standard applied by the court is unclear and unreviewable. Moreover, the record is unclear as to whether the termination orders were entered because the State had met its burden under RCW 13.34.180 or because the State had demonstrated that the parents had failed to comply with the court's conditions for granting the continuance.

Shantay C.J., 121 Wn. App. at 937. It distinguished *T.R.* on two grounds. First, in *T.R.*, the juvenile court had determined that the Department met its termination burden before continuing the matter and, second, because the parents in *Shantay C.J.* showed that “some positive changes had occurred.” 121 Wn. App. at 938.

This appeal falls between *T.R.* and *Shantay C.J.* Like *T.R.*, D.S. and S.S. did not show that any positive changes occurred after trial,⁵ but unlike *T.R.* and like *Shantay C.J.*, the juvenile court had not ruled in favor of termination when it continued the matter. Also here, unlike in *Shantay S.J.* when the court could not determine whether the juvenile court relied in part on the parent's post-trial noncompliance to terminate, the record is clear that the juvenile court relied on both trial and post-trial facts when making its termination

⁴ Because *T.R.* sets out the parents' interests and the State's interests, the first and third *Mathews* factors, this court finds no need to reiterate them here. 108 Wn. App. at 157-58, 159-60.

⁵ But this court notes that the juvenile court did not allow D.S. and S.S. to present evidence at the April 18, 2019 termination hearing.

decision.⁶ These facts were conveyed to the court through a combination of the Department's counsel's argument, the unsworn statements of the foster mother, the dependency review documents submitted to the juvenile court but not admitted into evidence in the termination proceedings, and the sworn testimony of Thomas. But the parents could not introduce any post-trial evidence.

So even though the record arguably lacks evidence of positive change, because the juvenile court took sworn testimony and considered unsworn statements from only one side, considered non-evidentiary documents from only one side, and then entered findings of fact based on the combination of these documents, statements, and Department testimony, it created an undue risk of erroneous deprivation of parental rights. Simply put, if one side is allowed to introduce additional evidence before a juvenile court enters a termination order, the other should be able to as well.

Burden Shifting for Methamphetamine

The parents also contend that because the juvenile court did not determine that the Department met its termination burden at the close of evidence, it should have ruled in their favor. Instead, it improperly gave the Department more time to make its case. This ignores that *Shantay C.J.* ultimately allowed the court to continue termination proceedings under similar circumstances, although not without holding additional proceedings. In that opinion, rather than reversing the termination and remanding for a full new termination trial, our court remanded the matter only for the taking of *additional*

⁶ See, e.g., Findings of Fact 2.16, 2.25(f), and 2.26(c). CP at 147, 150.

evidence. *Shantay C.J.*, 121 Wn. App. at 940. This supports that a juvenile court has the authority to continue a termination trial to allow the parents additional time to complete services even before it decides to terminate a parent's rights, which is what happened here. Accordingly, this court will adopt the same remand procedure approved of in *Shantay C.J.* 121 Wn. App. at 940.

Appearance of Fairness

Finally, the parents question the juvenile court's appearance of fairness. A judicial proceeding satisfies the appearance of fairness doctrine only if a reasonably prudent, disinterested person would conclude that the parties received a fair, impartial, and neutral hearing. *Neravetla v. Department of Health*, 198 Wn. App. 647, 670, 394 P.3d 1028, review denied, 189 Wn.2d 1010 (2017). Under this doctrine, a judge must be impartial both in fact and in appearance. *Neravetla*, 198 Wn. App. at 670. This court presumes a trial judge performs their functions properly without prejudice or bias. *In re Estate of Hayes*, 185 Wn. App. 567, 607, 342 P.3d 1161 (2015). "The test for determining whether a judge's impartiality might reasonably be questioned is an objective one that assumes the reasonable person knows and understands all the relevant facts." *Hayes*, 185 Wn. App. at 607.

Again, although *Shantay C.J.* reversed a termination, the court did not find fault with the juvenile court's decision to allow the parents time after trial to continue to remedy their deficiencies. It only criticized the post-trial decision to enter the termination orders without holding additional proceedings. *Shantay C.J.*, 121 Wn. App. at 937-38, 940. Moreover, here the parents did not object to, and arguably invited, the initial continuance,

so that they could engage in services. These circumstances do not support that the juvenile court's decision to continue the termination trial violated the appearance of fairness.

Because this court is reversing the termination orders, it does not address the other issues raised by the parents in this appeal. Accordingly, it is hereby

ORDERED the termination orders are reversed. It is further

ORDERED that the matter is remanded for additional termination proceedings. It is further

ORDERED that evidence from the 11-day termination trial is preserved and the additional juvenile court proceedings are limited to issues under RCW 13.34.180(1)(d), (e), and (f), the best interests of the children, and current parental fitness as of the date of the remanded hearing.

DATED this 11th day of February, 2020.



Aurora R. Bearse
Court Commissioner

cc: Peter B. Tiller
Kate Huber
Brian G. Ward
Hon. Frank Cuthbertson