IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

In the Matter of the Dependency of D.E.G., JR., d.o.b. 04/17/2010, Minor Child. BRIAN BRACKEEN, Appellant, v. STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES, Respondent.	No. 68659-3-I DIVISION ONE UNPUBLISHED OPINION FILED: January 14, 2013

Leach, C.J. — Brian Brackeen appeals the trial court's termination of his parental rights to his biological son, D.E.G. Jr. He claims that the trial court violated his due process rights to counsel and to attend the proceedings by failing to continue the trial date until he completed a court-ordered inpatient drug treatment program. Brackeen had a full and fair opportunity to testify and to defend through counsel. The State's interest in a speedy resolution for D.E.G.'s welfare outweighed Brackeen's desire to attend personally, and Brackeen fails to show a risk of error from his absence. We affirm.

Background

Brian Brackeen is the biological father of D.E.G. Jr., born April 17, 2010. The State removed D.E.G. from his parents' custody at birth, and he has never resided with Brackeen. D.E.G. suffers from respiratory issues and may suffer from fetal alcohol syndrome. The trial court entered orders of dependency for D.E.G. as to his mother on June 25, 2010, and as to his father on August 27, 2010. The court based its finding of dependency as to Brackeen on stipulated facts, including a history of mental illness and substance abuse and an extensive criminal history. Brackeen visited D.E.G. 15 times during the course of this dependency. He participated in remedial services until he was arrested again in October 2010.

A court terminated D.E.G.'s mother's parental rights on October 20, 2011.[1] On July 28, 2011, the Department of Social and Health Services (Department) filed a termination petition as to Brackeen. When trial began on March 6, 2012, Brackeen was unable to attend the proceedings because he was completing a court-mandated, 60-day inpatient drug treatment program. Brackeen's attorney requested a continuance until April 27, 2012, after Brackeen was scheduled to complete his treatment. His case manager at the treatment facility indicated that the facility did not have sufficient staff for Brackeen to participate by telephone over a number of days and that participating in the trial by telephone would prevent him from participating in the rehabilitation program. Counsel for Brackeen expressed concern that Brackeen would not be able to

[1] The child's mother is not a party to this appeal.

listen to the entire proceedings or to "potentially even assist" her. The court declined to continue the case, noting that the matter was pending since December 2011 and that based on Brackeen's "having been in custody . . . really since [D.E.G.] was born," it was not certain that he would be available to attend trial on April 27.

The Department's witnesses testified during the first two days of trial, and Brackeen testified by telephone on the third day. He listened to both parties' closing arguments, as well as the court's findings. In closing, counsel for Brackeen asked the court to give Brackeen additional time to continue his treatment before terminating his parental rights:

> The [court-appointed special advocate] said that the foster parents will be there for [D.E.G.'s] first date. But this is not true. There are many failed adoptions. Mr. Brackeen has stuck and been around through thick and thin. He admits that he has had problems, but he is now on the road to recovery. Can his son wait? Yes. Is there any need for the sword to drop today? No. Mr. Brackeen . . . has the support. He is in treatment, has indicated that he will remain in treatment, and asks the Court not to terminate his parental rights, and if the Court has concerns about where he is today, to extend the matter for a short period of time.

The court terminated Brackeen's parental rights. Without challenging any of the trial court's findings of fact, Brackeen appeals.

Standard of Review

The United States Constitution protects parental rights as a fundamental liberty interest.[2] To terminate a parent's rights, the Department must satisfy a

[2] Santosky v. Kramer, 455 U.S. 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982).

two-pronged test.[3] The first prong requires proof of the six factors enumerated in RCW 13.34.180(1).[4] The Department must prove these factors by clear, cogent, and convincing evidence.[5] If the Department satisfies the first prong, the court proceeds to the second prong, determining whether termination is in the child's best interests.[6] The Department must prove this second prong by a preponderance of the evidence.[7] We consider the facts and circumstances of each individual case to determine the child's best interests.[8] We place a "'very strong reliance on trial court determinations of what course of action will be in the best interests of the child.'"[9] Where the rights of a child conflict with the parent's rights, the child's rights should prevail.[10]

Brackeen does not challenge any of the trial court's findings of fact.

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[3] In re Dependency of K.N.J., 171 Wn.2d 568, 576, 257 P.3d 522 (2011).

[4] K.N.J., 171 Wn.2d at 576. RCW 13.34.180(1) requires the State to prove (a) the child has been found to be a dependent child; (b) the court has entered a dispositional order pursuant to RCW 13.34.130; (c) the child has been removed or will, at the time of the hearing, have been removed from the custody of the parent for a period of at least six months pursuant to a finding of dependency; (d) the services rendered under RCW 13.34.136 have been expressly and understandably offered or provided and all necessary services, reasonably available, capable of correcting the parental deficiencies within the foreseeable future have been expressly and understandably offered or provided; (e) there is little likelihood that conditions will be remedied so that the child can be returned to the parent in the near future; and (f) continuation of the parent and child relationship clearly diminishes the child's prospects for early integration into a stable and permanent home.

[5] K.N.J., 171 Wn.2d at 576-77.

[6] RCW 13.34.190(1)(b).

[7] In re Welfare of A.B., 168 Wn.2d 908, 911, 232 P.3d 1104 (2010).

[8] In re Dependency of A.V.D., 62 Wn. App. 562, 572, 815 P.2d 277 (1991) (citing In re Welfare of Aschauer, 93 Wn.2d 689, 695, 611 P.2d 1245 (1980)).

[9] In re Pawling, 101 Wn.2d 392, 401, 679 P.2d 916 (1984) (quoting In re Welfare of Todd, 68 Wn.2d 587, 591, 414 P.2d 605 (1966)).

[10] RCW 13.34.020.

Therefore, we treat them as verities.[11]

Analysis

Brackeen claims that by denying his request for a continuance and proceeding with trial in his absence, the court "deprived him of the right to communicate with counsel and to assist in his own defense." He also argues that the court violated both his statutory and constitutional due process rights.

"Preservation of the family unit is a fundamental constitutional right protected by the Fourteenth Amendment."[12] We accord strict due process protections for parental termination proceedings.[13] Such protections include a strict burden of proof,[14] the right to notice, and an opportunity to be heard and defend.[15] Due process does not guarantee the right to appear personally and defend, "so long as the [defendant] was afforded an opportunity to defend through counsel and by deposition or similar evidentiary techniques."[16] "'Any right to appear personally would have to rest upon convincing reasons and would ultimately be left to the sound discretion of the trial court.'"[17] Due process

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[11] In re Interest of J.F., 109 Wn. App. 718, 722, 37 P.3d 1227 (2001) (citing In re Dependency of P.D., 58 Wn. App. 18, 30, 792 P.2d 159 (1990)).

[12] In re Darrow, 32 Wn. App. 803, 806, 649 P.2d 858 (1982) (citing Quilloin v. Walcott, 434 U.S. 246, 255, 98 S. Ct. 549, 54 L. Ed. 2d 511 (1978)).

[13] Darrow, 32 Wn. App. at 806 (quoting Stanley v. Illinois, 405 U.S. 645, 651, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972)).

[14] Darrow, 32 Wn. App. at 806 (citing In re Welfare of Sago, 82 Wn.2d 736, 739, 513 P.2d 831 (1973) ("clear, cogent and convincing evidence")).

[15] Darrow, 32 Wn. App. at 806 (citing In re Welfare of Martin, 3 Wn. App. 405, 410, 476 P.2d 134 (1970)).

[16] Darrow, 32 Wn. App. at 808.

[17] Darrow, 32 Wn. App. at 808 (quoting In re Interest of F.H., 283 N.W.2d 202, 209 (N.D. 1979)).

is flexible and requires the procedural protections that a particular situation demands.[18] To determine whether Brackeen received adequate due process under the particular circumstances of this case, we balance three distinct factors: (1) the parent's interest, (2) the risk of error that the procedure creates, and (3) the State's interest.[19]

First, we consider Brackeen's fundamental liberty interest in the care and custody of his child.[20] This interest, however, is not absolute.[21] We balance this against the other two factors.

We also consider the minimal risk of error from the procedures followed in this case. Brackeen asserts, "Commencing a proceeding involving a fundamental liberty interest, despite the involuntary absence of the father, creates an unnecessary risk of error." He also states, "[H]ad Brian been present in court, he would have had the opportunity to consult with counsel, to assist counsel, and to have had his questions answered in a confidential setting." He claims that a parent's interest in an accurate and just decision is "more likely to result from the parent's effective representation by counsel." Brackeen argues that there was "no identifiable reason" and "no valid purpose" for rejecting his request for a continuance.

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[18] Morrissey v. Brewer, 408 U.S. 471, 481, 92 S. Ct. 2593, 33 L. Ed. 2d. 484 (1972).

[19] In re Dependency of M.S., 98 Wn. App. 91, 94, 988 P.2d 488 (1999) (citing In re Dependency of J.W., 90 Wn. App. 417, 429, 953 P.2d 104 (1998)); see also Santosky, 455 U.S. at 754.

[20] Santosky, 455 U.S. at 753; In re Dependency of C.R.B., 62 Wn. App. 608, 615, 814 P.2d 1197 (1991).

[21] M.S., 98 Wn. App. at 95.

On appeal, Brackeen does not dispute any of the trial court's factual findings. He does not assert that counsel did not represent him at all stages of the proceeding or that he did not have an opportunity to consult with counsel before trial. He had the opportunity to present and to cross-examine witnesses and also to testify by telephone. He does not show that his counsel failed to represent his positions adequately on the legal issues. Brackeen also does not identify how his additional participation would have resulted in any different or additional evidence relevant to the factual issues resolved by the trial court. In summary, he has provided no basis for any concern about the trial court's findings.

In regard to the third factor, the State has a "vital interest in protecting the welfare of children."[22] This includes D.E.G.'s right to a safe, stable, and permanent home and a speedy resolution of termination proceedings.[23] The trial court set the trial date in December 2011. Based upon Brackeen's extensive history of criminal activity and substance abuse, the trial court could reasonably conclude that a continuance would not secure his guaranteed attendance at a future trial date. The findings also show that it is extremely unlikely that he would be able to care adequately for D.E.G. in the near future:

> 2.48 The father's longstanding mental health and substance abuse issues are significant and chronic. It would take at least one to two years for the father to demonstrate his ability to refrain from committing new criminal violations or violating his probation in order to demonstrate an ability to remain available to parent, to be

[22] M.S., 98 Wn. App. at 95.
[23] RCW 13.34.020.

> sober outside of incarceration or inpatient treatment, and to establish and maintain mental health stability. One to two years is not in the near or foreseeable future for this child, who has spent his entire life under the supervision of [Division of Children and Family Services] and the dependency court.
>
> 2.49 The father has not demonstrated in the 18 months prior that he will be able to remedy his parental deficits. At this time there is no evidence to support giving the father additional time to correct his deficiencies when he is just starting inpatient drug treatment again.
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> . . . .
>
> 2.50 Continuation of the parent-child relationship between the father and the child is preventing the child from early integration into a permanent and stable home. The permanent plan for the child is adoption, which cannot occur so long as parental rights remain intact.

The State's interest in a timely resolution of this matter for D.E.G.'s welfare outweighs Brackeen's interest in personally attending the proceedings. Most importantly, Brackeen fails to demonstrate a significant risk of error from the procedures. Considering these circumstances, we hold that the trial court did not violate Brackeen's due process rights by proceeding with trial in his absence.

Conclusion

Because Brackeen had a full and fair opportunity to testify and to defend through counsel and he fails to establish a significant risk of error from his personal absence at trial, we affirm.

Leach, C.J.

WE CONCUR:

Grosse, J.

Becker, J.