

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Dependency of:)	
A.K.I.,)	
DOB: 3/29/2005,)	DIVISION ONE
)	
A minor child.)	No. 65439-0-1
)	
RANDY JUAREZ,)	
)	
Appellant,)	
)	
v.)	UNPUBLISHED OPINION
)	
STATE OF WASHINGTON,)	
DEPARTMENT OF SOCIAL AND,)	
HEALTH SERVICES,)	
)	
Respondent.)	FILED: August 29, 2011
_____)	

Dwyer, C.J. — Randy Juarez appeals from the superior court’s order terminating her parental rights to her child, A.K.I.¹ Juarez contends that the trial court, in determining that her parental rights should be terminated, relied on conditions causing parental unfitness that had not been alleged in the termination petition, thus denying her due process of law. Because a parent must be notified of the reasons for which his or her parental rights may be terminated, where termination results from conditions causing parental

¹ This matter is appropriate for accelerated review pursuant to RAP 18.13A.

deficiencies that the parent was not notified would be litigated, the parent's due process rights are violated. Here, Juarez never received notice that her mental health issues would be considered a factor in terminating her parental rights. Accordingly, we reverse.

I

A.K.I. was born in March 2005. She was removed from her parents' care almost two years later, when her parents were arrested for car prowling. Since that time, A.K.I. has lived in out-of-home placements.

Juarez, A.K.I.'s mother, "has a long difficult history of drug usage." Clerk's Papers (CP) at 13. Juarez has used methamphetamines since at least January 2000 and is a victim of domestic violence. In 2007, Juarez stipulated to dependency of A.K.I., admitting that she had a substance abuse problem. The dispositional order that was entered required that Juarez accomplish the following: complete a drug and alcohol treatment program, participate in random urinalysis (UA) testing, complete a dependency process workshop, attend weekly domestic violence victim's support groups, establish and maintain appropriate housing, and complete parenting classes.

For the next two years, Juarez embarked on a series of failed outpatient and inpatient treatment programs. She continued to have UAs that were positive for amphetamines. During this time, Juarez moved to Yakima and met Lloyd Calvert II, who was also a methamphetamine user. In February 2009, Juarez

became pregnant with Calvert's child. She then reentered inpatient treatment. Although she completed that program, she relapsed into methamphetamine use shortly thereafter. Evidence in this case is that Juarez last used methamphetamines in May 2009.

Prior to leaving one of her treatment programs, Juarez was evaluated by a psychiatric nurse specialist who diagnosed her with post-traumatic stress disorder, major depression, and anxiety with panic attacks.² Juarez was later prescribed medications. By March 2010, when the termination trial commenced, Juarez was involved in mental health counseling with Central Washington Comprehensive Mental Health and was taking anti-anxiety, anti-depression, and mood stabilization medications.

In June 2009, the State petitioned for termination of Juarez's parental rights.³ The termination petition alleged that "[t]he parents' use of intoxicating or controlled substances renders them incapable of providing proper care for the child for extended periods of time. They have been unwilling to complete treatment and have multiple failed treatment attempts." CP at 202.

Before trial, Juarez once again entered and successfully completed intensive inpatient treatment.⁴ While in treatment, she accessed mental health, domestic violence, and parenting education services. During the eight months

² In addition, Juarez testified that she had been diagnosed with bipolar disorder.

³ The termination petition was brought against both A.K.I.'s mother and father. A.K.I.'s father's parental rights were terminated by default in August 2009.

⁴ In September 2009, while in treatment, Juarez gave birth to her son, L.C. A dependency petition was filed regarding L.C. At the time of the termination trial, L.C. was placed in-home, living with Juarez at an intensive outpatient treatment facility.

that Juarez participated in this treatment program, staff expressed concerns with her parenting skills and her honesty. Moreover, shortly before Juarez was discharged from treatment, drug paraphernalia was discovered in her belongings. Juarez moved immediately into an intensive outpatient treatment program, which provided a structured environment and transitional housing. She had been in this program for only a short time when the termination trial began.

At the termination trial, numerous service providers and social workers testified over the course of three days. The trial court, in its oral ruling, expressed its grave concern that Juarez was likely to relapse. This concern was, in large part, based on the fact that Juarez had previously relapsed after leaving the structured environment of a different inpatient treatment program and based on a substance abuse treatment counselor's testimony that Juarez's prognosis was "fair to poor" unless she learned to be honest and to develop a support system. Report of Proceedings at 372. The trial court terminated Juarez's parental rights to A.K.I, finding that "[t]he mother has not remedied her parental deficiencies related to her substance abuse and mental health." CP at 25 (Finding of Fact 2.52).

Juarez appeals.

II

Juarez contends that her constitutional due process right to adequate notice was violated because the trial court terminated her parental rights based,

in part, on her mental health deficiencies despite the fact that she was not notified that her mental health would be considered a basis for termination.⁵ We agree.

A termination proceeding is a civil proceeding.⁶ In re Welfare of S.E., 63 Wn. App. 244, 249, 820 P.2d 47 (1991). It is well established that parents have a fundamental liberty and property interest in the care and custody of their children. U.S. Const. amends. V, XIV; Wash. Const. art. I, § 3; Santosky v. Kramer, 455 U.S. 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982); In re Custody of Smith, 137 Wn.2d 1, 13-14, 969 P.2d 21 (1998). “The due process clause of the Fourteenth Amendment protects a parent’s right to the custody, care, and companionship of [his or] her children.”⁷ In re 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); Prince v. Massachusetts, 321 U.S.

⁵ The State contends that Juarez cannot raise this constitutional due process issue for the first time on appeal. However, a party may raise a claim of “manifest error affecting a constitutional right” for the first time on appeal. RAP 2.5(a)(3). “[T]he issue of denial of procedural due process in a civil case” may be raised for the first time on appeal. Conner v. Universal Utils., 105 Wn.2d 168, 171, 712 P.2d 849 (1986). Juarez’s claim that she was never notified that her mental health deficiencies could cause her to lose her constitutionally-protected parental rights is an allegation of a manifest error affecting a constitutional right. Accordingly, we must address this claim on its merits.

⁶ To terminate a parent-child relationship, the State must establish by clear, cogent, and convincing evidence the six statutory elements set forth in RCW 13.34.180(1).

⁷ We note, however, that while parental rights are afforded constitutional protection, a parent does not have an absolute right to the custody and care of a child; the paramount consideration in a termination proceeding is the welfare of the child. In re Welfare of Young, 24 Wn. App. 392, 395, 600 P.2d 1312 (1979). Where the rights of a child conflict with the legal rights of a parent, the rights of the child should prevail. RCW 13.34.020. A child’s right to basic nurturing includes the right to a safe, stable, and permanent home and to a speedy resolution of dependency proceedings. RCW 13.34.020; In re Welfare of H.S., 94 Wn. App. 511, 530, 973 P.2d 474 (1999); In re Dependency of C.R.B., 62 Wn. App. 608, 615, 814 P.2d 1197 (1991). Nevertheless, “termination of parental rights should be allowed ‘only for the most powerful of reasons.’” In re Termination of S.J., No. 26179-4-III, slip op. at 6 (Wash. Ct. App. Aug. 2, 2011) (quoting In re Welfare of A.J.R., 78 Wn. App. 222, 229, 896 P.2d 1298 (1995)).

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158, 166, 64 S. Ct. 438, 88 L. Ed. 645 (1944); In re Welfare of Luscier, 84 Wn.2d 135, 139, 524 P.2d 906 (1974)). That right cannot be abridged without due process of law. U.S. Const. amend. XIV. Thus, “[p]arental termination proceedings are accorded strict due process protections.” In re Interest of Darrow, 32 Wn. App. 803, 806, 649 P.2d 858 (1982).

“Due process requires that parents have notice, an opportunity to be heard, and the right to be represented by counsel.”⁸ Key, 119 Wn.2d at 611 (citing In re Welfare of Myricks, 85 Wn.2d 252, 254, 533 P.2d 841 (1975); In re Welfare of Messmer, 52 Wn.2d 510, 514, 326 P.2d 1004 (1958)). More specifically, “the due process protections afforded parents in a termination hearing [include] . . . ‘[n]otice, open testimony, time to prepare and respond to charges, and a meaningful hearing before a competent tribunal in an orderly proceeding.’” In re Dependency of H.W., 70 Wn. App. 552, 555 n.1, 854 P.2d 1100 (1993) (quoting In re Moseley, 34 Wn. App. 179, 184, 660 P.2d 315 (1983)); see also Darrow, 32 Wn. App. at 809 (“the trial court should assure that the parent is afforded a full and fair opportunity to present evidence or rebut

⁸ “[T]he nature of the process due in parental rights termination proceedings turns on a balancing of the ‘three distinct factors’ specified in Mathews v. Eldridge, 424 U.S. 319, 335, 96 S. Ct. 893, 903, 47 L. Ed. 2d 18 (1976): the private interests affected by the proceeding; the risk of error created by the State’s chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure.” Santosky, 455 U.S. at 754; see also Darrow, 32 Wn. App. at 806.

“The private interest affected by the termination proceeding is great.” S.E., 63 Wn. App. at 249. “[C]ourts undertake a grave responsibility when they deprive parents of the care, custody and control of their natural children.” In re Sego, 82 Wn.2d 736, 738, 513 P.2d 831 (1973). “A parent’s right to control and have custody of children is a fundamental civil right which may not be interfered with without the complete protection of due process safeguards, particularly notice and an opportunity to be heard.” S.E., 63 Wn. App. at 250 (citing Halsted v. Sallee, 31 Wn. App. 193, 639 P.2d 877 (1982)).

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evidence presented against him”). Importantly, “[a] proceeding begun on one ground and continued on another, without any opportunity to define and contest the new allegations, constitutes a fundamental deprivation of due process.” In re Welfare of H.S., 94 Wn. App. 511, 522, 973 P.2d 474 (1999) (citing Cole v. Arkansas, 333 U.S. 196, 68 S. Ct. 514, 92 L. Ed. 644 (1948); In re Det. of Cross, 99 Wn.2d 373, 384-85, 662 P.2d 828 (1983)).

Of particular relevance here, due process requires that parents facing deprivation of their parental rights be provided with “notice that is ‘reasonably calculated, under all the circumstances,’ to apprise the parties of the pendency of the action and [to] enable them to present a defense.” H.S., 94 Wn. App. at 525 (quoting Duskin v. Carlson, 136 Wn.2d 550, 557, 965 P.2d 611 (1998)); In re Olson, 12 Wn. App. 682, 689, 531 P.2d 508 (1975) (quoting Glaspey & Sons, Inc. v. Conrad, 83 Wn.2d 707, 710, 521 P.2d 1173 (1974)). Specifically,

constitutional due process and fair treatment *require that parents receive notice of the specific issues to be considered*, including a clear and concise statement that the hearing may result in deprivation of all parental rights. The parents must be clearly advised in adequate time to meet that serious issue to prevent surprise, helplessness and disadvantage. Moreover, definite allegations of the purpose of the hearing are necessary to enable the parents to determine intelligently whether to admit or contest the petition.

In re Welfare of Martin, 3 Wn. App. 405, 410, 476 P.2d 134 (1970) (emphasis added). A parent must be informed not only that a proceeding is pending concerning his or her child, but also if, and how, the proceeding potentially will

affect his or her parental rights. Such notice informs the parent of the possible dire consequences of his or her derelictions and, thus, provides the parent with the opportunity to demonstrate a resolve to undertake parental responsibility. In re Adoption of J.D., 42 Wn. App. 345, 350, 711 P.2d 368 (1985). Generally, the parent must be notified of the requirements that the parent must meet in order to resume custody and of the importance of his or her participation in the dependency program in order to prevent termination. In re Welfare of Kevin L., 45 Wn. App. 489, 491-92, 726 P.2d 479 (1986) (discussing former RCW 13.34.130(2) (1985)); see also RCW 13.34.136(2)(i).

Here, the dependency petition specifies only that substance abuse and domestic violence are conditions affecting Juarez's ability to parent A.K.I. Similarly, the termination petition specifies only that substance abuse renders Juarez unable to care for A.K.I.⁹ The termination petition specifically asserts that "[t]he parents' use of intoxicating or controlled substances renders them incapable of provided proper care for the child for extended periods of time. They have been unwilling to complete treatment and have multiple failed treatment attempts." CP at 202. No similar allegation related to mental health conditions is contained within the petition. In fact, the termination petition does not include any mention of the mother's mental health diagnoses or of her

⁹ We note that where a new parental deficiency arises after the State files its termination petition, Civil Rule 15, regarding amendments to pleadings, provides the State with a procedure by which to amend the termination petition. We stress, however, that this case does not turn on a question of procedurally *improper* notice. The result in this case is mandated by the *absence* of required notice.

mental health counseling and medication. Moreover, the termination petition does not discuss any possible parental unfitness arising from any mental health conditions. Furthermore, the services that the State provided to Juarez pursuant to court order, as required by RCW 13.34.136, did not include any mental health services.¹⁰

None of the court documents in the record before us demonstrate that Juarez was informed that mental health issues could provide a basis to terminate her parental rights. Even the State's trial briefing fails to indicate that Juarez's mental health conditions affected her ability to parent; rather, it mentions only Juarez's "issues with sobriety and appropriate parenting." CP at 83. Indeed, at oral argument before this court, the State's counsel could not identify anywhere within the record where Juarez was informed that she could lose her parental rights to A.K.I. if she did not address her mental health conditions.¹¹

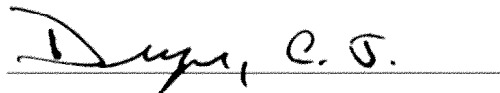
¹⁰ While Juarez was engaged in mental health treatment, this service was not required as a result of the dependency. Where the State does not notify a parent of a particular parental deficiency or condition, the State is unlikely to provide any services to correct the unidentified parental deficiency. See In re Welfare of C.S., 168 Wn.2d 51, 55, 225 P.3d 953 (2010); In re Dependency of T.L.G., 126 Wn. App. 181, 198, 108 P.3d 156 (2005) ("A threshold problem here is that DSHS never identified the parental deficiencies to be corrected."). Without the provision of services necessary to correct a parental deficiency, termination is improper. RCW 13.34.180; C.S., 168 Wn.2d at 56 ("Since this training, deemed necessary to address C.S.'s behavioral problems, was not offered to [the mother], termination of her parental rights was not warranted.").

¹¹ Rather, at oral argument, the State expressed the belief that, somehow, Juarez should have inferred that her mental health was causing her to be an unfit parent because a mental health assessment was requested by a social worker, because she was engaging in mental health treatment, and because her mental health conditions had been raised in the dependency petition for her other child. Court of Appeals oral argument, In re Dependency of A.K.I., No. 65439-0-1 (April 12, 2011), starting at 13 min., 30 seconds, *audio recording available at* <http://www.courts.wa.gov>. Contrary to the State's assertion, these circumstances did not provide sufficient notice to Juarez to satisfy constitutional due process requirements where fundamental parental rights are concerned.

Nevertheless, the trial court's findings of fact supporting its order terminating Juarez's parental rights include that, "[t]he mother's mental health problems are affecting the mother's ability to be truly compliant with the recommendations of the mother's other treatment providers." CP at 25 (Finding of Fact 2.47). The findings further provide that, "[t]he mother has not remedied her parental deficiencies related to her substance abuse and mental health." CP at 25 (Finding of Fact 2.52). The trial court also found that, "[b]ecause of the long-standing drug abuse, and the ongoing mental health problems that have been identified, the court finds that it is not likely that the mother would be able to parent [A.K.I.] independent of a structured environment." CP at 26 (Finding of Fact 2.68). The trial court's findings are in the conjunctive: both substance abuse *and* mental health issues provided the bases for terminating Juarez's parental rights. There was no finding that Juarez's substance abuse *alone* provided such a basis. Indeed, throughout the trial court's order both substance abuse issues and mental health issues are described as jointly affecting Juarez's ability to parent. In fact, the State agrees that "[t]he mother's mental health and stability were clearly a critical issue for the court's consideration." Rspt's Br. at 24. From the record before us, it appears that, in terminating Juarez's parental rights, the trial court relied on its findings that Juarez had substance abuse issues and mental health deficiencies and determined that these deficits, in conjunction, negatively affected her capacity to parent.

There being nothing in the record to indicate otherwise, we can only conclude that Juarez was not properly notified that her mental health deficits might supply a basis to terminate her parental rights. Thus, the State failed in its duty to notify this parent of the consequences of not addressing particular conditions that the State believed were causing parental unfitness. As a result, Juarez did not have the appropriate opportunity to respond to the allegations regarding her mental health diagnoses or the alleged effect that her mental health conditions may have on her parenting abilities. Juarez's constitutional due process rights were violated by the trial court's order relying on a condition causing parental unfitness of which she had not been properly notified.¹²

Reversed.

A handwritten signature in black ink, appearing to read "Dwyer, C. J.", is written above a horizontal line.

We concur:

¹² Because this claim of error is dispositive, we need not further address Juarez's remaining claims of error.

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Cox, J.

Grosse, J