

Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2017-178

AUGUST TERM, 2017

In re J.R., Juvenile	}	APPEALED FROM:
	}	
	}	Superior Court, Windham Unit,
	}	Family Division
	}	
	}	DOCKET NO. 120-10-15 Wmjv
		Trial Judge: Katherine A. Hayes

In the above-entitled cause, the Clerk will enter:

Mother appeals the superior court's termination of her parental rights with respect to her son, J.R., arguing that her right to due process was violated when the court proceeded with the termination hearing without her being given an opportunity to participate, at least by telephone. We vacate the termination order and remand the matter for the superior court to reopen the termination hearing to give mother an opportunity to consult with counsel concerning the testimony of the witnesses at the hearing and to testify on her own behalf.

J.R. was born on October 21, 2015. That same day, the Department for Children and Families (DCF) filed a petition to have him adjudicated a child in need of care or supervision (CHINS). DCF cited mother's lack of prenatal care, longstanding and ongoing substance abuse issues, chronic homelessness, and engagement in a violent relationship. J.R., who tested positive for opiates at birth, was placed into DCF custody the day after he was born pursuant to a motion for emergency relief. The superior court's temporary care order continued DCF custody and conditioned parent-child contact on mother engaging in inpatient treatment and providing clean urine samples.

On November 18, 2015, mother stipulated to a finding that J.R. was CHINS. On March 17, 2017, mother agreed to a disposition order that continued DCF custody and approved a case plan with concurrent goals of reunification and adoption. On May 27, 2016, DCF filed petitions to terminate mother's and the father's parental rights.*

The termination hearing was scheduled for April 18, 2017. At the time of an April 5, 2017 status conference, mother was incarcerated at the Chittenden County Correctional Facility on federal drug trafficking charges, but she participated in the conference by telephone. Mother's attorney asked the court to sign a writ of habeas corpus requesting that the U.S. Marshall's Service allow the Chittenden County Sheriff to transport mother to the upcoming termination hearing. The court signed the writ but to no avail. Mother did not appear for the termination hearing. Her attorney explained that despite having contacted a number of people and having gone through the

* The father was represented by counsel but did not appear at the termination hearing and has not contested the superior court's termination of his parental rights.

proper transport procedures, she had not received any communications regarding the writ and had not heard anything from either the U.S. Attorney or the U.S. Marshall's Service. She further explained that, as a fallback position, she attempted to arrange for mother to participate in the termination hearing by telephone, but the supervisor of the correctional facility told her that this would not be possible because the facility did not have the staff to allow for a correctional officer to be with mother all day for the entirety of the hearing. The attorney stated that mother wanted to participate in the hearing but could not do so without video conferencing, phone capability, or transport. She asked the court to deny the termination petition because by the next permanency hearing mother could conceivably be back in the community and available to participate in a hearing. The court decided to go forward with the hearing despite mother's absence, stating that although her nonappearance was not the result of her choice, it was based on her situation and not the fault of the court.

The State presented the testimony of two witnesses—J.R.'s foster mother and the family DCF case worker—both of whom mother's attorney briefly cross-examined. Mother's attorney presented the testimony of a Health Care Rehab Services Case Manager on mother's behalf. At the close of evidence, the court rejected mother's attorney's renewed request to deny the petition and defer a decision until mother could participate in the hearing. The court proceeded to give oral findings and conclusions from the bench, ruling that this is a "very straightforward" case in which mother's parental abilities had stagnated and termination of her parental rights was in J.R.'s best interests. The court issued a written judgment order on May 1, 2017.

On appeal, mother argues that the failure to provide her an opportunity, at least by telephone, to consult with counsel and to testify at the termination hearing amounted to a violation of her right to due process. The State responds that, applying the three-factor balancing test set forth in Matthews v. Eldridge, 424 U.S. 319, 335 (1976), mother's significant private interest is cancelled out by the State's countervailing compelling interest in protecting juveniles, such that the outcome of the case depends on the third factor, the risk of an erroneous deprivation of mother's interest. According to the State, the risk of an erroneous deprivation of mother's parental rights was small, considering that mother was represented by an attorney who actively litigated her rights and cross-examined the State's witnesses and that mother has failed to point to any evidence that would have changed the outcome had she been present at the hearing.

At the outset, we recognize that mother's attorney did not ask the superior court for a continuance per se, but rather requested that the court deny the petition at that time and defer a decision until some unspecified time after mother was released into the community. The court certainly was not obligated to grant such an open-ended request. Nonetheless, given the constitutionally implicated interests involved in a proceeding to terminate parental rights, the court's failure to explore other options to allow mother to participate, at least by telephone, within a reasonable period of time from the child's perspective amounted to an abuse of discretion. See In re R.B., 152 Vt. 415, 421 (1989) (stating that in termination of parental rights proceeding "all the parties involved are to be accorded a fair hearing, and their constitutional and other legal rights recognized and enforced" (quotation omitted)); cf. In re D.H. & S.C., 2017 VT 071, ¶ 16 (reversing termination order and remanding matter for termination proceeding to be reopened to allow mother to participate). On remand, the court need only provide mother an opportunity to review transcripts of the witnesses' testimony and consult with counsel as to any need for further examination of those witnesses and to testify on her own behalf by telephone if no transport order is forthcoming.

The superior court's order terminating mother's parental rights is vacated and the matter is remanded for the court to reopen the termination hearing and to provide mother an opportunity to

consult with counsel regarding the need for any further examination of witnesses and to testify on her own behalf by telephone in the absence of a transport order.

BY THE COURT:

Beth Robinson, Associate Justice

Harold E. Eaton, Jr., Associate Justice

Brian J. Gearson, Superior Judge,
Specially Assigned