



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:

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Beth Robinson, Associate Justice

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Harold E. Eaton, Jr., Associate Justice

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Brian J. Gearson, Superior Judge,  
Specially Assigned