

IMPOUNDED

COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss.

SALEM JUVENILE COURT
[REDACTED]

In re:
[REDACTED]

)
) **MOTHER’S MOTION**
) **FOR NEW TRIAL**
)
)

Pursuant to Mass. R. Civ. P. 60(b)(6), Respondent-Mother, [REDACTED] (“Mother”), respectfully moves this Court to grant her a new trial on the grounds that her procedural due process rights were violated. Mother was deprived of her opportunity to participate meaningfully in the proceedings, including the right to rebut evidence and effectively cross-examine witnesses. Mother’s trial was conducted via Zoom, which she could connect to only by telephone. Her connection was too poor to hear much of the testimony of the first witness well and she was disconnected from the final two witnesses at trial. Mother was prejudiced by the termination of her parental rights in a proceeding in which her connection was faulty, she was unable to see witnesses, and the Court could not hear her, rendering her unable to meaningfully participate. The proceeding violated her due process rights.

In support of this motion, Mother states as follows, as supported by the attachments:

Background

On November 26, 2014, the Department of Children and Families (“DCF”) filed a care and protection petition on behalf of [REDACTED]). In February 2020, Mother’s first trial ended with a premature judgment, the decree was vacated, and a new trial with a different judge was granted. [Attachment A, Docket].

On April 21, 2020, Mother’s counsel filed a motion for leave to withdraw by Mother’s counsel. On April 23, 2020, the Court ordered Mother to proceed *pro se* and appointed prior counsel as her standby counsel. In June and in September, Mother asked for an in-person trial. [Attachment B, Affidavit of Mother]. On September 9, 2020, the Court denied Mother’s motions and, instead, held trial by Zoom Video Communications, Inc. (“Zoom”).

At the beginning of the trial, Mother had not been contacted by the Court with the log-in information for the trial. [Attachment C¹: Tr.I/5]. She was sent the link after the Court was already on record. Standby counsel alerted the court that Mother did not have video capacity but agreed to send Mother the link created by the Court. [Attachment C: Tr.I/6]. The Court took a short break and Mother called in for pre-trial motions by means of her cell phone. [Attachment C: Tr.I/9-12].

¹ Attachment A contains relevant transcript pages 5-15 and 45-54.

The trial then began. After the first witness was called and began testifying, the clerk noted that Mother was no longer on the Zoom hearing but was awaiting admission into the hearing. [Attachment C: Tr.I/14]. The clerk interrupted the Court to ask if she should admit Mother. [Attachment C: Tr.I/14.] Mother was admitted back into the call. [Attachment C: Tr.I/15]. While logged into the Zoom trial, Mother was only able to hear; she could not see the courtroom, the judge, or witnesses. [Attachment B, Affidavit of Mother].

Mother's cell phone reception also did not allow her to hear the testimony well, so she took the phone into her car and drove to find better reception. [Attachment B, Affidavit of Mother]. After six to seven minutes of the testimony of [REDACTED] Mother was not able to hear the testimony well and was unable to hear some portions of the testimony. [Attachment B, Affidavit of Mother]. Mother called the Court and tried to call back in, but she was unable to log back in. [Attachment B, Affidavit of Mother].

At the end of [REDACTED] testimony, the Court asked Mother if she had questions for the witness, but the Court did not receive a response. [Attachment C: Tr.I/45]. Noting that Mother's absence was strange, the Court called Mother's cell phone number, removed her to the waiting room on Zoom, and then moved her back into the hearing. [Attachment C: Tr.I/45-50]. The Court instructed Mother to call standby counsel. [Attachment C: Tr.I/51]. The Court then removed her from the hearing completely. [Attachment C: Tr.I/52].

After a short break, the parties came back on record, stating that Mother did not attempt to log back in to Zoom and standby counsel was unable to reach her. [Attachment C: Tr.I/52]. The Court noted that there was no information as to whether Mother's absence as purposeful. The Court then continued the trial without Mother, proceeding with the testimony of two additional witnesses. [Attachment C: Tr.I/53-54].

Of the three witnesses at Mother's termination trial, Mother only heard the beginning of the testimony of the first witness, ██████████, but her reception was so poor she did not hear the rest of the testimony well. [Attachment B, Affidavit of Mother]. She spoke during ██████████ testimony but assumed that she could not be heard when there was no response. [Attachment B, Affidavit of Mother]. She did not hear the conclusion of ██████████ testimony, and she did not hear any testimony from the second of the two witnesses. [Attachment B, Affidavit of Mother]. She attempted to reconnect to the Zoom hearing but was unable to do so. [Attachment B, Affidavit of Mother].

Argument

- I. **This Zoom termination trial deprived Mother of her right to due process, because Mother's Zoom connection was faulty, she could not hear the witnesses, the Court could not hear Mother, and, as a result, Mother had no meaningful opportunity to rebut DCF's adverse allegations against her.**

A. Introduction

A termination of parental rights trial by Zoom *might* satisfy due process if all internet video and audio connections work, and the parent can meaningfully

participate and rebut DCF's adverse allegations. But that is not what happened here. Here, Mother's right to due process was violated because she was forced, due to limited internet access, to participate by phone while driving in order to find a location with decent internet connectivity. Nevertheless, Mother's audio connection was so flawed that she could not hear witnesses, the Court could not hear her, and she periodically dropped out of the trial altogether. Mother had informed the Court of these problems, and the Court was aware of these problems, throughout the trial.

Parents have a fundamental, substantive due process right to the care and custody of their children that is protected by the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution and Article 10 of the Massachusetts Declaration of Rights. *See Stanley v. Illinois*, 405 U.S. 645, 653 (1972); *Department of Pub. Welfare v. J.K.B.*, 379 Mass. 1, 3 (1979). When the State intervenes to terminate a parent-child relationship, due process requires notice and an opportunity to be heard at a meaningful time and in a meaningful manner. *See Armstrong v. Manzo*, 380 U.S. 545, 552 (1965); *Department of Pub. Welfare v. J.K.B.*, 379 Mass. at 3-4. A meaningful opportunity to be heard requires that parents receive an opportunity to effectively rebut adverse allegations concerning child-rearing capabilities. *Adoption of Don*, 435 Mass. 158, 169 n.16 (2001). It also requires the effective assistance of counsel. *See Department of Pub. Welfare v. J.K.B.*, 379 Mass. at 4. Mother was deprived of these due process rights and a new trial should be ordered.

B. The trial deprived Mother of her due process right to meaningful participation.

This termination of parental rights trial did not allow Mother to meaningfully participate. Because “[m]inimum due process varies with context,” *Spence v. Gormley*, 387 Mass. 258, 274 (1982), the court must determine what procedures are sufficient in a particular case to protect the right to be heard at a meaningful time in a meaningful manner. The court balances “the private interest that will be affected, the risk to the parent of the erroneous deprivation, and the government’s interest in making the determination.” *Adoption of Edmund*, 50 Mass. App. Ct. 526, 529 (2000), citing *Matthews v. Eldridge*, 424 U.S. 319, 334-335 (1976).

First, Mother’s private interest at trial is of the highest order. *Care and Protection of Zita*, 455 Mass. 272, 284 (2009). Mother has a liberty interest in family integrity. *See Santosky v. Kramer*, 455 U.S. 745, 753 (1982). This proceeding resulted in the termination of Mother’s parental rights, which irreparably and irreversibly affected her private interest.

The second factor, the risk of the erroneous deprivation of Mother’s rights, was high in this instance. In Massachusetts care and protection cases, meaningful participation means that “a parent [has] the opportunity effectively to rebut adverse allegations concerning child rearing capabilities,” even though it does not require that a parent actually be *present* in the courtroom in all cases, such as incarceration out of state. *Edmund*, 50 Mass. App. Ct. at 529, quoting *Adoption of Mary*, 414 Mass. 705, 710, (1993). In some cases – *perhaps* including a trial during a pandemic - meaningful participation may be possible through video conference or telephone.

See Adoption of Whitney, 53 Mass. App. Ct. 832, 836 (2002). Here, Mother sought to participate live, or some other meaningful fashion, but she was forced to participate in a Zoom hearing by phone. In the best of circumstances, this strains the bounds of fairness. But here, the technological problems encountered by Mother during the trial infringed on her rights to have a meaningful opportunity to be heard, to rebut evidence, to cross-examine witnesses, and present evidence. Mother's myriad technological problems accessing, and meaningfully participating in, the trial are laid out in the Background section, above.

No case in Massachusetts addresses whether a Zoom termination trial satisfies due process, and no case in Massachusetts addresses whether a parent's telephonic participation at trial satisfies due process outside of the context of a parent incarcerated in another state. But relevant cases state clearly that any kind of remote participation satisfies due process *only* if it allows a parent to participate meaningfully. *See Adoption of Edmund*, 50 Mass. App. Ct. at 529-530 (father incarcerated out of state denied "meaningful opportunity to be heard" when telephone equipment enabling father to participate in trial did not work correctly and judge refused to grant father continuance); *Adoption of Whitney*, 53 Mass. App. Ct. 832, 832 (2002). The use of technology here violated Mother's due process rights, because it simply did not work.

Participation via electronic means is premised on a reliable connection to the Court, and the lack of such connection violates due process. Courts have held that a parent was denied due process where an audio line into a termination trial "faded in

and out” and was “temporarily interrupted by static.” *In re Termination of Parental Rights of Idella W.*, 708 N.W.2d 698,702-703 (Wis. 2005) [Attachment D]. According to the appellate court in *Idella W.*, use of the telephone did not allow for meaningful participation “because periodic or sporadic inaudibility... significantly truncates a party’s ability to fully comprehend what is going on, and thus hinders the ability to get a feel for the proceedings—a mix of spoken words and body language—and, therefore, meaningfully consult with his or her lawyer concerning not only the testimony but also what everyone else may be doing in court.” *Id.* In that case, the appellate court vacated the termination decree. *Id.* at 703.

The appellate court reasoned in *Idella W.* that unless the parent knowingly waives her right to appear at a proceeding, any alternative to physical presence “*must. . . be functionally equivalent to personal presence*: the parent must be able to assess the witnesses, confer with his or her lawyer, and, of course, *hear everything* that is going on.” *Id.* The Supreme Judicial Court likewise noted in a recent case that today’s video conferencing technology can adequately safeguard a defendant’s constitutional right to be present in a criminal pre-trial hearing if it allows him to listen, adequately observe witnesses, and privately consult with his attorney. *Vasquez Diaz v. Commonwealth*, 487 Mass. 336, 167 N.E.3d 822, 837 (2021). But this did not happen here.

In this case, when technological difficulties arose, safeguards were not taken to protect Mother’s due process right to meaningful participation. The trial could have been suspended until contact with Mother was resumed and the reliability of

her video and audio assured. *See Vasquez Diaz.*, 167 N.E.3d at 832 (suspension and resumption of hearing during technological difficulties an important protection). The Court could have allowed Mother time to watch any recorded testimony she missed and then recall witnesses, as necessary. The Court did none of those things to protect Mother's rights. Without these safeguards, the opportunity to cross-examine witnesses on the second day of trial was illusory and Mother was not called to the stand. During this proceeding, Mother did not have the opportunity to effectively rebut the testimony presented to terminate her parental rights, and, thus, her due process rights were violated. *See Adoption of Mary*, 414 Mass. 705, 710 (1993) ("Due process concerns and fundamental fairness require that a parent have an opportunity effectively to rebut adverse allegations concerning child-rearing capabilities, especially in a proceeding that can terminate all legal parental rights").

Finally, the government has an interest in protecting public health during the COVID-19 pandemic. *See Vasquez Diaz v. Commonwealth*, 487 Mass. at * 832. But the government has no interest in holding trials against parents that the parents cannot see or hear. Audio and video connectivity has no bearing on the safety of court personnel or litigants. The government has a strong interest in ensuring that its citizens actually participate in trials regarding their liberty interests, and that its citizens feel confidence in the judicial system. Here, the government interest is only to ensure that parents have a safe but meaningful way to participate in their trial.

The decree should thus be vacated, and Mother allowed a new trial, in person, at which she will be able to assess the witnesses and “hear everything that is going on.” See *In re Termination of Parental Rights of Idella W.*, 708 N.W.2d at 703 (vacating termination decree and remanding). At a minimum, the Court should reopen the trial and allow Mother to cross-examine and introduce other competent and relevant new evidence, through the testimony of other witnesses or otherwise. See *Adoption of Whitney*, 53 Mass. App. Ct. 832, 832 (2002) (vacating decree and remanding for further proceedings).

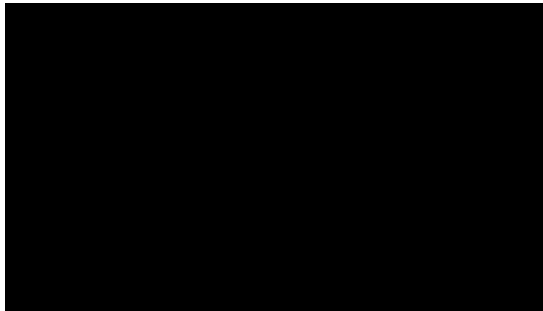
Finally, Mother requests the appointment of counsel at any new trial or further proceedings relating to any reopening of evidence at trial in the juvenile court. Parents are entitled to court-appointed counsel in care and protection and termination of parental rights cases. See G.L. c. 119, § 29 (stating that parents in care and protection and other department-initiated custody proceeding have right to counsel); *Dep’t of Pub. Welfare v. J.K.B.*, 379 Mass. 1, 3-4 (1979) (holding that due process requires the appointment of counsel for indigent parents in termination proceedings). Even though Mother had eight prior attorneys who withdrew, she is entitled to counsel. See *Adoption of Ulon*, 75 Mass. App. Ct. 1103 (2009) (1:28 decision) (court reversed and remanded, agreeing that court erred in failing to ensure that mother was afforded counsel where she was denied after court granted four prior attorney’s motion to withdraw on the basis of breakdown of communication).

Conclusion

For these reasons, Mother respectfully requests that this Court grant her:

- (a) a new trial, to be held in person,
- (b) such other relief as is just and proper under the circumstances, and
- (c) the appointment of counsel for future juvenile court proceedings.

██████████ (Mother)
by her appellate counsel,



Dated: June 25, 2021

CERTIFICATE OF SERVICE

I hereby certify, under the penalties of perjury, that on June 25, 2021, I have made service of this Mother's Motion For a New Trial upon the attorneys of record as set forth below for electronic service:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

ATTACHMENT B

IMPOUNDED

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT

ESSEX, ss

SALEM JUVENILE COURT
[REDACTED]

IN RE: CARE AND PROTECTION OF: [REDACTED]

Affidavit of Mother

I, [REDACTED] being duly sworn, do hereby state that the following is true to the best of my knowledge and belief:

1. I am the mother of [REDACTED], the child in this case.
2. At trial, I represented myself *pro se* and [REDACTED] was appointed as my standby counsel.
3. I moved for an in-person trial in June 2020 and in September 2020.
4. On September 9, 2020, I dialed in to the court from out of state.
5. I had to dial in on my cellphone because I could not use video on my phone. I could not see the courtroom, witnesses, or judge.
6. My cellular service was bad after I called in so I brought my phone into the car and drove to try to find an area with better service.
7. I heard the beginning of the testimony by [REDACTED] for about the first six or seven minutes. My phone was going in and out of service.
8. I heard [REDACTED] ask some questions to [REDACTED].
9. I tried to speak during [REDACTED] testimony but no one responded to me so I assumed that I could not be heard.
10. I heard [REDACTED] testify about an altercation between myself and [REDACTED].

11. I had very poor reception and could not hear the testimony well after the first few minutes.
12. I did not hear [REDACTED] question [REDACTED]
13. I tried to dial back in, but I couldn't connect. I called the clerk's office, but they were not able to connect me.
14. I did not hear [REDACTED] or [REDACTED] testify.
15. I have discussed the motion for a new trial with [REDACTED]. This affidavit was prepared by [REDACTED] but with the information I provided her. I have read this affidavit and discussed each numbered paragraph with [REDACTED].

Signed under the penalties of perjury, in Essex County, this 17th day of June, 2021.

[REDACTED]