

IN THE JUDICIAL CCIRCUIT
COURT, IN AND FOR COUNTY,
FLORIDA

CASE NO:
DIVISION:

IN THE INTEREST OF:

MINOR CHILDREN /

**DEPARTMENT’S MEMORANDUM OF LAW IN SUPPORT OF
TERMINATION TRIAL BY ZOOM DURING THE COVID-19 PANDEMIC**

COMES NOW the State of Florida Department of Children and Families (“Department”), by and through its undersigned attorney, and respectfully offers this Court the following Memorandum of Law in support of the Termination Trial by Zoom Technology pursuant to section 39.809, Florida Statutes (2019)¹ and Florida Supreme Court Administrative Order No. AOSC20-23. In support thereof, the Department states the following:

ARGUMENT IN SUPPORT OF TRIALS BY ZOOM DURING COVID-19

The Department objects to a blanket continuance of the trial in this case due to the COVID-19 pandemic. The Department is aware of the unique circumstances surrounding the COVID-19 epidemic; however, the Court has been holding hearings via Zoom since March 16, 2020 without issue. The Florida Supreme Court Administrative Order No. AOSC20-23 on April 6, 2020 to address the COVID-19 Pandemic and to enable the courts to operate to the fullest extent consistent with public safety. In AOSC20-23, the Florida Supreme Court extended the previously administered Order until May 29, 2020.

The guiding principle in the AOSC20-23 indicates, “to maintain judicial workflow to the maximum extent feasible, chief judges are directed to take all necessary steps to facilitate conducting proceedings with the use of technology.” The order further authorized the use of technology and makes exceptions to allow hearings to continue including administering an oath to witnesses by audio-visual technology. Indeed, on April 17, 2020, Chief Justice Charles T. Canady issued a memorandum to the Chief Judges of the Circuit Courts emphasizing the need for continuity of court operations. That memorandum states: “Unfortunately, I have received troubling informal reports that some judges—who I am confident represent a small minority—are routinely refusing to set hearings in matters that could readily be dealt with through video or telephone conferences. This is totally unacceptable. All judges have a duty to undertake reasonable and appropriate efforts to advance cases on the docket through the use of available technology.”

The Department asserts (1) it is in the best interests of dependent children that termination of parental rights trials continue to be held through electronic means so that no child remains in

¹ All references are to the 2019 version of the Florida Statutes unless otherwise indicated.

the dependency system longer than necessary (2) termination trials can be effectively conducted through the use of technology without the necessity of in-person court appearances because, with the observance of procedural safeguards, a hearing conducted through Zoom can protect the parent’s constitutional rights, provide all parties an opportunity to effectively participate, and protect against claims of ineffective assistance of counsel; and (3) because of the proven availability of technology to effectively conduct the hearing, the continuance does not rise to the level of an “exceptional circumstance” to be permitted under Florida law.

1. Conducting Termination trials timely is critical to ensuring Florida’s children timely achieve permanency

A blanket continuance of all termination of parental rights trials until the COVID-19 pandemic concludes will be harmful to Florida’s dependent children, whose permanency will be unnecessarily held in abeyance. Chapter 39 expressly provides that one of the chief purposes of Chapter 39 is “to ensure that permanent placement with the biological family or adoptive family is achieved as soon as possible for every child in the foster care and that **no child remain in foster care longer than 1 year.**” § 39.001(1)(h), Fla. Stat. (emphasis added). The Legislature further has proclaimed that “time is of the essence for establishing permanency for a child in the dependency system.” § 39.001(7), Fla. Stat. The time limitations in Chapter 39 are “a right of the child” that may not be waived except in extraordinary circumstances. § 39.0136(1), Fla. Stat. Indeed, “courts are compelled to expedite proceedings to prevent children from languishing in the foster care system.” C.M. v. Dep’t of Children & Fam. Servs., 854 So. 2d 777, 779 (Fla. 4th DCA 2003). Where a termination trial can be conducted through technology that will observe procedural safeguards as outlined further below, any continuance granted for the sole purpose of waiting until an in-person hearing would be in contravention to these principles and would ultimately violate the child’s right to a timely process.

2. Termination trials can be effectively conducted through the use of technology without the necessity of in-person court appearances because, with the observance of procedural safeguards, a hearing conducted through Zoom can protect the parent’s constitutional rights, provide all parties an opportunity to effectively participate, and protect against claims of ineffective assistance of counsel

With appropriate procedural safeguards, a trial conducted via Zoom or other virtual technology can protect all parties’ rights, including a parent’s constitutional rights. The parties proposing continuance of trials have made several assumptions that barriers will certainly be encountered during a virtual trial. With preparation, many barriers can be avoided. For example, the parties and court should reach common understanding prior to or at the start of the hearing on how the trial will be recorded, the process for ensuring all parties can see, hear, and participate, the protocol for counsel to privately confer with their clients throughout the process, the understanding of how objections should be contemporaneously asserted by a party, and the conditions that will require the hearing to be continued such as a party losing connectivity and being unable to reconnect. Even with the most preparation, unexpected issues can arise. The best approach is for the parties to specifically identify the issues as they arise during the trial to enable the court to address the particular matter rather than assume every trial will be ridden with insurmountable problems.

Objections have been lodged to termination trials being held through audio-video technology based on a purported violation of the parent's right to confront witnesses. Florida law firmly establishes that dependency proceedings are civil in nature, not criminal, and the constitutional right to confront witnesses is not implicated in a civil dependency proceeding. *S.D. v. Department of Children & Families*, 208 So. 3d 320, 322 (Fla. 3d DCA 2017).

Nevertheless, the Parents' due process rights would still be protected because the Florida Supreme Court has previously approved of the use of witnesses testifying via remote video testimony in criminal cases where the defendant has a right to confront witnesses. *Harrell v. State*, 709 So. 2d 1364 (Fla. 1998); *see also Lima v. State*, 732 So. 2d 1173 (Fla. 3d DCA 1999); *Butler v. State*, 254 So. 3d 651 (Fla. 4th DCA 2018); *Rogers v. State*, 40 So. 3d 888, 889 (Fla. 5th DCA 2010). The Court in *Harrell* held that admission of trial testimony using a live satellite transmission for a witness residing in a foreign country and unable to appear in court did not violate the federal or state Confrontation Clauses. *Harrell*, 709 So. 2d at 1366. There, the courtroom was set up so the defendant and jury could see the witness who was testifying from Argentina. *Id.* at 1367. The testimony was presented with a few technological glitches. The Court acknowledged that under the United States and Florida Constitution, criminal defendants have a right to confront witnesses. The Confrontation Clause ensures that (1) that the witness will give the testimony under oath, impressing upon the witness the seriousness of the matter and protecting against a lie by the possibility of penalty of perjury, (2) that the witness will be subject to cross-examination, and (3) that the jury will have the chance to observe the demeanor of the witness, which aids the jury in assessing credibility. *Id.* at 1368 (*citing Maryland v. Craig*, 497 U.S. 836, 851 (1990)).

However, the Florida Supreme Court explained that confrontation was not an absolute right, it was subject to considerations including public policy and necessities of the case. *Id.* at 1368. While the satellite testimony was not the equivalent to face-to-face confrontation, the Court explained there are exceptions to such confrontation. To qualify as an exception, the procedure (1) must be justified on a case-specific basis, considering public policies and necessities of the case and (2) must satisfy the other three elements of confrontation—oath, cross-examination, and observation of the witnesses' demeanor. *Id.* at 1369.

entitled to call witnesses that are material and necessary to present their defense. Contemplating that some cases will need to proceed via audio-video testimony, the Florida Supreme Court in AOSC20-23 expressly suspended any rule that could be read to limit the use of audio-video equipment to administer oaths of witnesses. Indeed, the purpose of that order is "keeping the courts operating to the fullest extent consistent with public safety." Testimony via audio-video technology would promote public safety by eliminating the need for in-person testimony, promote the parties' interest by permit the parties to fully present their cases, and prevent the child's permanency from being held in limbo until the uncertain time when in-person hearings can recommence.

Presentation of witnesses through Zoom or similar technology also satisfies the second analysis as discussed in *Harrell*. The three elements of confrontation of oath, cross-examination, and observation of the witnesses' demeanor can easily be accomplished through the virtual platform. Regarding the oath, AOSC20-23 permits the court to administer the oath virtually when the court can positively identify (i.e. both see and hear) the witness via the equipment. The Zoom

platform and similar technology enables participants to both see and hear each other, so the court can have the ability to positively identify the witness. As for cross-examination, like any in-person trial, Zoom enables a participant to fully observe by both sight and sound a direct examination and then present a responsive cross-examination. Finally, Zoom enables the court to observe the witnesses' demeanor. Prior to each witness testifying, the court can confirm that the witness can clearly be seen and heard. If the witness cannot be seen, the court can instruct the witness to adjust the position of the camera until the witness is appropriately observable, which may actually offer a closer view of the witness than what is available in some courtrooms. Based on the visual presentation facilitated by Zoom, the court would be able to make the necessary credibility determinations to render its findings. To that end, the case cited by the Office of Regional Conflict Counsel to support its argument that the court would not be able to observe the witness—*City of St. Petersburg v. Meaton*, 987 So. 2d 755 (Fla. 2d DCA 2008)—is inapplicable to the Zoom platform. In *Meaton*, the court determined that the fact finder who had made findings based solely on a review of audio tapes could not satisfy the requirement that a fact-finder should personally observe the witness when making credibility determination. *Id.* at 757. Unlike the audio tapes in *Meaton*, Zoom gives the court the opportunity to personally observe the witness. Because Zoom technology enables the administration of an oath, effective cross-examination, and observation of a witnesses' demeanor, the technology would meet even the strictest constitutional requirements associated with the confrontation clause.

Further concerns have been raised about the ability to impeach a witness, refresh a witness's recollection, or ensure that a witness is not relying upon notes or documents during his testimony. Generally, the first step in the impeachment process is to ask about the prior statement or read the prior statement to the witness having provided the information of the date, time and place of making the statement. Only if the witness does not recall making the statement or denies making the statement is the witness confronted with an actual document. The Zoom application offers the opportunity to share documents in real time for all the participants to view through the Chat option. Alternatively, the attorney can hold up the document to her own camera to ask the witness to read it. To facilitate this process better, documents can be discussed and distributed among the parties beforehand at a pretrial conference or through a pretrial stipulation. The same process can be used to refresh a witness's recollection. Additionally, all witnesses at the start of their testimony can be reminded that they are not to refer or have any documentation on hand. And, the court can require the witness's camera to be set up in such a way the court can fully view the witness's surroundings to ensure such notes are not being used.

The use of Zoom enables parents and parent's attorney to be "present" with their attorneys and have the ability to consult one another. Parents have a right to be present at all hearings, yet Florida Rules of Procedure already contemplate that they may appear by audiovisual device. *See Fla. R. Juv.* P 8.525(2) ("A party may appear in person or, at the discretion of the court for good cause shown, by an audio or audiovisual device.") The parent and his or her attorney can and should confer during trial and all parties and the court should establish a protocol before the trial commences to ensure effective communication. By making use of available technology there are multiple options for parents and attorneys to confer during the trial. The Zoom application offers a chat option in which the Parent and Parent's attorney can privately confer. Alternatively, the parent's attorney and the parent confer via phone, text message, or email while a witness is testifying. If needed, the parent's attorney and parent can formally recess at the conclusion of each

direct and cross examination to confer via phone, text message, email, or other options that can be discussed between the parent and counsel prior to the start of the trial. No parent will have to give up the right to confer with his or her counsel simply because the trial is conducted virtually, and the parent and attorney are not located in the same room.

The Parent's attorney objects to trial by Zoom on the basis that counsel would be ineffective if made to go to trial by Zoom. Florida courts consider a two-step test when considering if Counsel is ineffective. *J.B. v. Fla. Dep't of Children & Families*, 170 So. 3d 780, 792–93 (Fla. 2015). First, a parent must identify specific errors of commission or of omission made by the parent's counsel that under the totality of the circumstances evidence a deficiency in the exercise of reasonable, professional judgment in the case. Second, the parent must establish that, cumulatively, this deficient representation so prejudiced the outcome of the TPR proceeding that but for counsel's deficient representation the parent's rights would not have been terminated. If the parent establishes that the result of the TPR proceeding would have been different absent the attorney's deficient performance, the order terminating parental rights should be vacated, and the case returned to the circuit court for further proceedings. *Id.* at 793. Like any trial, to avoid such a claim, the parent's attorney should and would still be held to the same level of required representation as in an actual courtroom. The parent's attorney would still be required to call necessary witnesses, make objections, cross-examine witnesses and be familiar with the evidence in the case prior to trial. These issues can be resolved through regular channels of discovery, pretrial stipulations, pretrial conferences, brief recesses and a plan to communicate with their client prior to and during trial. That the trial will be conducted via electronic technology does not necessitate that the parent's counsel will provide deficient performance.

The Court can remain in control of the virtual courtroom through Zoom or similar technology to the extent the parents' due process rights are protected while also protecting the integrity of the court proceedings. When sequestering witnesses, the Court can monitor the participants to the session to ensure that no witnesses are observing other witness's testimony. In response to the assertion that a witness could be "off camera" in another participant's connection, the court that impress upon all witnesses the risk of contempt of court for failing to follow the rules of sequestration ranging from having his or her testimony struck up to incarceration. The same concerns exist for sequestered witnesses in the traditional courtroom settings as in the use of Zoom and should not be considered a reason for continuing trials.

The use of Zoom like any technology is subjected to glitches. Yet, the Florida Supreme Court in *Harrell* has already provided guidance on this matter. "It is incumbent upon the trial judge to monitor such problems and to halt the procedure if these problems threaten the reliability of the cross-examination or the observation of the witness's demeanor." *Harrell*, 709 So. 2d at 1372. Thus, at any time, the court can pause the proceeding, take a recess, or continue the hearing to another day if a party cannot meaningful participate, a party loses connection, or in the rare instance that the connection is hacked. But that bridge will only need to be crossed when we come to it.

3. Because of the availability of technology to effectively conduct the trial, the continuance does not rise to the level of an “exceptional circumstance” to be permitted under Florida law.

The Court should deny any motion to continue the trial based upon the plain language in Chapter 39 concerning continuances. Pursuant to section 39.0136, time is of the essence for children in the dependency system and time belongs to the child. Section 39.0136(2) requires all parties to work together to ensure permanency is achieved timely. If a continuance is not requested by the child’s counsel, the guardian ad litem, or a child of sufficient capacity to express reasonable consent, continuances are permitted in only two instances. First, a continuance is permissible because of the unavailability of evidence that is material provided the requesting party exercised due diligence. § 39.0136(3)(b)1., Fla. Stat. There has been no suggestion that a party is seeking a continuance in this case due to the unavailability of evidence. Second, a continuance is permissible to allow the requesting party additional time to prepare and the time is justified because of an exceptional circumstance. § 39.0136(3)(b)1., Fla. Stat. Again, there has been no suggestion that a party is seeking a continuance to have additional time to prepare. Moreover, that the format for the hearing will be via Zoom or similar technology does not rise to the level of constituting an exceptional circumstance as the counsel will be able to advocate for their client in the same manner as they would in the courtroom in that they can question a witness, introduce exhibits, make objection, and present arguments.

When considering granting a continuance, the Court should consider first the best interest of the child and secondly fairness to the parents. *C.J. v. Dep’t of Children and Families*, 756 So. 2d 1108, 1110 (Fla. 5th DCA 2000) (holding that without exceptional circumstances it would be unreasonable to postpone a termination of parental rights trial until the conclusion of a death penalty trial which could take one to three years to go to trial). When considering the fairness to the child, the Court should consider how long the child has been in care and the harm suffered by the child to continue lingering in the dependency system. When considering fairness to the parent, there has been no indication that the parent’s attorney needs additional time to prepare the case or that there is unavailable evidence. The motion to continue makes no indication on why the parent’s attorney cannot be ready for trial other than the broad statement that using Zoom prevents going forward to trial. The Department is ready for trial and is prepared to call witnesses, submit exhibits, and cross-examine any witnesses disclosed by the parents. The parent’s attorney has not indicated anything about the platform that prevents them from calling their own witnesses or entering their own evidence. Thus, pursuant to the dictates of section 39.0136, the Court should deny the Motion to Continue.

CONCLUSION

The Department acknowledges the seriousness of the pandemic surrounding COVID-19 and continues to take steps necessary to ensure the safety and well-being of the families it serves. Nevertheless, permanency for Florida’s dependent children remains of paramount importance. Termination of parental rights trials are proceedings that are subject to statutorily-mandated time frames that should proceed. Trials conducted through the Zoom platform or similar technology can respect the rights of the child while also providing a fundamentally fair hearing to the parent when procedural safeguards are observed. For these reasons, the Court should deny the motion to continue and commence trial on the Department’s petition.

WHEREFORE, the Department respectfully requests that this Court deny the Motion to Continue and hold the termination of parental rights trial.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Memorandum of Law has been furnished to the below named individuals by electronic delivery, this ____ day of April 2020.

Respectfully submitted,