

**I. THE ADJUDICATION OF [MINOR(S)] AS DEPENDENTS OF THE JUVENILE COURT IN THE ABSENCE OF [PARENT'S] EXPRESS WAIVER OF THE RIGHT TO A CONTESTED HEARING AND ASSOCIATED RIGHTS WAS A VIOLATION OF [PARENT'S] RIGHT TO DUE PROCESS.**

**A. The Juvenile Court Is Required To Obtain A Parent's Express Waiver After Fully Informing Her Of Her Right To A Contested Hearing.**

We have emphasized time and again that “the touchstone of due process is protection of the individual against arbitrary action of government,” [citation], whether the fault lies in a denial of fundamental procedural fairness, [citation], or in the exercise of power without any reasonable justification in the service of a legitimate governmental objective, [citation].

(*County of Sacramento v. Lewis* (1998) 523 U.S. 833, 845-846 [140 L.Ed.2d 1043, 118 S.Ct. 1708].)

[The concept of procedural due process] “has traditionally involved the elaboration of procedural safeguards designed to accord to the individual ‘the right to be heard before being condemned to suffer grievous loss of any kind’ as a result of governmental choices[.]” . . . Procedural due process thus focuses upon the essential and fundamental elements of fairness of a procedure which would deprive the individual of important rights.

(*In re Crystal J.* (1993) 12 Cal.App.4th 407, 412, quoting Tribe, *American Constitutional Law* (2d ed. 1988) at page 664; *In re B. G.* (1974) 11 Cal.3d 679, 689 [due process in the context of juvenile dependency proceedings requires the opportunity to be heard generally].)

Thus, every parent over whose child the juvenile court is asked to take jurisdiction is entitled to a contested hearing in accordance with the right to due process under the Fourteenth Amendment to the United States Constitution. (*In*

*re Marilyn H.* (1993) 5 Cal.4th 295, 307-308; *In re Monique T.* (1992) 2

Cal.App.4th 1372, 1375-1377.) Accordingly, rule 1412(j) of the California Rules of Court provides that the juvenile court must advise each parent in a juvenile dependency case of the following:

- (1) Any right to assert the privilege against self-incrimination;
- (2) The right to confront and cross-examine the persons who prepared reports or documents submitted to the court by the petitioner, and the witnesses called to testify at the hearing;
- (3) The right to use the process of the court to bring in witnesses;
- (4) The right to present evidence to the court.

Then, the juvenile court must advise each parent of his or her right to “a hearing by the court on the issues raised by the petition,” and the court must ask each parent whether he or she admits or denies the allegations. (Cal. Rules of Ct., rule 1449(c).) An admission must be made personally, and before accepting it, the court must find that the parent understood and waived the previously enumerated rights. (Cal. Rules of Ct., rules 1449(d) and 1449(f).) Unless a parent expressly waives her right to a contested hearing, if she denies the allegations contained in a petition, “the court shall hold a contested hearing and determine whether the allegations are true.” (Cal. Rules of Court, rules 1449(e) and 1450(a); *In re Stacy T.* (1997) 42 Cal.App.4th 1415, 1422 [a “default” procedure which bypasses the rights described in rules 1412 and 1449 violates a party’s federal constitutional right to due process]; *Steve J. v. Superior Court* (1995) 35 Cal.App.4th 798, 812; *In re Tommy E.* (1992) 7 Cal.App.4th 1234,

1237.)

“[A] parent has substantial private interests at stake in a section 300 proceeding [because] a parent can lose custody if the section 300 petition is sustained. Similarly, parents have significant dignity interests in being fully and fairly able to present their sides.” (*In re Malinda S.* (1990) 51 Cal.3d 368, 383-384, citations omitted.) “Moreover, the First Amendment protects those relationships, including family relationships, that presuppose ‘deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one’s life.’” (*Board of Directors v. Rotary Club* (1987) 481 U.S. 537, 545 [95 L.Ed.2d 474, 107 S.Ct. 1940]; *Lee v. County of Los Angeles.* (9<sup>th</sup> Cir. 2001) 250 F.3d 668, 685.) The right to remain a unified family is a core belief of our society and interference with that right has far-reaching ramifications for the child as well as the parent. (*In re Joanna Y.* (1992) 8 Cal.App.4th 433, 438.) The risk is high that a parent and child will be erroneously deprived of the substantial liberty interest in remaining a unified family when jurisdiction is assumed, as it was here, and services are denied, as they were here, without a contested hearing, and without an express waiver of the right to such a hearing. (*In re Stacy T., supra*, 42 Cal.App.4th at pp. 1424-1425; *In re Monique T., supra*, 2 Cal.App.4th at pp. 1375-1377.)

According to *Malinda S., supra*, the risk that these weighty fundamental rights may be erroneously terminated must be evaluated in light of legitimate

governmental goals. The Agency shares the parent's and the children's joint interest in an accurate and just decision. (*David B. v. Superior Court* (1994) 21 Cal.App.4th 1010, 1018.) That goal is furthered by the truth-finding process of a contested hearing. The juvenile court's advice to the parent regarding her right to a contested hearing and its ascertainment whether the parent wishes to waive that right also serves the same objective by providing the possibility that the truth can be expediently and reliably established. Accordingly, the government's interest in an expeditious determination of jurisdiction over a family in order to protect a child's welfare is not sufficiently weighty to excuse the minimal administrative burden of conducting a contested hearing. (*In re Stacy T.*, *supra*, 42 Cal.App.4th at pp. 1424-1425; *In re Monique T.*, *supra*, 2 Cal.App.4th at pp. 1375-1377.)

Therefore, the juvenile court may not accept a parent's counsel's submission of the matter without obtaining the parent's express waiver of her right to a contested hearing. That is exactly what the juvenile court did here. . . .

Thus, the fact that [parent] was represented by counsel did not obviate the need for her express waiver. In *Monique T.*, *supra*, the juvenile court inquired of counsel whether the parent waived her right to advisement of her due process rights. Trial counsel assured the court that she had explained the parent's due process rights to her, and that she waived advisement and waived her right to a contested hearing. (*In re Monique T.*, *supra*, 2 Cal.App.4th at p. 1376.) The court of appeal held that in light of the representations by counsel and the

absence of any indication that the parent actually contested the allegations, the error was harmless beyond a reasonable doubt. (*Id.*, at p. 1378.) By contrast, as previously stated, to the extent any information was sought from [parent], she informed the social worker that she wanted to participate in the jurisdiction hearing and . . . . There is no indication in the record that either the court or counsel advised [parent] of her right to contest the allegations, or inquired whether she wished to waive it. Nor is there a representation by counsel that [parent] wished to waive her rights.

## **B. Prejudice**

The deprivation of the right to a contested hearing in the absence of an express waiver is reversible unless the Agency can show the error was harmless beyond a reasonable doubt. (*In re Stacy T.*, *supra*, 42 Cal.App.4th at p. 1426; *In re Monique T.*, *supra*, 2 Cal.App.4th at p. 1377.)

In *Stacy T.*, the Court of Appeal addressed the improper use of “default” judgments in juvenile dependency proceedings. In assessing the prejudicial effect of depriving the parent of the opportunity to contest the allegations of the petition, the court was required “to consider that [the parent] might have testified on her own behalf.” Further, the court refused to “speculate as to the substance or effect of such testimony,” except to assume “it would have to bear on issues before the court.” (*In re Stacy T.*, *supra*, 42 Cal.App.4th at p. 1426.)

[Parent had previously told the social worker that she wanted to attend and “participate” in the jurisdiction hearing. She also told the Agency she loved her

children, and she was concerned about them being in foster care. Further, the evidence showed that parent was not directly responsible for the events that gave rise to the petition. Rather, the maternal grandmother's negligent supervision resulted in . . . . Had parent been given the opportunity to contest the allegations, she may well have provided evidence regarding . . . , such that reunification may have been possible within statutory time limitations. She may also have provided information regarding other care givers who could have taken custody of the children . . . .