**STATE OF CONNECTICUT**

 **OCTOBER 5, 2020**

**MEMORANDUM OF LAW IN SUPPORT OF RESPONDENT MOTHER’S OBJECTION TO VIRTUAL TERMINATION OF PARENTAL RIGHTS TRIAL**

Respondent Mother in the above listed case objects to a virtual trial regarding the Termination of her Parental Rights. A virtual court date has been set for October 6, 2020 to schedule a virtual trial over Zoom on the issue of the termination of the respondent parents’ parental rights. Respondent Mother hereby objects for the following reasons and points of law:

**ARGUMENT**

Parents have a fundamental liberty interest in family integrity. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). As such, a termination of parental rights trial threatens to permanently sever a constitutionally protected familial relationship. Despite the resounding agreement throughout the country that criminal trials, even ones that do not jeopardize permanent rights, cannot be held virtually,[[1]](#footnote-1) the parents here are facing a permanent extinguishment of their right to care for and raise their children, to be decided, in part, over the internet.

As set forth below, a virtual TPR trial, even a “partial” virtual TPR trial as contemplated by the Court in this case, violates the parents’ rights to due process and equal protection of the law. It is also fundamentally unfair to hold any TPR trial at this time, because the global COVID-19 pandemic has shut down vital parenting services for the last seven months, and has led to the loss of visitation essential to parent-child attachment.

**I. To protect the parents’ constitutional rights, this court should continue the TPR trial to such time as it is deemed safe for all parties, counsel, court personnel, and witnesses to participate in person.**

**A. A virtual TPR trial deprives the parents’ of their due process right to a meaningful opportunity to be heard.**

Parents and children have due process rights to family integrity that are protected by both the Fourteenth Amendment to the Constitution. *Troxel v. Granville*, 530 U.S. 57, 66 (2000). In Connecticut, the Court has ruled, “the fundamental liberty interest of a parent that is placed in jeopardy by a trial to terminate that parent's parental rights, standing alone, has been sufficient to warrant heightened procedural safeguards.”*In re Yasiel R*., 317 Conn. at 783.

If a TPR trial is held virtually, the parents will be deprived of important due process rights. As such, any order terminating their rights may be overturned. A virtual trial, even a partial one as contemplated by the court in this case, violates the parents’ due process rights in several ways.

**1. A virtual TPR trial deprives the parents of their due process right to counsel and the effective assistance of counsel.**

“The right of a parent to raise his or her children has been recognized as a basic constitutional right.”*In re Alexander V.,* 223 Conn. 557, 560 (1992) citing  *Stanley v. Illinois,* [405 U.S. 645](http://casemakerlegal.com/SearchResult.aspx?searchFields%5bstate%5d=&query=405+U.S.+645&juriStatesHidden=&searchCriteria=Citation&tabAction=ALLC&dtypeName=&headAdmin=&headCaselaw=&headStatutes=&searchType=overview&jurisdictions.allStates=on&jurisdictions.includeRelatedFederal=on&pinCite=y), 651, [92 S.Ct. 1208](http://casemakerlegal.com/SearchResult.aspx?searchFields%5bstate%5d=&query=92+S.Ct.+1208&juriStatesHidden=&searchCriteria=Citation&tabAction=ALLC&dtypeName=&headAdmin=&headCaselaw=&headStatutes=&searchType=overview&jurisdictions.allStates=on&jurisdictions.includeRelatedFederal=on&pinCite=y), 1212, 31 L.Ed.2d 551 (1972).  “Accordingly, it has been held that the due process clause of the Fourteenth Amendment to the United States Constitution applies when a state seeks to terminate the relationship between parent and child.”*Id.,* citing *Lassiter v. Department of Social Services,* [452 U.S. 18](http://casemakerlegal.com/SearchResult.aspx?searchFields%5bstate%5d=&query=452+U.S.+18&juriStatesHidden=&searchCriteria=Citation&tabAction=ALLC&dtypeName=&headAdmin=&headCaselaw=&headStatutes=&searchType=overview&jurisdictions.allStates=on&jurisdictions.includeRelatedFederal=on&pinCite=y), 27, [101 S.Ct. 2153](http://casemakerlegal.com/SearchResult.aspx?searchFields%5bstate%5d=&query=101+S.Ct.+2153&juriStatesHidden=&searchCriteria=Citation&tabAction=ALLC&dtypeName=&headAdmin=&headCaselaw=&headStatutes=&searchType=overview&jurisdictions.allStates=on&jurisdictions.includeRelatedFederal=on&pinCite=y), 2159, 68 L.Ed.2d 640 (1981).

Parents and attorneys have the right to be safe in their representation and in the defense of their parental rights. Safe representation is not possible where defense counsel and the parents are placed at risk of infection and fear contagion. Fear of transmission on the part of client or counsel fatally undermines the trust and communication necessary to establish and maintain an attorney-client relationship. The accused cannot make intelligent and informed choices, including the decision to plead guilty, absent such a relationship. In addition, there is no way to adequately defend any respondent, unless they are in the same room as their attorney.

Forcing the respondents to litigate a termination of parental rights trial virtually would deprive them of their well-established due process right to be heard meaningfully, through effective assistance of counsel, in the following ways:

1. An inability to assess witness credibility virtually, impeding counsel’s ability to conduct direct and cross examination;
2. The hampered ability to see how counsel’s presentation is affecting the judge in the event the judge is wearing a mask; and
3. The inability to have the client seated directly next to counsel for the purpose of whispering information. As such, communication between parent and counsel shall require longer and more glaring interruption that may chill the client’s willingness to engage with his or her attorney.

**2. A virtual trial deprives parents of their due process right to be heard meaningfully, as this court cannot meaningfully and reliably assess the credibility of the parents’ witnesses, or the Department’s witnesses against them, by video.**

The ability of a trial judge to examine the demeanor of a witness in assessing that witness’s credibility is a central tenet in our judicial system.

A virtual TPR trial, would deprive the court of the ability to perceive, and fairly determine, the credibility of witnesses in several ways: “First, choices about camera shots influence perceptions of others. Second, video presentations always either strip some nonverbal cues from the communication or overemphasize them. Finally, video presentations do not replicate normal eye contact.” Anne Bowen Poulin, *Criminal Justice and Videoconferencing Technology: The Remote Defendant*, 78 Tul. L. Rev. 1089, 1108 (2004). Given that a judge’s impression of someone’s facial expressions, body language, and voice can ultimately be outcome-determinative, it would be prejudicial to proceed to a termination trial virtually.

There are inherent weaknesses in virtual trials that affect all users by diminishing their ability to fully comprehend the information communicated during the video hearing experience. Many of the physical and auditory cues upon which individuals rely — both consciously and sub-consciously — in face-to-face interactions are lost or impaired during a videoconference for a number of reasons, including:

1. The transmission of audio during a videoconference results in the compression and clipping of speech. This degrades comprehension, especially for ESL or hearing-impaired participants;
2. “The audio feature on some video-conferencing technology uses a middle bandwidth filter that cuts off low and high voice frequencies, which are typically used to transmit emotion…[t]his feature removes critical emotional cues that can be used by judicial officers to determine a defendant’s remorse and character.”[[2]](#footnote-2)
3. The screen and the video camera are not fully aligned; typically, screens and cameras are off-set. Therefore, a person looking at the screen to watch other participants will not be looking at the camera. This might make it appear that they are not meeting other participants’ eyes – indeed, it is not possible for participants in a videoconference to actually look each other in the eye – which can be erroneously perceived as disengagement or dissembling.
4. Neither the video nor audio feed during a virtual videoconference is in real time. There is a short delay, referred to as “latency.” This can cause participants to speak over each other, in violation of social norms. Latency can also cause delays in responses to questioning, which may be erroneously attributed to the participant rather than the technology. Latency is frustrating enough in interoffice meetings, but rises to an entirely different level of concern when an objection is overlooked or not processed in a timely fashion.[[3]](#footnote-3)
5. A virtual hearing impinges the court’s ability to observe body language. Body language can indicate attention, participation, or serve as a mode of expression. In Zoom meetings, this positional attention, which is used to indicate things like investment, interest, honesty, openness, engagement, is lost because the video, due to lack of resolution, cannot capture subtleties. Body movement outside the frame of view and bodily position may bear no representation to how a speaker may actually be positioned. This creates perceptual dissonance.
6. There may be technical disruptions to the speaker’s image. The way in which video images are digitally encoded and decoded through the internet results in a variety of artifacts – byproducts of the technology itself – such as freezing, pixilation, blurring, or temporal separations between audio and visual. As the use of videoconferencing has exploded during the pandemic, users have noted how these disruptions, some of which can be subtle enough to escape widespread notice, can “confound perception and scramble subtle social cues,” making participants “feel vaguely disturbed, uneasy and tired without quite knowing why.”[[4]](#footnote-4)

Additional indicators of credibility upon which the court may rely and about which defense counsel must be aware include: ability to see exactly what the witness is looking at (e.g., adverse witness looking to opposing counsel for direction; witness improperly looking at notes or other writings); whether sequestration orders are being followed; and whether confidentiality of the proceedings is being fully observed.

Because a virtual trial thus renders it impossible for judges to fairly and accurately determine witness credibility, it violates the parents’ right to be meaningfully heard. This is particularly true in the context of a TPR trial, at which the court may permanently sever important liberty interests in family integrity.

**3. A virtual trial deprives the parents of the right to confront witnesses.**

The Supreme Court has never recognized the constitutionality of a virtual criminal trial and has only allowed virtual witness testimony in the narrowest of circumstances. *United States v. Yates*, 438 F.3d 1307, 1319 (11th Cir. 2006) (video testimony of Australian witnesses violated Sixth Amendment Confrontation Clause).

Under the Sixth Amendment of the U,nited States Constitution, as well as Article 1, Section 8 of the Connecticut Constitution, a defendant in a criminal case holds the right to confront his or her accuser, face-to-face. The finder of fact, whether a jury or a judge, must be able to view a witness’ facial features without obstruction in order to perform the critical function of assessing credibility. (“Another purpose of the confrontation guarantee is to afford the jury the opportunity to observe the demeanor of the witness in order better to assess his credibility”).

While TPR cases are not criminal in nature, the deprivation of liberty is on par with the deprivation implicated in a criminal case. A care and protection case can lead to terrible, permanent consequences: the permanent loss of one’s child. This is why TPR proceedings are sometimes referred to as civil death penalty cases. Daniel Heimpel, *Hearings: Young, First-Time Parents Face ‘Civil Death Penalty’ in a Ventura Child Welfare Court,* (April 10, 2019), available at: <https://chronicleofsocialchange.org/child-welfare-2/young-parents-face-civil-death-penalty-in-a-ventura-child-welfare-court/34449>. The opportunity for “vigorous” cross examination is quelled if defense counsel must question witnesses virtually.

**B. A virtual trial deprives the parents of their right to equal protection of the law.**

The Fourteenth Amendment to the United States Constitution prohibits any state from denying “to any person within its jurisdiction the equal protection of the laws.” As noted above, the parents – like all parents in the child welfare system – have significant liberty interests at stake in a proceeding brought by the State to permanently sever their legal rights to their children. The parents would not be treated equally – indeed, they would be treated in a drastically inferior way – to similarly situated individuals if they had to face potential termination of their rights in a virtual or partially virtual trial; similarly situated parents do not risk such a terrible, permanent loss in a virtual or partially virtual hearing.

Commencing a virtual trial based upon when cases of a similar age will be tried in a manner that does *not* impinge due process likewise bolts the door to equal justice. Equal protection is thus further implicated by the possibility that a non-indigent parent could simply move to a different county for a trial at which her due process rights will be more fully protected; a county in which the trial would be scheduled for a later date and held in-person. Indeed, no parent should get lesser justice based on the particular juvenile court or county they are in. As such, the parents in this case will be deprived of equal protection by proceeding to trial, even just partially virtually.

**II. The parents will be unfairly prejudiced if forced to defend against TPR, because this court’s assessment of *current* parental fitness will necessarily be tainted by service reductions and visitation restrictions stemming from the global COIVD-19 pandemic, not from the intentions, efforts, and progress of the parents.**

To terminate parental rights, DCF must prove by clear and convincing evidence that the parents are not “currently” fit to further the best interests of the child. See *Santosky v. Kramer*, 455 U.S. at 755; *Adoption of Nancy*, 443 Mass. 512, 515 (2005). Any assessment of “current” unfitness is highly problematic at this time.

During this global pandemic, vital parenting services have been shut down. Family time has been cut off and, when not cut off, seriously restricted. Families from all walks of life are doing their best to simply survive while they face unprecedented economic troubles, the loss and ill-health of loved ones, and uncertainty about the future. Not surprisingly, low-income families like this one are disproportionally affected by these factors. Jacey Fortin, *When Court Moves Online, Do Dress Codes Still Matter?,* New York Times, (Apr. 15, 2020), available at: https://www.nytimes.com/2020/04/15/us/coronavirus-lawyers-court-telecommute-dress-code.html. A TPR trial in the wake of this disaster places parents in a fundamentally unfair disadvantage.

The services upon which the parents have relied are unavailable to them. While some may be available virtually, it remains to be seen whether virtual services and virtual participation in services is clinically on par with in-person engagement. Parents’ access to services is a critical facet of any termination decision made by this court. Many of the factors for the court to examine before making its decision involve services that the parents need to comply with. It is not this family’s fault that many services have not been accessible since March 2020, and it would be fundamentally unfair to hold lack of access or participation against them. Trial should be continued until the parents have had a fair opportunity to engage or re-engage in services. That is the only way for this court, in these unprecedented times, to evaluate “current” parental fitness.[[5]](#footnote-5)

The children who are subjects of these Termination of Parental Rights petitions, will not suffer in any way. They too, have a fundamental right to the integrity of their families, and that integrity must be preserved until a fair and constitutional trial can be offered by the State of Connecticut.

**CONCLUSION**

To protect the parents’ due process rights to be heard meaningfully; to ensure their right to effective and conflict-free assistance of counsel; to ensure their right to confront the state actor who seeks to terminate their rights; to ensure their right to equal protection of the laws; and to ensure them a fundamentally fair opportunity to access and re-engage in services that were cut off by the global pandemic, this court must continue the TPR trial until such time as it can be held in-person, rather than by partial video hearing.

 WHEREFORE, the parents respectfully request that this court grant this motion and continue these matters for trial until such time as they can be handled in the normal course and fully in-person.

Respectfully submitted,

 By: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

**ORDER**

The foregoing motion having been heard is hereby:

GRANTED /// DENIED

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 Judge Date

## CERTIFICATION

I hereby certify that a copy of the foregoing was delivered on XXX to all parties of record.

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1. Thirty-five states have suspended most in-person criminal proceedings and 13 have reduced in-person criminal proceedings. The Marshall Project, *How Prisons in Each State Are Restricting Visits Due to Coronavirus*, available at: https://www.themarshallproject.org/2020/03/17/tracking-prisons-response-to-coronavirus (last visited June 30, 2020). [↑](#footnote-ref-1)
2. Robin Davis, et al., *Research on Videoconferencing at Post-Arraignment Release Hearings: Phase I Final Report*, NCJRS (June 2015), available at: <https://www.ncjrs.gov/App/Publications/abstract.aspx?ID=271040>. [↑](#footnote-ref-2)
3. Jacey Fortin, *When Court Moves Online, Do Dress Codes Still Matter?,* New York Times, (Apr. 15, 2020), available at: <https://www.nytimes.com/2020/04/15/us/coronavirus-lawyers-court-telecommute-dress-code.html>. [↑](#footnote-ref-3)
4. Kate Murphy, *Why Zoom is Terrible*, New York Times (Apr. 29, 2020), available at: <https://www.nytimes.com/2020/04/29/sunday-review/zoom-video-conference.html>. [↑](#footnote-ref-4)
5. The Children’s Bureau released guidance on June 23, 2020 strongly urging agencies to carefully consider whether it is appropriate to terminate a parent’s rights pursuant to the 15/22 requirement. [↑](#footnote-ref-5)