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| DISTRICT COURT, Click or tap here to enter text., COLORADO  Click or tap here to enter text., Click or tap here to enter text., CO Click or tap here to enter text. | **<court use only>** |
| THE PEOPLE OF THE STATE OF COLORADO  In the Interest of:    Click or tap here to enter text.,  Child  Click or tap here to enter text.,  Petitioner    And Concerning  Click or tap here to enter text.,  Respondent |
| Attorney for Respondent  Click or tap here to enter text. | Case Number: Click or tap here to enter text.  Division: Click or tap here to enter text. |
| **MOTION TO CONTINUE TERMINATION HEARING** | |

Respondent Mother, Rebecca Barrientos, by and through undersigned counsel, respectfully moves the Court to continue the termination hearing currently set for April 27, 2020. As grounds therefore, Mother states and alleges as follows:

**Certificate of Compliance with Colo. R. Civ. P. 121(c)(1-15)(8)**

The undersigned conferred via email with the Assistant City Attorney, Guardian ad Litem, and counsel for Respondent Father. The Assistant City Attorney and Guardian ad Litem object. Respondent Father joins this motion.

1. This matter is currently set for termination of parental rights hearing on \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_.
2. The minor child is placed with \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_.
3. In the \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ order, Chief Judge Martinez ordered that “all in-person civil proceedings, including bench trials, are converted to appearance by phone or other teleconferencing options through May 15, 2020.” The order further states, “Any proceeding that the attorneys feel are not capable of remote presentation may be continued at the Court’s discretion.” [**NOTE – THIS IS DENVER’S ORDER – PLEASE REFERENCE THE PRESIDING ORDER IN YOUR JURISDICTION]**
4. The Children’s Codes emphasizes the need “[t]o preserve and strengthen family ties whenever possible…” § 19-1-102, C.R.S.; *see also* *K.D. v. People*, 139 P.3d 695 (2006). “[G]iven that the termination of the parent-child legal relationship affects a parent’s fundamental liberty interest in the care and custody of the child, the state must exercise extreme caution in terminating parental rights.” *People In Interest of S.R.N.J-S.*, 2020 COA 12, ¶ 7 (citing *K.D. v. People*, 139 P.3d 695, 700 (Colo. 2006)).
5. In termination proceedings, a parent’s rights must be protected “with fundamentally fair procedures.” L.L. v. People, 10 P.3d 1271, 1276 (Colo. 2000) (quoting Santosky v. Kramer, 455 U.S. 745 (1982)). “These procedures include a parent receiving notice of the hearing, advice of counsel, and *a meaningful opportunity to be heard and defend*.” People in Interest of Z.P.S., 2016 COA 20, ¶ 40 (emphasis added).
6. The greater the deprivation of the parent’s interest, the greater the procedural protection that must be provided to the parent. *L.L. v. People*, 10 P.3d 1271 (Colo. 2000).
7. Section 19-3-104, C.R.S., provides that a court may grant a continuance for good cause and when the best interests of the child shall be served by granting a delay or a continuance.
8. Chief Justice Directive 96-08 requires that continuances only be granted “upon a finding that a manifest injustice would occur in the absence of a continuance.”
9. In this case, there is no harm that will occur by continuing the hearing until it can be conducted in person. To counsel’s knowledge, there is no risk of losing placement for the minor child. However, a manifest injustice would result if the termination of parental rights hearing proceeded virtually.

**A CONTINUANCE IS NECESSARY SO THAT MOTHER MAY ADEQUATELY DEFEND AGAINST THE MOTION TO TERMINATE HER PARENTAL RIGHTS, AND DEFEND HER MOTIONS FOR LESS DRASTIC ALTERNATIVES**

1. Mother has filed a motion requesting an allocation of parental responsibilities for the minor child to the kinship placement. As well, Mother has filed a motion to find a less drastic alternative to the termination of her parental rights. [**INSERT YOUR OWN FACTS HERE].**
2. In order to adequately support her motions, Mother intends to subpoena the following witnesses: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_. However, Mother has been unable to contract with an investigator or process server who is willing to go to people’s homes or businesses to serve them with a subpoena during the COVID-19 outbreak and while the Governor’s stay at home order is in place. [INSERT ANY OTHER FACTS PREVENTING SERVICE ON WITNESSES OR OTHER EVIDENTIARY ISSUES PRESENTED BY COVID-19]
3. When termination is sought, “due process requires that a parent be provided with adequate notice of a termination hearing and an opportunity to protect her interests at the hearing itself.”  M.M., 726 P.2d 1108, 1115 (Colo. 1986).
4. Absent a continuance, Mother will not be able to serve the necessary witnesses to defend against the motion to terminate her parental rights. Mother’s due process rights will be violated as she will be denied an opportunity to protect her interests at the hearing itself. *See id.*

**PROCEEDING WITH A VIRTUAL TERMINATION HEARING WOULD RENDER THE PROCEEDING FUNDAMENTALLY UNFAIR**

1. Since March 20, 2020, the Denver Juvenile Court has been conducting hearings via the WebEx application. Although the application works well enough for permanency planning or dispositional hearings, it has led to substantial difficulties in contested matters.[[1]](#footnote-1) Since the court began using WebEx, the following issues have been identified by counsel for respondent mother, as well as other counsel who regularly appear in the Denver Juvenile Court:
   * Issues hearing other parties in real time
   * Difficulty unmuting yourself
   * Difficulty knowing if you are being adequately heard by the other parties
   * Issues with the video cutting in and out
   * Issues with the video freezing while the audio continues
   * Issues with parties’ broadband capabilities
2. Counsel is further concerned that:
   * The technical difficulties make it difficult for parties to make contemporaneous objections.
   * The efficacy of the court’s sequestration orders is unknown given that it is not clear what, if anything the potential witnesses may hear in the WebEx lobby. Further if a witness were to join the WebEx proceedings in the middle of someone’s testimony, counsel or the court may not notice that person has entered the “courtroom” with the same speed they would notice a person’s entrance into a physical courtroom.
   * Counsel cannot independently guarantee that any witness is not looking at their phone, computer, email, or notes during their testimony. Further, as the court is aware, it is possible to send a private message on the WebEx application, but it would be unknown to any counsel if another party was communicating with the witness, or with other parties during the proceeding.
   * Counsel is unaware of the method by which she might be able to impeach a witness or refresh the witness’s recollection if necessary. It is unknown who on the WebEx could view the document used for impeachment purposes, and whether any redactions would be necessary. Further, it is not clear how any potential exhibits may be offered, if necessary, to the court.
   * There is a significant concern that conducting the hearing via WebEx will lead to substantial errors in the record. It is imperative that there be a clear record of the termination proceeding so that should Mother wish to exercise her right to appeal, there is a clear and accurate record of the proceedings.
3. Parents have a due process and statutory right to be present, in person or through counsel, at critical stages of dependency and neglect proceedings. *See, e.g.*, *People in Interest of V.M.R.*, 768 P.2d 1268 (Colo. App. 1289).
4. There is no substitute for a parent being able to be physically present with their attorney and have the assistance of their attorney during what is likely to be one of the most traumatic experiences of their life, a termination hearing. There is also no substitute for a parent being able to be physically present to hear the evidence against them at such a hearing. Indeed, there is evidence that in the criminal context, judges treat defendants more harshly when defendants appear via video from jails than when they appear in person.[[2]](#footnote-2) Similarly, asylum seekers who appear from detention vs in person are more likely to be deported and less likely to actively participate in their hearings.[[3]](#footnote-3)
5. **OTHER CONSIDERATIONS**
   * Does your client have access to high speed internet?
   * Is your client incarcerated? If so, how will you be able to confer with your client during the hearing? Will you have to end the conference call and then arrange a separate conference call with your client? Will you need to get a transcript of each witness to review with your client in a separate video visit with your client?
   * Does your client need any kind of interpreter or written materials to understand? (ADA or language barriers) – how can these be accommodated virtually?
   * Has the lack of in person services or visitation resulted in a lack of reasonable efforts to reunify the child with your client that would make denial of a continuance a manifest injustice and make a continuance in the best interests of the child?
   * Is there good cause for a continuance because your client had been making improvements and then visits/services abruptly stopped due to COVID-19?
6. At a termination of parental rights hearing, it is essential for the court to be able to determine the credibility of the witnesses, and that becomes much more difficult if the court cannot see the witnesses testify. Assessing credibility via videoconference is very difficult due to shifted eye contact produced by videoconferencing technology, lighting issues, and other technological issues. Multiple studies have shown that videoconferencing has limited abilities to capture non-verbal cues that hold important clues for assessing credibility that can be assessed when in person testimony is provided. See, e.g.*,* Amy Salyzyn*, A New Lens Reframing the Conversation about the Use of Video Conferencing in Civil Trials in Ontario*, Osgoode Hall Law Journal 50.2 (2012): 429-462, 445, available at <https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1026&context=ohlj>.
7. Further, counsel’s ability to cross-examine witnesses will be hindered and will be much less effective if witnesses and parties are to appear virtually. Although a right to confrontation does not exist in the context of dependency and neglect cases, Mother argues that the court can infer from the importance placed on confrontation in the criminal context, the importance of face-to-face questioning in the context of dependency and neglect cases. *See Jay v. Boyd,* 351 U.S. 345, 375-376 (1956) (Douglas, J. dissenting). Not only is it important for counsel to be able to see and respond to the reactions of the witness, it is also important for the court, as the fact-finder, to be able to observe the body language of witnesses testifying in front of the court.
8. “Due process is not violated when a parent has access to a record of sufficient completeness to permit proper appellate consideration of the parent’s claims.” *People In Interest of Z.M.*, 2020 COA 3M, ¶ 21. However, should the hearing occur via WebEx, there are no assurances that an accurate record would be produced.

**FAILURE TO CONTINUE THE TERMINATON HEARING WOULD VIOLATE MOTHER’S RIGHT TO EQUAL PROTECTION OF THE LAW**

1. The Equal Protection Clause of the Fourteenth Amendment provides that no state shall “deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1. Although the Colorado Constitution contains no equal protection clause, the Colorado Supreme Court has construed the due process clause of the Colorado Constitution to imply a similar guarantee. See Colo. Const. art. II, § 25; People v. Stewart, 55 P.3d 107, 114 (Colo. 2002); People v. Estrada, 601 P.2d 619, 620 (1979). Equal protection of the laws assures the like treatment of all persons who are similarly situated. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 439 (1985); People v. Cagle, 751 P.2d 614, 619 (Colo. 1988); People v. Mozee, 723 P.2d 117, 126 (Colo. 1986). Thus, the threshold inquiry is whether persons who are similarly situated are subjected to disparate treatment. *People in Interest of C.B.*, 740 P.2d 11, 17 (Colo. 1987).
2. In Colorado, a number of counties have orders or policies establishing that termination of parental rights hearings will not occur, at least until the end of April, but in most counties the courts have determined that no termination of parental rights hearings will occur until the hearing can be held in person. Specifically, at least Jefferson, Arapahoe, El Paso, Bent, Crowley, Otero, Mesa, Delta, and Montrose counties have all established such policies. *See* Exhibit A—Presiding Judge Order from Jefferson County, p. 2; Exhibit B—Email from Judge Chase regarding court procedures, p 2. Upon information and belief, other states have promulgated similar policies—that no termination proceedings will occur until the hearings may safely be held in person.
3. Thus, in looking at similarly situated parents in other counties of Colorado, Mother would be subjected to disparate treatment if the proceeding to terminate her parental rights proceeded via WebEx. Indeed, if Mother lived one county over, in Jefferson County or Arapahoe County, she would be entitled to an in-person hearing where her counsel would have the ability to: effectively cross-examine the witnesses presented by the Petitioner, properly impeach the witnesses when appropriate, and evaluate and comment on the credibility of each witness presented in support of the motion to terminate parental rights.
4. Should the hearing proceed on [**INSERT DATE]**, Mother will be denied a fundamentally fair proceeding, as required by the United States Supreme Court. Santosky v. Kramer, 455 U.S. 745 (1982). Mother is facing the complete and permanent termination of her fundamental liberty interest in the care, custody, and management of her child. There are few liberty interests more important, and, the greater the deprivation of the parent’s interest, the greater the procedural protection that must be provided to the parent. *L.L*, 10 P.3d 1271.
5. Mother is aware that this case has been open for over a year, and she recognizes the importance of obtaining permanency for the minor child. However, under Colorado law Mother is entitled to a meaningful opportunity to present her case against the termination of her parental rights and to a fundamentally fair proceeding.
6. Mother makes this motion pursuant to her rights to Due Process and Effective Assistance of Counsel under the Fifth, Sixth, and Fourteenth Amendments of the United States and Article II, Sections Sixteen and Twenty-Five of the Colorado Constitutions.

WHEREFORE, Mother requests the Court continue the hearing on Petitioner’s Motion to Terminate the Parent-Child legal relationship until a date when the hearing may safely be conducted in person and make a finding that such a continuance is necessary and in the best interest of the minor child.

Respectfully submitted on this \_\_\_\_\_th day of \_\_\_\_\_\_\_\_\_ 2020.

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*Attorney for Respondent Mother*

**Certificate of Service**

I hereby certify that on \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, 2020, I served the foregoing document via courthouse mail the same to all opposing counsel of record.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, Assistant County Attorney

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, Guardian Ad Litem

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, Attorney for Respondent Father

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1. While Mother’s access to due process and fundamentally fair procedures is of the utmost importance to counsel in this case, counsel notes that § 19-1-106(2), C.R.S. requires that the general public not be excluded from a hearing unless the court makes a finding that doing so is in the best interests of the child. Hearings conducted via WebEx are not accessible to the general public, and counsel is not aware that such a finding has been made in this case or would be justified in this specific case. [↑](#footnote-ref-1)
2. See Shari Seidman Diamond et al, *Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail* Decisions, 100 J. Crim. L. & Criminology 869 (2010), available here: <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7365&context=jclc>; *see also* Matthew Terry et al, *Virtual Court Pilot Outcome Evaluation* (December 2010), available here: <https://www.justice.gov.uk/downloads/publications/research-and-analysis/moj-research/virtual-courts.pdf>. [↑](#footnote-ref-2)
3. Ingrid Eagly, *Remote Adjudication In Immigration*, Northwestern University Law Review 109 (2015), available here: <https://www.researchgate.net/publication/283711668_Remote_Adjudication_in_Immigration/citation/download>. [↑](#footnote-ref-3)