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**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

In Re the Dependency of P.P.T., J.J.I., O.L.T., minor children,

STATE OF WASHINGTON
DEPARTMENT OF SOCIAL AND HEALTH SERVICES

Appellant,

v.

PETER TSIMBALYUK,

Respondent.

OPENING BRIEF OF DSHS, APPELLANT

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TABLE OF CONTENTS

| | | |
|------|--|----|
| I. | INTRODUCTION..... | 1 |
| II. | ASSIGNMENT OF ERROR..... | 2 |
| III. | ISSUE PERTAINING TO ASSIGNMENT OF ERROR..... | 3 |
| IV. | STATEMENT OF THE CASE..... | 5 |
| V. | ARGUMENT..... | 14 |
| | A. Standard of review..... | 14 |
| | B. The trial court’s findings and conclusions that alternatives to termination exist are not supported by substantial evidence and are contrary to established law because no alternative action was before the court and no evidence was presented indicating that an alternative was viable..... | 16 |
| | C. The trial court erroneously interpreted RCW 13.34.180(1)(f) to require the state to prove the children’s current placement with relatives is not stable and permanent short of termination and adoption..... | 25 |
| | D. The trial court’s finding that termination is not in the children’s best interest is not supported by substantial evidence and violates the children’s right to stability and early permanency..... | 33 |
| | E. The trial court abused its discretion in denying the Department’s motion to vacate and reopen the case for further evidence, because reopening the case would have shown that the court’s original findings were based on mistakes of fact and irregularities; it would have allowed the court to consider the evidence it originally found lacking; and it would have given the children a chance to have permanent homes..... | 36 |
| | 1. The trial court erred by refusing to grant a hearing on the motion to vacate the order denying termination..... | 36 |

| | | |
|-----|---|----|
| 2. | Had the court granted a hearing on the motion to vacate, it would have learned that its denial of termination was based on an incorrect assumption that the father would work cooperatively with the relatives in providing the children a permanent home. | 37 |
| 3. | The court’s refusal to consider vacating and reopening the case sentences the children to a lifetime of legal limbo in foster care. | 41 |
| VI. | CONCLUSION | 43 |

TABLE OF AUTHORITIES

Cases

| | |
|---|----------------|
| <i>American Nursery Products, Inc. v. Indian Wells Orchards</i> , 115 Wn.2d 217, 797 P.2d 477 (1990)..... | 15 |
| <i>Haller v. Wallis</i> , 89 Wn.2d 539, 573 P.2d 1302 (1978)..... | 37 |
| <i>In re A.V.D.</i> , 62 Wn. App. 562, 569, 815 P.2d 277 (1991)..... | 26, 29 |
| <i>In re A.W.</i> , 53 Wn. App. 22, 32, 765 P.2d 307 (1998)..... | 32 |
| <i>In re D.A.</i> , 124 Wn. App. 644, 102 P.3d 847 (2004)..... | 27 |
| <i>In re D.Y.H.</i> , 226 S.W.3d 327 (Tenn. 2007)..... | 15 |
| <i>In re Dependency of C.B.</i> , 61 Wn. App. 289, 286, 810 P. 2d 518 (1991)..... | 14 |
| <i>In re Dependency of C.T.</i> , 59 Wn. App. 490, 498, 798 P.2d 1170 (1990) <i>review denied</i> , 116 Wn.2d 1015 (1991)..... | 36 |
| <i>In re Dependency of I.J.S.</i> , 128 Wn. App. 108, 114 P.3d 1215 (Div. I 2005), <i>rev. denied</i> , 155 Wn.2d 1021(2005)..... | 20, 22 |
| <i>In re Dependency of J.B.S.</i> , 123 Wn.2d 1, 863 P.2d 1344 (2008)..... | 36 |
| <i>In re Dependency of K.S.C.</i> , 137 Wn.2d 918, 976 P. 2d 113 (1999)..... | 20, 22, 26, 29 |
| <i>In re Dependency of R.H.</i> , 129 Wn. App. 83, 117 P.3d 1179 (2005)..... | 23 |

| | |
|---|------------|
| <i>In re Dependency of T.C.C.B.,</i> 138 Wn. App. 791, 158 P.3d 1251 (Div. I 2007)..... | 20, 22 |
| <i>In re Esgate,</i> 99 Wn.2d 210, 214, 660 P.2d 758 (1983)..... | 22, 27 |
| <i>In re Hall,</i> 99 Wn.2d 842, 850, 664 P.2d 1245 (1983)..... | 31, 32 |
| <i>In re J.C.,</i> 130 Wn.2d 418, 427, 924 P.2d 21 (1996)..... | 26 |
| <i>In re P.A.D.,</i> 58 Wn. App. 18, 26, 792 P.2d 159 (1990)..... | 32, 36 |
| <i>In re Ramquist,</i> 52 Wn. App. 854, 861, 765 P.2d 30 (1988)..... | 36 |
| <i>In re Russell,</i> 70 Wn.2d 451, 423 P.2d 640 (1976)..... | 36 |
| <i>In re Santore,</i> 28 Wn. App. 319, <i>review denied</i> , 95 Wn.2d 1019, 623 P.2d 702 (1981)..... | 15 |
| <i>In re Sego,</i> 82 Wn.2d 736, 739, 513 P.2d 831 (1973)..... | 14 |
| <i>In re T.R.,</i> 108 Wn. App. 149, 29 P.3d 1275 (2001)..... | 27, 32 |
| <i>In re the Dependency of A.C.,</i> 123 Wn. App. 244, 98 P. 3d 89 (2004)..... | 18, 26, 27 |
| <i>In re the Dependency of J.S.,</i> 111 Wn. App. 796, 46 P.3d 273 (2002)..... | 36 |
| <i>In re the Welfare of C.B.,</i> 134 Wn. App. 336, 139 P.3d 1119 (Div. II 2006) | 20, 28 |
| <i>In re Welfare of A.T.,</i> 109 Wn. App. 709, 34 P.3d 1246 (2001)..... | 15 |

| | |
|---|--------|
| <i>In re Welfare of H.S.</i> , 94 Wn. App. 511, 519, 973 P. 2d 474, <i>review denied</i> , 138 Wn.2d 1109 (1999), <i>cert denied</i> , 529 U.S. 1108 (2000)..... | 14 |
| <i>In re Welfare of M.R.H. and J.D.F.</i> , 145 Wn. App. 10, 188 P.3d 510 (Div. III 2008), <i>rev. denied</i> , 165 Wn.2d 1009(2008), <i>cert. denied</i> 129 S. Ct. 1682 (2009)..... | 20 |
| <i>In the Interest of J.F.</i> , 109 Wn. App. 718, 37 P.3d 1227 (2001) | 15 |
| <i>In the Matter of Henderson</i> , 97 Wn. 2d 356, 644 P. 2d 1178 (1982)..... | 38 |
| <i>M.W. v. Department of Soc. & Health Svcs.</i> , 149 Wn.2d 589, 599, 70 P.3d 954 (2003)..... | 35 |
| <i>Robertson v. Perez</i> , 123 Wn. App. 320, 96 P.2d 420 (2004)..... | 37 |
| <i>State v. Scott</i> , 20 Wn. App. 382, 580 P.2d 1099 (1978)..... | 16, 38 |

Statutes

| | |
|--|----|
| 42 U.S.C. § 671(a)(15)..... | 34 |
| 42 U.S.C. § 675(a)(15)..... | 34 |
| 42 USC § 675(5)(c)..... | 35 |
| Adoption and Safe Families Act (ASFA), Pub. L. No. 105-89, 111 Stat. 2115 (1997)..... | 34 |
| Laws of 1998, ch. 314, p. 1664..... | 35 |
| Laws of 2008, Ch. 152, sec. 3..... | 35 |
| RCW 13.34.020..... | 35 |
| RCW 13.34.136..... | 23 |

| | |
|-----------------------------|---------------|
| RCW 13.34.136(2)(a) | 25 |
| RCW 13.34.145..... | 23 |
| RCW 13.34.180..... | 21 |
| RCW 13.34.180(1)(f)..... | 4, 15, 25, 31 |
| RCW 13.34.190..... | 21 |
| RCW 13.34.190(2)..... | 15 |
| RCW 13.34.231 and .232..... | 20 |

Other Authorities

| | |
|---|----|
| Cindy S. Lederman and Joy D. Osofsky, <i>Infant Mental Health Interventions in Juvenile Court: Ameliorating the Effects of Maltreatment and Deprivation</i> , 10 Psychol. Pub. Pol’y & L. 162 (2004)..... | 34 |
| Deborah L. Sanders, <i>Toward Creating a Policy of Permanence for America’s Disposable Children: The Evolution of Federal Foster Care Funding Statutes from 1961 to Present</i> , 29 J. Legis. 51, 52 (2002) | 35 |

Rules

| | |
|----------------------------------|--------|
| CR 60(b)..... | passim |
| CR 60(b)(1)(3) | 39 |
| CR 60(b)(1)(3) and/or (11) | 13 |
| CR 60(b)(11)..... | 39 |
| CR 60(e)..... | 36 |
| CR 60(e)(2) | 37 |

I. INTRODUCTION

On March 25, 2009, the Honorable Ronald Kessler denied termination of the father's parental rights to these three children, ages two, four, and eight. The court found that all services capable of correcting the father's parental deficiencies had been provided; and found there was little likelihood the father's deficiencies could be remedied in the near future; and found that custody should remain with the relatives but denied termination concluding that some alternative to termination would better serve the children's interest.

The court made this conclusion even though there was no alternative action pending before the court, and no alternatives advocated by any of the parties, and no evidence presented that any alternatives were viable or would provide the children the kind of stability and permanence they need. In fact, the only alternative to termination advocated by the father was a full return of the children to his custody, and he argued that he was prepared to do whatever was necessary to make that happen.

Following trial, the Department and CASA moved the court pursuant to CR 60(b) to vacate the order denying termination and reopen the case for presentation of additional evidence so that the Department could present evidence establishing that the court's ruling was based on mistakes of fact because there were no viable alternatives to termination.

The court refused to grant a hearing on the motion to vacate and denied it without explanation. Both the Department and the CASA appeal.¹

II. ASSIGNMENT OF ERROR

1. The court's ruling denying termination based on consideration of theoretical alternatives to termination, which were not pending before the court and were not raised or argued by any party is not supported by substantial evidence and is contrary to existing law. Finding of Fact 1.33, Conclusion of Law 2.3.

2. The court's findings and conclusions that alternatives to termination exist that would better serve the children's best interest are not supported by substantial evidence. Findings of Fact 1.22, 1.26, 1.27, 1.28, 1.30, 1.32, 1.33, 1.34, Conclusion of Law 2.3.

3. The court's finding and conclusion that ongoing dependency and placement in relative care is sufficiently stable and permanent for these young children is not supported by substantial evidence and is contrary to existing law. Finding of Fact 1.29, Conclusion of Law 2.3.

4. The court's finding and conclusion that the children's prospects for permanency are not diminished by continuing the parent-child relationship

¹ A copy of the Order denying Termination is attached as Appendix A and a copy of the Order denying the Motion to Vacate is attached as Appendix B.

is not supported by substantial evidence and is contrary to existing law.

Finding of Fact 1.30, Conclusion of Law 2.2

5. The court's finding that it is in the children's best interest to continue the parent child relationship solely to facilitate visitation with their father is not supported by substantial evidence or existing case law.

Finding of Fact 1.22.

6. The court erred in ruling that the relative caretakers should have been called to testify about their willingness to continue caring for the children in some alternative structure short of adoption. Findings of Fact 1.26, 1.30, Conclusion of Law 2.2.

7. The court abused its discretion in denying the CASA's request to delay entry of the court's order so that the parties could meet with the relatives and present the evidence the court found lacking.

8. The court erred in denying the Department and CASA a hearing on their motion to vacate and abused its discretion in denying the motion to vacate and reopen the case because that remedy would have corrected the court's mistakes of fact and irregularities in the proceedings and would have ensured timely resolution for the children.

III. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

1. Did the trial court err by requiring the Department to present evidence ruling out the viability of theoretical alternatives to termination,

even though there were no alternative actions pending or advocated by any other party, and did the court err in requiring the testimony of relative care providers to establish whether or not they are willing to continue caring for the children in a legal structure short of adoption? (Assignments of error 1, 2, 6)

2. Did the trial court err in concluding that RCW 13.34.180(1)(f) was not established by clear, cogent, and convincing evidence since these children are currently in relative care and in concluding that even if an alternative legal structure such as dependency guardianship is not implemented with the relatives, an on-going dependency provides this two, four, and eight year old sufficient stability and permanency? (Assignment of Error 3, 4)

3. Are the trial court's findings and conclusions that alternatives to termination will better serve the children's interest, and that the benefits of the father's visitation outweigh the children's need for termination supported by substantial evidence? (Assignment of Error 1, 2, 5)

4. Did the trial court abuse its discretion in refusing to delay entry of its ruling on termination, and then refusing to grant a motion to vacate and reopen the case to hear additional evidence on the viability of alternatives to termination, when such remedies would have allowed for the

presentation of evidence the court found lacking and would have protected the children's right to timely resolution? (Assignment of Error 7, 8)

IV. STATEMENT OF THE CASE²

This case concerns three children, O.L.T. age two, J.J.I. age four, and P.P.T. age eight. CP 266 – 276. The respondent, Peter Tsimbalyuk is the father of all three children. CP 267, Unchallenged Finding of Fact 1.1. P.P.T.'s mother is Veronica Haupt, and O.L.T. and J.J.I.'s mother is Toby Anne Irby. CP 267. P.P.T.'s mother had her parental rights terminated in November of 2008, and Ms. Irby entered into an open adoption agreement and relinquished her parental rights to J.J.I. and O.L.T. the first day of trial. CP 217-220, 224-232. The father was never married to P.P.T.'s mother, but he married Ms. Irby in September of 2008 and he planned to raise the children with Ms. Irby despite her relinquishment. 1RP 52-53, 108, 110, Unchallenged Finding of Fact 1.10.

At the time of trial the Department had been involved with the father continuously since J.J.I.'s birth four years prior. 1RP 57-58, CP 267, Unchallenged Finding of Fact 1.2. The Department had been

² There are eight volumes of transcripts in this case. For ease of reference, 1RP will refer to the transcript of February 10, 2009; 2RP will refer to the transcript of February 11, 2009, 3RP will refer to the transcript of February 12, 2009, 4RP will refer to the transcript of February 19, 2009, 5RP will refer to the transcript of February 23, 2009, 6RP will refer to the transcript of February 24, 2009, 7RP will refer to the transcript of February 25, 2009, and 8RP will refer to the transcript of March 25, 2009. Unless otherwise indicated, the clerk's papers referred to in this brief will be those filed in the case involving O.L.T., King County Superior Court No. 08-01084-6 SEA.

involved with Ms. Irby for over fifteen years. CP 267-68, Unchallenged Finding of Fact 1.2, 1.3, 1.5. Ms. Irby suffers from chronic mental health and substance abuse problems and has been in and out of psychiatric hospitals. CP 268, Unchallenged Finding of Fact 1.5. In addition to the two children who are the subject of this appeal, she has lost three other children due to long standing parental deficiencies that have never been corrected despite continuous services. *Id.* At the time of trial, she was again hospitalized for psychiatric issues. 1RP 9-10, 16. She stopped services and stopped visiting O.L.T. and J.J.I. more than a year prior to trial and only saw the children five times in 2008. CP 268, Unchallenged Findings of Fact 1.5. The court found she was incapable of caring for the children even in conjunction with the father as the primary caretaker. *Id.*

The father also used drugs and has a criminal history involving drugs, burglary, theft, and vehicle prowl. 1RP 54. He has been arrested twenty five times and has been incarcerated approximately ten times. 1RP 54, 55. He has also been incarcerated for immigration related issues, and at the time of trial he was pursuing an appeal of an order requiring him deported to the Ukraine. 1RP 53. One of the most concerning parental deficiencies that had never been resolved was the father's violent relationship with the mother. CP 271, Unchallenged Finding of Fact 1.15. In November of 2006, just seven months after J.J.I. had been returned to

his parents' care, the father assaulted the mother by punching her in the face, back, neck, and abdomen where she had recently had a Caesarean section involving the birth of O.L.T. CP 269, Unchallenged Finding of Fact 1.7. The assault was so severe it caused bruising, and it caused her to black out, throw up blood, and bleed from the rectum. *Id.* The father refused to help her and refused to let her go to the hospital for medical attention. *Id.* The assault occurred within hearing distance of P.P.T. who came downstairs and saw his mother bleeding. *Id.*, 3RP 387. After the assault, the father violated a no-contact order and told the mother to lie about the assault. CP 269, Unchallenged Finding of Fact 1.9. He threatened to tell the Department about her substance abuse if she told the truth about the assault. *Id.* His assault led to the removal of all three children and the establishment of dependency as to P.P.T. and O.L.T. in May of 2007. 1RP 62-63, 66, 69-70, CP 267, Unchallenged Finding of Fact 1.3. The father's assault on the mother in November of 2006 was not the first such incident. CP 269, Unchallenged Finding of Fact 1.8. He had previously assaulted her on at least one occasion by hitting her with a belt for at least five or six minutes. *Id.*

Throughout the Department's involvement with this family, it provided extensive services. For over fifteen years it facilitated the mother's drug/alcohol evaluations, inpatient and outpatient substance

abuse and mental health treatment, random urinalysis, family preservation services, domestic violence victims counseling, psychological evaluations, mental health counseling, parenting classes and housing assistance. CP 268-69, Unchallenged Finding of Fact 1.5. Over the four years the Department worked with the father, it facilitated a drug/alcohol evaluation, random urinalysis, parenting classes, psychological evaluation and treatment, domestic violence perpetrator's treatment and family preservation services. CP 268, Unchallenged Finding of Fact 1.4. A psychological evaluation conducted in October of 2007 diagnosed the father as anti-social personality disorder, and concluded there were no services which, over a reasonable time, would remedy his deficiencies such that he could resume full custody of his children. CP 271-72, Unchallenged Finding of Fact 1.16. The Department provided the father individual mental health counseling to address the disorder, but he did not make sufficient progress. CP 272, Unchallenged Finding of Fact 1.18. On two separate occasions, the father began a domestic violence treatment program, but either quit or was suspended for non-compliance from both programs after just a few months. CP 270-71, Unchallenged Findings of Fact 1.12, 1.13.

At the time of trial, J.J.I. and O.L.T. were living with their paternal aunt, Lena, whom they looked to as their primary caretaker. CP 273,

Unchallenged Finding of Fact 1.23. Prior to residing with his aunt, J.J.I. had been in multiple placements and had lived out of his parents' care for three of his four years. *Id.* O.L.T. had been out of his parents' care for all but five months of his two and a half years of life. *Id.* P.P.T. had lived with his paternal grandmother for the past two years, and had stayed with her and other aunts for substantial periods even before the Department got involved. 1RP 124, 2RP 260, CP 273, Unchallenged Finding of Fact 1.24. He too was extremely bonded to his paternal grandmother and looked to her as his primary caregiver. *Id.* The uncontroverted evidence established that both the aunt and the grandmother wanted to adopt the children, and the aunt in particular had been hesitant to even accept the younger children into her home until they were legally free. 6RP 684, 7RP 875.

At trial, the father testified that he was fully capable of caring for his children and he wanted his children returned to him. 1RP 101, 102, 7RP 930. He did not believe there were any additional skills or services he needed. 1RP 101, 102. He testified that he was willing to separate from the mother if that was required to have his children returned. 1RP 102, 130. Otherwise, he planned to co-parent his children with the mother and believed she was a good mother who posed no risk to the children. CP 269-70, Unchallenged Finding of Fact 1.10. He testified that he was prepared to take his children to live with him in the Ukraine if he was

deported. 1RP 149. Although his attorney suggested that the father only needed six more months of counseling to resume care of the children, neither he nor his attorney argued in favor of any permanent plan other than return to the father's care. 1RP 45-48, 7RP 930.

The court found the first five elements required for termination to be established by clear, cogent and convincing evidence. CP 267, 272-73, 275, Unchallenged Findings of Fact 1.2, 1.3, 1.20, 1.21, 1.23, 1.24, and Unchallenged Conclusion of Law 2.1. The court specifically found that all services reasonably available and capable of correcting the parental deficiencies within the foreseeable future had been expressly and understandably offered and found there was little likelihood that conditions could be remedied so the children could be returned to the father in the near future. CP 272, Unchallenged Findings of Fact 1.20, 1.21. The court found that all three children are in need of a permanent home given the instability they faced in their parents' home and the length of time they had spent in out-of-home placement and found that all three children have prospects for adoption. CP 274, Unchallenged Finding of Fact 1.25. The court found the father's testimony – the only witness to testify on his behalf – to lack credibility. Unchallenged Finding of Fact 1.10, 1.11, 1.21.

Nonetheless, the court denied termination after concluding that a continued relationship with the father, while remaining in the custody of the relatives, was in the children's best interest. CP 274, Challenged Finding of Fact 1.27. The court found the state failed to prove that continuing the parent child relationship diminished the children's prospects for permanency because the court believed the children had stable placements with their relatives, and the court was not convinced the relative caregivers would end their relationship with the children if they could not adopt. CP 274, Challenged Finding of Fact 1.30.³ The court found it to be mere speculation that the relatives would permit the father to visit following adoption, and since termination would deny the father a guaranteed right to visit, the court found termination to be contrary to the children's best interest. CP 273, Challenged Finding of Fact 1.22, 123. The court acknowledged there was no dependency guardianship petition pending and that the relatives wanted to adopt the children, but concluded that either dependency guardianship or long-term relative care would be in the best interests of the children because it would allow the father the right to see the children. CP 274, Findings of Fact 1.30 1.31, 1.32. The court encouraged any or all of the parties to file a dependency guardianship

³ Ironically, the court stated in its oral ruling that if the relatives testified to that affect, the court would have doubts about their commitment to the children. 7RP 999.

petition, and ultimately concluded that even an ongoing dependency would be sufficiently stable and permanent. CP 274-75, Challenged Findings of Fact 1.29, 1.34. The court recognized that it might be awkward to call the relative caregivers to testify at a termination trial but suggested that a narrow inquiry might be “elucidating” to the court. CP 274, Challenged Finding of Fact 1.26.

On March 25, 2009, the attorney for the CASA requested that the court delay entry of its written order so that the parties could meet on April 6, 2009 with the relatives to discuss the court’s ruling. 8RP 4. She explained that the court’s ruling on alternatives had been unexpected; the relatives had wanted to maintain family ties so had been hesitant to testify; but they also had reasonable concerns that the court’s ruling left them unable to adopt these young children. 8RP 4-5. She explained that the relatives had been out of town and this was the earliest they could meet. *Id.* The Department agreed with the CASA arguing that the court’s ruling was unusual in its hope that the relatives would come to an alternative decision; the delay would allow the court to be more fully informed about the viability of alternatives; and there was no prejudice in delaying entry of the ruling. 8RP 6-7. The court denied the request and entered the order denying termination. 8RP 7-8.

Both the CASA and Department sought appellate review of the court's order and after meeting with the relatives, brought a motion pursuant to CR 60(b)(1)(3) and/or (11) requesting the court vacate its earlier ruling and reopen the case for presentation of additional evidence. The CASA and Department argued that the court should reopen the case because of irregularities in the proceedings and entry of facts based on incorrect assumptions and mistakes of fact. CP 319-352. Specifically, the court's findings that viable alternative plans existed were based on mistakes of fact because neither the relatives nor the father would agree to any alternative plans and even if one were ordered, the father intended to undermine the plan. *Id.* Additionally, the CASA and Department presented newly discovered evidence that supported the court vacating its order because after the trial ended the father announced his proposal to move the children to live with another relative in Tennessee, who already has eight children and is expecting her ninth. *Id.* He had no concern over the impact this move would have on the children, or his ability to visit – which the court had found so vital to the children's best interest. *Id.* Both the Department and the CASA argued that the court's order to deny termination had created significant tension in the extended family and could lead to a complete disruption in the children's placement. *Id.* The Department urged the court to vacate its order and reopen the case so that

the children would have some chance at timely permanency. *Id.* The court refused to hear the motion or require a response from the father, and denied the motion without explanation. CP 354-55, 358-59. The Department and the CASA appealed that ruling as well. Both the order denying termination and the order denying the motion to vacate have been consolidated for appeal.

V. ARGUMENT

A. Standard of review.

In this appeal there are three applicable standards of review. The first concerns the factual findings and conclusions made by the trial court. The court's ruling can be affirmed only if the factual findings made by the court are supported by substantial evidence. *In re Dependency of C.B.*, 61 Wn. App. 289, 286, 810 P. 2d 518 (1991). The quantum of evidence must be substantial enough to allow this court to conclude that the court's findings and conclusions to deny termination are "highly probable." *In re Sego*, 82 Wn.2d 736, 739, 513 P.2d 831 (1973). And, while this court must afford deference to the trial court's ability to observe the witnesses, it still reviews the sufficiency of the evidence by looking at the record as a whole. *In re Welfare of H.S.*, 94 Wn. App. 511, 519, 973 P. 2d 474, *review denied*, 138 Wn.2d 1109 (1999), *cert denied*, 529 U.S. 1108 (2000).

Unchallenged findings are verities on appeal. *In the Interest of J.F.*, 109 Wn. App. 718, 37 P.3d 1227 (2001); *In re Santore*, 28 Wn. App. 319, *review denied*, 95 Wn.2d 1019, 623 P.2d 702 (1981). In this case, most of the trial court's findings are not challenged, and they are alone sufficient to justify termination of the father's parental rights.

The second standard of review applicable to this case concerns legal errors made by the court below in its interpretation of the termination statute. Specifically the trial court's legal conclusion that the termination statute permits it to consider theoretical alternatives to termination even when there are no alternative actions pending or advocated by the parties, and its conclusion that the termination statute requires the state to prove that the children's current relative placements are not stable without termination.⁴ The interpretation of a statute is a question of law which is reviewed *de novo*, and the trial court's conclusions carry no presumption of correctness. *In re Welfare of A.T.*, 109 Wn. App. 709, 34 P.3d 1246 (2001); *In re D.Y.H.*, 226 S.W.3d 327 (Tenn. 2007). Because an appellate court is not bound by the conclusions of the trial court, it may substitute its own conclusions of law, apply them to the established facts, and render judgment accordingly. *American Nursery Products, Inc. v. Indian Wells Orchards*, 115 Wn.2d 217, 797 P.2d 477 (1990). Since most of the court's

⁴ The relevant sections of the statute are RCW 13.34.190(2) and RCW 13.34.180(1)(f) respectively.

findings are not challenged and they support an order of termination, this court should reverse the incorrect legal rulings and enter an order terminating the father's parental rights

The third applicable standard of review concerns the trial court's order denying the motion to vacate and its refusal to reopen the case for presentation of additional evidence. This ruling is reviewed under the abuse of discretion standard. *State v. Scott*, 20 Wn. App. 382, 580 P.2d 1099 (1978). In this case the trial court's refusal to grant a hearing to consider reopening the case for presentation of evidence the court found lacking, and its denial of the motion to vacate was manifestly unreasonable and created an unnecessary delay in resolving the children's permanency.

B. The trial court's findings and conclusions that alternatives to termination exist are not supported by substantial evidence and are contrary to established law because no alternative action was before the court and no evidence was presented indicating that an alternative was viable.

Although the only action pending before the court below was a petition for termination, the court denied termination based solely on its findings and conclusions that some alternative to termination existed that would better serve the children's interest. Appendix A, Findings of Fact 1.22, 1.26, 1.27, 1.28, 1.29, 1.30, 1.32, 1.33, 1.34, Conclusion of Law 2.2, 2.3. These findings and conclusions are assumptions not supported by

substantial evidence because there was no evidence, much less substantial evidence, supporting any alternative to termination.

The father did not file, or argue for, or even mention a dependency guardianship, or a third party custody action, and he did not advocate that the children remain with their relatives in some sort of long term care agreement or ongoing dependency. Finding of Fact 1.29, 1.31, 1RP 45-48, 7 RP 981, 992. In fact, he had no desire for the children to remain with the relatives and he advocated for a full return of the children to his custody. He claimed he was prepared to do whatever was necessary to make that happen. 1RP 45-48, 101, 102, 7RP 930. He did not understand why the children were removed and he did not understand the sacrifices his family made to care for his children. 4RP 606, 618. He admitted that his relatives do not have a friendly relationship with Ms. Irby, the biological mother of the children and the woman with whom he planned to raise his children. 2RP 223.

Neither the Department nor the CASA, who were the only other parties to the action, advocated for, or believed an alternative to termination was viable or appropriate and no evidence was presented suggesting otherwise. Both the Department and the CASA advocated for termination of the father's parental rights based on the children's urgent need for permanency, their need for a healthy attachment to a caretaker

who is consistent, stable, and nurturing, and the relative's desire for adoption. 5RP 667, 680-681, 682, 684, 687-688, 7RP 874, 878. They believed that termination and adoption by the current relative caretakers is in the children's best interest, and believed there is a risk of harm if termination is not ordered because the relatives want to set boundaries with the father, they want to make their own decisions for the children, and they want the Department out of their lives. 5RP 668, 680, 6RP 685, 686, 687, 688, 697, 720, 7RP 868, 874-875, 876, 877, 881. The social worker explained that a dependency guardianship would keep the Department involved with the extended family, which was contrary to their desires. 6RP 684, 685; *see also In re the Dependency of A.C.*, 123 Wn. App. 244, 98 P. 3d 89 (2004)(dependency guardianship requires consideration of parent's wishes, makes the guardians a party to the dependency, and requires continued involvement of the Department). She also had concerns about whether the father had been candid with his family. 6RP 697. Both the social worker and CASA agreed the family dynamics are fragile and the father's desire to have the children returned to him was difficult on the family and causing stress. 6RP 684, 685, 688, 720, 771, 7RP 875, 876, 877.

The CASA testified that while the relatives are close, the father is not as connected to the family as the other siblings, and the situation of

having the children placed with relatives is delicate because the family wants permanence for the children. 7RP 868, 875. She felt the current situation was difficult and possibly causing stress for the children. 7RP 876-77. According to the social worker, the relatives met and discussed available options and they all expressed a desire for adoption. 6RP 684, 686. The CASA testified that adoption was the only acceptable option for the paternal aunt and she had been reluctant to have the children placed with her until they were legally free. 7RP 875. It took effort and faith to convince her to accept the children before they were legally free. 7RP 875. The CASA also testified there was no one available for P.P.T to be dependency guardian. 7RP 881. Both the CASA and Department social worker believed termination was the only viable option that would serve the children's best interest, and they supported termination even if it meant they could no longer visit with their father, and even if the relatives did not ultimately adopt the children. 6RP 690, 720, 771, 7RP 869-70, 878, 880, 881, 890, 891, 892. The Department's social worker additionally testified that all three children could be adopted if they were legally free and she testified that all of the relative caretakers wanted to adopt the children. 6RP 684.

It has long been the law in Washington that when faced solely with a petition for termination of parental rights, the court's duty is to

determine whether the statutory requirements for termination are satisfied, and not concern itself with whether theoretical alternatives to termination exist. *In re Dependency of K.S.C.*, 137 Wn.2d 918, 976 P. 2d 113 (1999). In *K.S.C.*, the Court held: “Nothing in the statute directs that an assessment must be made of a dependency guardianship under RCW 13.34.231 and .232 as an alternative to termination.” *Id.*

The principles articulated by the Supreme Court in *K.S.C.* have been reaffirmed numerous times. *In re Welfare of M.R.H. and J.D.F.*, 145 Wn. App. 10, 188 P.3d 510 (Div. III 2008), *rev. denied*, 165 Wn.2d 1009(2008), *cert. denied* 129 S. Ct. 1682 (2009)(court is not required to consider guardianship or open adoption if no such petition is filed); *In re Dependency of T.C.C.B.*, 138 Wn. App. 791, 158 P.3d 1251 (Div. I 2007)(no need for the court to consider theoretical alternatives such as guardianship or open adoption prior to terminating); *In re the Welfare of C.B.*, 134 Wn. App. 336, 139 P.3d 1119 (Div. II 2006)(court need not consider a dependency guardianship as alternative to termination when no petition has been filed); *In re Dependency of I.J.S.*, 128 Wn. App. 108, 114 P.3d 1215 (Div. I 2005), *rev. denied*, 155 Wn.2d 1021(2005)(in the absence of a petition for guardianship the state is not required to prove that an alternative such as guardianship is not available). In all of these cases, the parents argued that the court could not legally terminate parental rights

unless the Department established that there were no alternatives available. All three divisions of the Court of Appeals rejected this argument, and both the Washington and the United States Supreme Court have declined review of this issue. *Id.*

The trial court in this case asserted that although it is not obliged to consider alternatives, it can choose to do so even in the absence of an alternative action pending because the legislature has approved alternative permanent plans besides termination. 7RP 959, CP 274, Challenged Finding of Fact 1.28. This assertion is not supported by existing law; it misinterprets the statute identifying permanent plans; it expands the authority of the court hearing a termination proceeding beyond that which is granted by statute and existing case law; and it places the Department in the untenable position of disproving any and all theoretical alternatives to termination regardless of whether any such action is pending – just because the court might otherwise believe that some theoretical alternative exists.

Although the trial court did not articulate what statute it was relying on for the proposition that the legislature granted it authority to consider alternative plans when hearing a termination action, the termination statute itself contains no such authority. *See* RCW 13.34.180 and RCW 13.34.190. The case law interpreting the termination statute

also grants no such authority. *See supra* at 19-21. In *K.S.C.* the Court held that approval of a permanent placement is not before the court in a termination proceeding, and the state is not required to seek the court's approval of a permanent placement at the time of termination. 137 Wn.2d at 928-29. Long before the *K.S.C.* case was decided, the Supreme Court rejected the notion that the state must establish that an adoptive home is available prior to termination. *In re Esgate*, 99 Wn.2d 210, 214, 660 P.2d 758 (1983). In *I.J.S.* and in *T.C.C.B.* this court rejected the argument that the state must disprove the existence of theoretical alternative plans when presenting a case for termination. 128 Wn. App. 108, 120-121; 138 Wn. App. 791, 800-802.

Since the petitioner in a termination case has no legal obligation to present evidence on permanent plans that are only theoretically available, it should not be faulted for failing to do so. *I.J.S.*, 128 Wn. App. at 111. Yet, the trial court's denial of termination and its subsequent response suggesting the parties 'should have known' to present evidence of alternatives demonstrates the trial court's misunderstanding of the law.⁵ 8RP 7-8. The Department has a right to rely on existing law, and that law

⁵ Additionally, the court's comments that post trial was not the point at which the parties should 'begin negotiation' suggest that the court believed the parties had not considered or discussed alternatives prior to trial. That is clearly not supported by the evidence since both the CASA and Department social worker testified about their consideration of alternative plans and their discussions about those plans with the relatives prior to trial.

is clear that the Department is not required to present evidence on alternatives to termination, when no alternative action is pending before the court. *supra* at 19-22. The court's expectation to the contrary was erroneous and should be reversed. *See e.g. In re Dependency of R.H.*, 129 Wn. App. 83, 117 P.3d 1179 (2005)(court reversed dismissal of a dependency where the Department had no notice and no legal reason to present evidence or argument related to dismissal at a shelter care hearing).

To the extent the trial court relied on the permanency planning statute in RCW 13.34.136 and/or RCW 13.34.145, for the proposition that it can consider alternative plans at termination, the court's reliance was misplaced since those statutes apply to permanency planning hearings held in the dependency proceeding, not to termination trials. *Id.* And, the court hearing the dependency case had already considered, and ruled out, alternative permanent plans for these children. In this case, the court hearing the underlying dependency case of these children reviewed the permanent plans proposed by the parties as statutorily required throughout the life of the case. *See e.g. Ex. 12, 23, 28, 29.* In October of 2005, the first permanency planning hearing concerning J.J.I. was held. *Ex. 12.* The court approved a permanent plan of return to the mother and father. By August of 2007, the court concluded that plan was no longer the best plan

and ordered it modified to a primary plan of adoption and an alternative plan of dependency guardianship. Ex. 23. In February of 2008 a permanency planning hearing was held on O.L.T. and P.P.T. and the court ordered adoption as the sole permanent plan. Ex. 28. The court additionally ordered that a termination petition be filed no later than July of 2008. *Id.* In July of 2008 a permanency planning hearing was held on J.J.I. and the court ordered that a termination petition be filed by October of 2008. Ex. 29. In January of 2009, the last permanency planning hearing before the termination trial was held on all three children and the sole permanent plan approved by the court was adoption. Ex. 33.

By denying termination based on speculation that an alternative permanent plan to termination existed, the court hearing the termination trial ignored the evidence, and ignored the prior judicial findings and conclusions, which had ruled out those alternatives. In fact, its ruling rendered all of the prior review and permanency planning hearings that occurred over the life of the case to be meaningless. And, although the court correctly noted that “the law provides that there are permanent plans other than adoption” the permanency planning statute was never intended to provide the court hearing a termination trial the authority to pick among all the theoretically possible plans, and dictate that those plans be pursued, irrespective of whether those alternatives were properly before the court,

or would serve the interests of children before it.⁶ CP 274, Challenged

Finding of Fact 1.28

C. The trial court erroneously interpreted RCW 13.34.180(1)(f) to require the state to prove the children's current placement with relatives is not stable and permanent short of termination and adoption.

In concluding there was insufficient evidence to establish that continuing the parent-child relationship diminished the children's prospects for early integration into a stable and permanent home, the court erroneously focused on what the relative caretakers might or might not be willing to settle for in terms of a permanent plan. CP 274, Challenged Findings of Fact 1.26, 1.28, 1.29, 1.30. The court faulted the Department for not presenting the testimony of the relatives, and was not persuaded that the relatives would terminate their relationship with the children if adoption was not the sole option. *Id.* It concluded as a matter of law, that RCW 13.34.180(1)(f) was not established because the Department had not shown that the current placements are not stable and permanent short of termination and adoption. CP 275, Conclusion of Law 2.2.

⁶ For example, in addition to dependency guardianship, third party custody, or long term foster care agreement, the law also recognizes independent living as an appropriate permanent plan in certain cases. RCW 13.34.136(2)(a). Long term foster care agreements or independent living might very well be appropriate permanent plans for adolescent youth who are close to being emancipated, but would hardly be appropriate for children as young as two, four, and eight. The court's ruling below suggests the department should have presented evidence ruling out all possible permanent plans. This interpretation of the statute would lead to absurd results.

However, the trial court's interpretation of the termination statute is contrary to existing law. Several courts have previously interpreted this element of the termination statute and concluded that it focuses on the legal relationship between the parent and child, and whether continuing that legal relationship impairs the child's prospects for early permanency. *In re A.C.*, 123 Wn. App. 244, 98 P.3d 89 (2004). Where the Department proves that it is unlikely a parent will correct his or her deficiencies in the near future, the finding that continuation of the parent child relationship diminishes the child's prospects for early integration into a permanent home "necessarily follows." *In re J.C.*, 130 Wn.2d 418, 427, 924 P.2d 21 (1996).

None of the published decisions have interpreted this element as foreclosing termination whenever a child is fortunate enough to be cared for by a committed relative or foster care provider at the time of trial. In fact, both the Supreme Court and Court of Appeals have ruled that regardless of how emotionally committed a relative care provider might be to a child, placement is inherently temporary as long as parental rights remain intact. *In re K.S.C.*, 137 Wn.2d 918, 976 P.2d 113 (1999); *In re A.V.D.*, 62 Wn. App. 562, 569, 815 P.2d 277 (1991).

Similarly, the appellate courts have rejected the notion that this element depends on the child's future prospect for adoption, his or her

relationship with extended relatives, or other theoretical possibilities. *In re Esgate*, 99 Wn.2d 210, 214, 660 P.2d 758 (1983)(this element of the statute should not be interpreted as allowing termination only when the child is going to be adopted); *In re D.A.*, 124 Wn. App. 644, 102 P.3d 847 (2004)(this element is not concerned with the permanence of a particular current placement); *In re A.C.*, 123 Wn. App. 244, 98 P.3d 89 (2004)(this element is concerned with the *legal* relationship between a parent and child rather than the personal relationships of those involved); *In re T.R.*, 108 Wn. App. 149, 29 P.3d 1275 (2001)(theoretical possibilities must yield to the child's present need for stability and permanence).

The court's expectation that the relative care providers testify at trial is contrary to this established law and places them in an impossible position. CP 274, Challenged Finding of Fact 1.26. The record in this case is replete with references to the relatives desire to keep peace with the father, and maintain relationships of extended family members, yet protect themselves and provide the children the structure and security that would come with an adoption. 6RP 684, 685, 686, 688, 720, 771, 7RP 875, 876, 877, 7RP 868. If they had testified that they would only keep the children if the court terminated parental rights, the court might have changed its mind that alternatives to termination were possible, but the relatives would pay a heavy price for that testimony within their family relationships, and,

would risk them losing the children since the court made clear – that testimony would cause the court to question the relatives commitment to the children. 7RP 999.

Instead of focusing on the children's current placement with extended family, and whether the relatives might settle for something less than adoption, the court should have focused on the *father's* fitness and whether his *legal* relationship with the children impedes early permanence for the children. *In re Dependency of C.B.* 134Wn. App. 336, 139 P.3d. 1119 (2006)(continuation of the parent child relationship can still diminish the child's prospects for integration into a stable and permanent home even if the child is settled in a stable foster care placement). In this case, all three children's prospects for integration into permanent homes came to a dead end because of the continued legal relationship with their father. By refusing to terminate the father's rights, the children's integration into a permanent home and permanent family has been indefinitely delayed.

Although the court found the prospects for reunification with their father essentially non-existent, the court assumed that because the children were currently placed with relatives their legal relationship with the father would not impair their permanency. This ignores the evidence and the court's own finding that "All three children are in need of a permanent home, given the instability they have faced in their biological home and

the length of time they have spent in out-of-home care.” CP 274, Unchallenged Finding of Fact 1.25. It also conflicts specifically with the standards articulated in both *In re K.S.C.*, 137 Wn.2d 918, and *In re A.V.D.*, 62 Wn. App. 562.

In both *K.S.C.* and *A.V.D.*, the children were placed with relatives at the time of the termination trial. In *A.V.D.*, the child had been living with his grandmother since birth and the grandmother was willing to keep him indefinitely. The father argued that his relationship with the child was not interfering with what was already a “permanent and stable” home. The Court of Appeals rejected the father’s argument and held a relative/foster care placement is, by definition, temporary, and cannot become “permanent” unless parental rights are terminated. *In re A.V.D.*, 62 Wn. App. at 569. Likewise, in *K.S.C.* the child had been placed with an aunt at birth and remained in that placement at the time of trial three years later. The mother argued that the child had already been integrated into the aunt’s home so termination was unnecessary. The Supreme Court disagreed, holding the issue of where a child might permanently be placed is not a proper focus of a termination trial. *In re K.S.C.*, 137 Wn.2d at 927.

The facts of this case are even more compelling since the testimony established that these children cannot afford to wait any longer

for permanency. 6RP 682, 7RP 874. The CASA testified that continuing the parent-child relationship diminishes the children's ability to integrate into a permanent home. 7RP 874. At the time of trial, J.J.I. had been in multiple placements and had already lived out of parental care for three quarters of his young life. CP 269, Unchallenged Finding of Fact 1.6, 1.23. He was placed in care at birth in 2005 and then returned to his parents in 2006 where he suffered developmentally. *Id.* He made developmental improvements after being placed in care again in the Fall of 2006. *Id.* However, he was placed in four different foster homes and moved eight times before being placed with his Aunt Lena, and the CASA was particularly concerned about the impact of multiple moves on J.J.I. because he is so fragile. 6RP 715-16, 849, 850, 7RP 887. The CASA did not believe J.J.I. could tolerate another move. 7RP 891. O.L.T. had been out of his parent's care for all but five months of his two and a half years of life. 6RP 716-17, Unchallenged Finding of Fact 1.23. P.P.T. has lived with his paternal grandmother for the past two years, and stayed with her and other aunts for substantial periods even before the Department got involved. 1RP 124, 2RP 260, CP 273, Unchallenged Finding of Fact 1.24. P.P.T. is aware that his father cannot care for him and that his grandmother wishes to adopt. 7RP 866. He adores his grandmother, he calls her mom, and he loves his life with her. 7RP 867. All three children

look to their relatives to meet their everyday needs. 7RP 854, 857, CP 273, Unchallenged Finding of Fact 1.23, 1.24.

The trial court's rulings in this case conflict with the plain language of the termination statute and the phrases "early integration" and "stable and permanent home." RCW 13.34.180(1)(f). This statute emphasizes that there is only a limited time frame for establishing permanency for a child into a stable and permanent home. The court is supposed to view the future, not from the parent's perspective, but from the child's point of view. See *In re Hall*, 99 Wn.2d 842, 850, 664 P.2d 1245 (1983); *In re A.W.*, 53 Wn. App. 22, 32, 765 P.2d 910, review denied, 112 Wn.2d 1017 (1989). All of these children have already waited years for a permanent home, and none of them should have to wait even six more months. 6RP 682, 7RP 874.

In addition to being unconcerned with the length of time that these children have already waited for a permanent home, the trial court was unconcerned about the prospect of them never having a permanent home. CP 274, Challenged Finding of Fact 1.29. It expressed a desire for an alternative permanent plan, but ultimately found that "Ongoing dependency and placement in relative care would be sufficiently stable and permanent without adoption." *Id.* Yet, no published case has accepted a lifetime of legal limbo in an ongoing dependency as acceptable for any

children, let alone children as young as these children. *In re Welfare of Hall*, 99 Wn.2d 842, 850-51, 664 P.2d 1245 (1983)(eight months is not within foreseeable future of a four year old child); *In re T.R.*, 108 Wn. App. 149, 164-65, 29 P.3d 1275 (2001) (to wait one year or longer is well beyond foreseeable future of six year old child); *In re A.W.*, 53 Wn. App. 22, 32, 765 P.2d 307 (1998) (one year not in the near future of a three year old child); *In re P.A.D.*, 58 Wn. App. 18, 27, 792 P.2d 159 (1990) (six months is not in the near future of fifteen-month-old child). The court's finding that the children could be maintained in relative care in an on-going dependency assumes the relatives would be willing to keep the children indefinitely in an on-going dependency.

Having found that all services capable of correcting the father's parental deficiencies in the foreseeable future had already been offered or provided, and having found there was little likelihood that conditions could be remedied so that the children could return to the father in the near future, and having found that all three children need permanency, it should necessarily follow that continuing the parent-child relationship diminished the children's prospects for early integration into a stable and permanent home. As indicated *supra* at 15-16, the trial court's interpretation of the termination statute is reviewed *de novo* by this court. Its conclusion of

law carries no presumption of correctness and because it conflicts so plainly with the established law of Washington, it should be reversed.

D. The trial court's finding that termination is not in the children's best interest is not supported by substantial evidence and violates the children's right to stability and early permanency.

In addition to denying termination because the court believed some alternative permanent plan would better serve the children's interest; and the children's relative placements were sufficiently stable without termination; the court also denied termination because that result would end the father's legal right to visit the children. CP 273, Challenged Finding of Fact 1.22. The court found it to be mere "speculation" that the relative caregivers would permit visitation following an adoption. *Id.* However, unlike the court speculating that theoretical alternatives to termination were viable, the uncontroverted evidence established that the relatives were likely to allow visitation with the father after termination, and even if they did not, the benefits of visitation were outweighed by the far more pressing need for the children to have closure and permanency.

The CASA believed the relatives would still maintain contact with the father even if parental rights were terminated. 7RP 890. The father testified he had no concerns about the way his children were being raised by their current caregivers and felt they took good care of the children.

2RP 214. He never disputed the CASA's contention that the relatives would permit him to visit even if his rights were terminated.

Even if the relatives did not allow the father to have contact with his children, both the CASA and the social worker testified that termination was still appropriate and in the children's best interest. 6RP 688, 690, 7RP 869-70, 891, 892. This evidence is consistent with the law which has increasingly emphasized the value of permanence over an on-going relationship with a deficient parent.

In 1997, Congress passed the Adoption and Safe Families Act (ASFA), Pub. L. No. 105-89, 111 Stat. 2115 (1997), and changed the focus of juvenile dependency proceedings. Instead of focusing on the parent, family preservation and reunification, ASFA revolutionized dependency law by mandating that the safety, well being and *permanency* of children be the paramount considerations of the juvenile court in making decisions regarding dependent children. Cindy S. Lederman and Joy D. Osofsky, *Infant Mental Health Interventions in Juvenile Court: Ameliorating the Effects of Maltreatment and Deprivation*, 10 Psychol. Pub. Pol'y & L. 162 (2004). *See also*, 42 U.S.C. § 671(a)(15), 42 U.S.C. § 675(a)(15); Deborah L. Sanders, *Toward Creating a Policy of Permanence for America's Disposable Children: The Evolution of Federal Foster Care Funding Statutes from 1961 to Present*, 29 J. Legis.

51, 52 (2002). Under federal law, the Department is required to file a termination petition within twelve months of out-of-home placement unless there is a good cause finding that a petition should not be filed. 42 USC § 675 (5)(c).

Washington's dependency law was amended in 1998 to make it consistent with ASFA. Laws of 1998, ch. 314, p. 1664. Accordingly, the paramount concern of juvenile dependency proceedings is now the child's safety and well being, and right to permanency. RCW 13.34.020; *see also, M.W. v. Department of Soc. & Health Svcs.*, 149 Wn.2d 589, 599, 70 P.3d 954 (2003). In 2008, Washington's statutes were amended to mandate the court to order the filing of a termination petition when the child has been in out-of-home care for fifteen months. Laws of 2008, Ch. 152, sec. 3.

In this case, the court hearing the dependency case approved adoption as the permanent plan as early as August of 2007. Ex. 23. It ordered that a termination petition be filed in 2008. Ex. 28, 29. These efforts by the dependency court to follow the law and ensure early resolution for these children were thwarted by the judge hearing the termination trial who ignored the children's rights and law's requirement for early permanency. *In re the Dependency of J.S.*, 111 Wn. App. 796,

46 P.3d 273 (2002)(statute mandates *speedy* resolution in order to allow the child to have a safe, stable and permanent home).

The court's decision to deny termination simply because it believed visitation was beneficial sentences these children to a lifetime of uncertainty. It violates their statutory and constitutional right to stability and early permanency and it ignores their best interest. *See In re Dependency of J.B.S.*, 123 Wn.2d 1, 863 P.2d 1344 (2008); *In re P.A.D.*, 58 Wn. App. 18, 26, 792 P.2d 159 (1990); *In re Dependency of C.T.*, 59 Wn. App. 490, 498, 798 P.2d 1170 (1990) *review denied*, 116 Wn.2d 1015 (1991); *see also, In re Russell*, 70 Wn.2d 451, 423 P.2d 640 (1976); *In re Ramquist*, 52 Wn. App. 854, 861, 765 P.2d 30 (1988).

E. The trial court abused its discretion in denying the Department's motion to vacate and reopen the case for further evidence, because reopening the case would have shown that the court's original findings were based on mistakes of fact and irregularities; it would have allowed the court to consider the evidence it originally found lacking; and it would have given the children a chance to have permanent homes.

1. The trial court erred by refusing to grant a hearing on the motion to vacate the order denying termination.

CR 60(b) enumerates the grounds upon which a court can vacate an order. CR 60(e) directs the procedure to be followed for ruling on such a motion and provides that upon the filing of the motion, the court "*shall* enter an order fixing the time and place of the hearing thereof and

directing all parties to the action to appear and show cause why the relief asked for should not be granted.” CR 60(e)(2) (emphasis added), *Robertson v. Perez*, 123 Wn. App. 320, 96 P.2d 420 (2004).

Following the court’s order denying termination, the Department and CASA filed a motion to vacate and requested that the court set a show cause hearing to determine whether the order should be vacated and whether the case should be reopened for further evidence. CP 319-352. The court refused to grant a hearing and denied the motion without explanation. CP 70, 72 (Copy attached as Appendix B). This was manifestly unreasonable since resolving the issue through other avenues would clearly cause unnecessary delays and potentially harm the children.⁷

2. **Had the court granted a hearing on the motion to vacate, it would have learned that its denial of termination was based on an incorrect assumption that the father would work cooperatively with the relatives in providing the children a permanent home.**

In ruling on a motion to vacate, the law directs the court to exercise its authority liberally to preserve substantial rights and to do justice between the parties. *Haller v. Wallis*, 89 Wn.2d 539, 573 P.2d 1302 (1978). In proceedings involving the vital interest of children, it is

⁷ As the Department pointed out in its motion, the only other remedies for resolving this matter would be to file another termination petition and/or pursue its appeal. Neither of those options was preferred because of the inherent delays in both options.

especially important for the court to exercise this authority. *In the Matter of Henderson*, 97 Wn. 2d 356, 644 P. 2d 1178 (1982). While errors of law must be preserved through an appeal rather than a CR 60(b) motion, the court has the authority to correct those mistakes of fact, which formed the basis for an incorrect legal ruling. *State v. Scott*, 20 Wn. App. 382, 580 P.2d 1099 (1978).

During the termination trial in this case, the Department and the CASA presented limited evidence about the likelihood that these children could be maintained in relative placement in some legal structure other than adoption, or the likelihood that the relative caretakers would agree to keep the children in some legal structure other than adoption, because as indicated *supra at 19-22*, the case law directs that theoretical alternatives to termination need not be presented when there is no pending alternative proposal before the court. Additionally, both the Department and the CASA consistently believed that termination and adoption was the only appropriate plan that would serve these children, and since no alternative plans were before the court, or advocated by the father, there was no need to present extensive evidence as to why other plans were ruled out.

Nonetheless, the trial court was clearly disturbed by the lack of evidence regarding the viability of alternatives, and denied termination because it assumed that alternative permanent plans were possible.

See Findings of Fact 1.22, 1.26, 1.27, 1.28, 1.29, 1.30, 1.31, 1.32, 1.33, 1.34, and Conclusion of Law 2.3. The court also denied the CASA's request to delay entry of the order pending inquiry and possible presentation of evidence on the viability of alternatives. This denial prevented the Department and the CASA from asking for reconsideration under CR 59 because the relative caregivers were unavailable to meet within the time frame necessary to bring such a motion. 8RP 4, CP 343, paragraph 10.

In its motion, the Department made clear that it was not attempting to utilize CR 60(b) as a vehicle to challenge the mistakes of law it believed the court committed in requiring evidence of alternatives as a condition for termination, but explained that the court's unspoken expectation of evidence it believed should have been presented created an irregularity in the proceedings, which could be remedied by allowing for presentation of the evidence the court previously found lacking. CP 319-352, CR 60(b)(1)(3) (allowing the court to vacate orders based on mistakes, or irregularity in the proceedings, or newly discovered evidence). The Department also relied on CR 60(b)(11) which permits vacation of an order for "(a)ny other reason justifying relief from the operation of the judgment." *Id.*

In support of its motion, the Department submitted evidence that the father has no interest in any permanent plan for J.J.I. and O.L.T. other than a full return of the children to his care. CP 343, paragraph 8. Even if a third party custody order was entered, his plan is to have that order undone as soon as the dependency is dismissed. CP 343, paragraph 9. He also has no intention of cooperating with the current relative caregivers of the children for any kind of long term care agreement, and in fact proposes sending the children to live with another relative in Tennessee, who already has eight children and is expecting her ninth. CP 344, paragraph 13. He has no concern over the effect that this would have on the children's welfare; or the relative caretakers who have devoted themselves to these children; or the negative impact this would have on his ability to visit the children – which the court found so vital to the children's best interest.

The motion to vacate also demonstrated that the relatives of the children are concerned about the lack of permanency created by the court's order, and the likelihood that the order denying termination will result in them spending a lifetime fighting with the father over custody issues related to the children. CP 345-46, paragraph 18. The relatives are interested only in adoption, and are not willing to agree to a guardianship or third party custody. *Id.* Since neither of these alternatives can be

imposed upon them against their will, and they cannot be forced to continue caring for the children in an on-going dependency, the trial court was mistaken in assuming that these alternatives to termination are viable options. Additionally, given the father's threat to have the children moved out of state to another relative, the trial court's denial of termination might dissuade them from continuing to care for the children for any length of time.

Just requesting the relatives to consider alternatives to adoption, which they do not want created significant tension in the extended family and threaten a complete disruption in the children's current placements. CP 346, paragraph 20, CP 349-50, paragraphs 6, 9. Finally, the fact that no alternative legal proceedings had been instituted by anyone to pursue any alternative permanent plan for these children after the court denied termination demonstrated that the court was mistaken when it assumed alternative permanent plans were feasible. This evidence clearly justified the court vacating its earlier order and opening up the case for additional evidence, and the court abused its discretion in refusing to do so.

3. The court's refusal to consider vacating and reopening the case sentences the children to a lifetime of legal limbo in foster care.

In its motion, the Department also noted the sad reality that these children will likely spend the next ten to sixteen years in limbo, without

any hope of a permanent, forever home if the court does not vacate its order and reopen the termination case. Since the court found that all services reasonably available and capable of correcting the father's parental deficiencies have already been offered or provided, and found that there is no likelihood that conditions will be remedied so the children could be returned in the near future, there is little that can be done for this family. The continuation of services that have already been tried without success would serve no purpose and would amount to a futile gesture. The children are not likely to be returned to the father's care, yet the court's order denying termination prevents them from being fully integrated into their relatives' care. Even more concerning is the unfortunate reality that forcing a discussion of alternatives, even when the court understood the relatives wanted to adopt these children (Finding of Fact 1.30), created an unnecessary rift in the family dynamics that could result in these children being displaced and moved again. Since the children have already been in placement a long time, and J.J.I. has been moved multiple times and cannot tolerate another move, and since the court found that all three children were in need of a permanent home, it was manifestly unreasonable for the court to deny the motion without explanation. Granting a hearing to at least consider the Department's evidence would

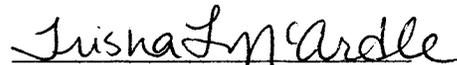
have given the children some chance at timely resolution of their case so they would not be forced to drift in the system any longer.

VI. CONCLUSION

For all of the foregoing reasons, this court should reverse the orders entered below, and enter an order terminating the father's parental rights to these children so that the children can be adopted.

RESPECTFULLY SUBMITTED this 6th day of August, 2009.

ROBERT M. MCKENNA
Attorney General


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Appendix A

FILED
KING COUNTY, WASHINGTON

MAR 25 2009

Judge Ronald Kessler

SUPERIOR COURT CLERK

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY
JUVENILE DEPARTMENT

IN RE DEPENDENCY OF
TSIMBALYUK, PETER PETROVICH
DOB 9/12/2000

IRBY, JAYCOB JAMES
DOB 2/21/2005

TSIMBALYUK, OSCAR LEONID
DOB 8/17/2006

Minor Children

NO 08-7-01084-6 SEA ✓
NO 08-7-01085-4 SEA
NO 08-7-01086-2 SEA

FINDINGS OF FACT CONCLUSIONS OF
LAW AND ORDER DENYING PETITION
FOR TERMINATION OF PARENT-CHILD
RELATIONSHIP

(Clerk's Action Required)

THIS MATTER came on before the Honorable Ronald Kessler for a hearing on the Department's Petition for Termination of Parent-Child Relationship. Trial occurred on February 10, 11, 12, 19, 23, 24, and 25, 2009. An oral decision was delivered on February 25, 2009. The Department appeared through its social worker Sandra Street and was represented by Marc D. Comeau, Assistant Attorney General. The father Peter Tsimbalyuk, appeared, and was represented by Nikole Hecklinger. The court-appointed special advocate, Lori Reynolds, appeared, and was represented by Heidi Nagel. The mother of Peter Petrovich Tsimbalyuk, Veronica Haupt, did not appear, and her parental rights were terminated by order of the court on November 3, 2008. The mother of Jaycob James Irby and Oscar Leonid Tsimbalyuk, Toby Anne Irby (AKA Toby Anne Tsimbalyuk),

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND ORDER DENYING PETITION FOR
TERMINATION OF PARENT-CHILD
RELATIONSHIP

1

King County Superior Court
Juvenile Department
1211 E. Alder Street
Seattle WA 98122

1 appeared by telephone on the first day of trial, and was represented by Sharon Varnado-
2 Rhodes Ms Irby relinquished her parental rights, and her parental rights were terminated
3 by order of the court on February 13, 2009

4 The court heard testimony from the following witnesses Peter Tsimbalyuk, Tanya
5 Copenhaver, Detective Ellen Inman, Robert Thornquist, Barry Glatt, Sandra Street, Dr
6 Richard Borton, Doug Bartholomew, Jay Williamson, and Lori Reynolds The court
7 admitted into evidence 60 exhibits

8 The Court having considered the files and records herein and being fully advised in
9 the premises now makes the following

10 **I FINDINGS OF FACT**

11 1 1 Peter Petrovich Tsimbalyuk born on September 12, 2000, is the child of
12 Peter Tsimbalyuk and Veronica Haupt, who are not minors Jaycob James Irby, born on
13 February 21, 2005, and Oscar Leonid Tsimbalyuk, born on August 17, 2006, are the
14 children of Peter Tsimbalyuk and Toby Anne Irby (AKA Toby Anne Tsimbalyuk), who are
15 not minors

16 1 2 Jaycob James Irby was found dependent pursuant to RCW 13 34 030 by
17 agreed orders of dependency entered on May 10, 2005, as to the mother, and May 17,
18 2005, as to the father Disposition orders were also entered on those dates

19 1 3 Peter Petrovich Tsimbalyuk and Oscar Leonid Tsimbalyuk were found
20 dependent pursuant to RCW 13 34 030 by agreed orders of dependency entered on May
21 18 2007, as to the mothers and May 18, 2007 as to the father Disposition orders were
22 also entered the same dates

1 1 4 In the father's dispositional order as to Jaycob, he agreed to engage in a
2 drug/alcohol evaluation and engage in random UAs two times per week. In the father's
3 dispositional order as to Peter and Oscar, he agreed to engage in age-appropriate parenting
4 classes, a psychological evaluation and recommended treatment, random UAs for 90 days,
5 domestic violence perpetrator's treatment, and Family Preservation Services if the children
6 were returned to him. The father was also ordered to comply with the restraining order
7 regarding Ms. Irby. Mr. Tsimbalyuk performed the UAs, completed an approved course of
8 parenting, submitted to a psychological evaluation and participated in counseling with 2
9 different counselors. He enrolled in two different domestic violence perpetrator's programs
10 but did not complete either of them.

but did not complete

rk

11 1 5 Ms. Irby has chronic mental health and substance abuse issues. Ms. Irby has
12 been involved with the Department for over fifteen years. Her parental rights as to one child
13 were terminated in 1994, and two other children were removed from her care in Snohomish
14 County, Washington. The mother has been offered continuous services over the past fifteen
15 years, including drug/alcohol evaluations, inpatient and outpatient substance abuse
16 treatment, random urinalysis, family preservation services, domestic violence victim's
17 counseling, psychological evaluations, mental health counseling, parenting classes, and
18 housing assistance. None of these services have been able to address the mother's long-
19 standing parental deficiencies. The mother has been voluntarily and involuntarily
20 committed to psychiatric hospitals on multiple occasions. The mother ceased all court-
21 ordered services around January 2008. The mother stopped visiting with her children in
22 January 2008, re-commenced visitation around November 2008, visited only three more
23 times, and ceased visitation again in December 2008. The mother only visited her children
24

1 Jaycob and Oscar approximately five times in 2008 Ms Irby is incapable of caring for
2 children, even in conjunction with Mr Tsimbalyuk as the primary caregiver

3 1 6 Jaycob Irby was removed from the care of his parents in March 2005 He
4 was returned to the care of his parents in March 2006

5 1 7 In November 2006, the father assaulted Ms Irby After Ms Irby returned
6 home one evening with Oscar, Mr Tsimbalyuk changed Oscar's diaper, put the child down
7 to sleep, came downstairs, and assaulted Ms Irby, punching her in the face, back, neck, and
8 abdomen where she had recently had a Caesarean section The assault caused bruising and
9 caused Ms Irby to black out, throw up blood, and bleed from the rectum Ms Irby asked
10 for Mr Tsimbalyuk's help, which he refused Mr Tsimbalyuk refused to permit Ms Irby to
11 go to the hospital for medical attention The evidence established that the assault occurred
12 within the hearing of Peter Jr , who was then six years old

13 1 8 Mr Tsimbalyuk had assaulted Ms Irby in the past Mr Tsimbalyuk
14 assaulted Ms Irby on at least one other occasion with a belt hitting her for at least five or
15 six minutes in order to punish her for relapsing

16 1 9 While Mr Tsimbalyuk was incarcerated for assaulting Ms Irby, Mr
17 Tsimbalyuk contacted Ms Irby on several different occasions in violation of a no-contact
18 order It is clear from jail recordings that Mr Tsimbalyuk was aware of the no-contact
19 order During the conversations from the jail, Mr Tsimbalyuk told Ms Irby to lie to the
20 court and the Department about the assault Mr Tsimbalyuk threatened to tell the
21 Department about Ms Irby's substance use if she told the truth about the assault

22 1 10 Mr Tsimbalyuk married Ms Irby in September 2008 Mr Tsimbalyuk
23 plans to co-parent his children with Ms Irby Mr Tsimbalyuk believes that Ms Irby is a
24

1 good mother who poses no risk to his children Mr Tsimbalyuk's testimony that he would
2 be willing to separate from Ms Irby if his children were returned to his care is not credible

3 I 11 Mr Tsimbalyuk's credibility is puzzlingly questionable His November
4 2006 assault on Ms Irby was more severe than the slap he described at trial Mr
5 Tsimbalyuk lied to Detective Inman, the arresting officer regarding the November 2006
6 assault against Ms Irby The court will not consider father's refusal to consent to search
7 as evidence that he had something to hide With some exceptions, the court does not draw
8 adverse inferences from the exercise of constitutional rights Yet Mr Tsimbalyuk
9 provided details of the assault to Dr Richard Borton during his psychological evaluation
10 The court does not believe that Mr Tsimbalyuk merely slapped Ms Irby He beat her up

11 I 12 Mr Tsimbalyuk made some attempt to address his domestic violence
12 problem, although certainly he sought out the easiest way of doing so He engaged in
13 domestic violence perpetrators' treatment with Doug Bartholomew and Associates from
14 May 2007 through August 2007 The father selected Mr Bartholomew's program, and
15 the Department approved the father's enrollment in the program The father made no
16 progress in treatment He continued to believe that his behavior was justified, he did not
17 want to change his behavior, he showed no regard for the feelings of others, and he
18 showed no emotional reaction that would inhibit future bad behavior Doug
19 Bartholomew testified that, without domestic violence treatment Mr Tsimbalyuk posed a
20 high risk of re-offending Mr Tsimbalyuk withdrew from the program because he did
21 not want to participate in a program that required polygraphs The court does not fault
22 Mr Tsimbalyuk wanting to get out of the program, which the court finds to be
23 overwhelming and so controlling as to lack credence with the court
24

1 1 13 The father engaged in domestic violence perpetrators' treatment with Coastal
2 Treatment and Associates from October 2007 through February 2008. The father selected
3 the program, and the Department approved the father's enrollment in the program. The
4 father was suspended from the program in February 2008 after he refused to complete a
5 responsibility letter to his victim, Ms. Irby. The father never re-initiated domestic violence
6 perpetrators' treatment following his discharge from Coastal Treatment.

7 1 14 The court lacks faith in the efficacy of both domestic violence education
8 and domestic violence cognitive behavioral treatment, relying on Washington State
9 Institute of Public Policy Paper, January 2006, Evidence-Based Adult Corrections
10 Programs: What Works and What Does Not, which concluded these programs have no
11 impact whatsoever on domestic violence recidivism.

12 1 15 Mr. Tsimbalyuk's perpetration of domestic violence continues to be a
13 parental deficiency that has not been corrected and will not be corrected in the near
14 future.

15 1 16 The father engaged in a psychological evaluation with Dr. Richard Borton in
16 October 2007. Dr. Borton noted significant deceptiveness during the interview. Dr. Borton
17 expressed concerns regarding the father's judgment with regards to the risks posed by Ms.
18 Irby, the father's lack of remorse regarding the domestic violence, and the father's inability
19 to recognize the impact of the domestic violence on his children. Dr. Borton made a
20 provisional diagnosis of anti-social personality disorder. Dr. Borton found that there were
21 no services which, over a reasonable period of time, would remedy Mr. Tsimbalyuk's
22 parenting deficiencies such that he could resume full custody of his children. Dr. Borton did
23 recommend that Mr. Tsimbalyuk engage in counseling and indicated that Mr. Tsimbalyuk
24

1 would likely need intensive, long-term psychotherapy with external monitoring in order to
2 make progress towards addressing his mental health disorder

3 1 17 Dr Borton observed positive interactions between the father and Jaycob and
4 Oscar Dr Borton noted that Jaycob, who was three years old appeared delayed in his
5 speech, and that the father lacked insight into Jaycob's delays Dr Borton recommended
6 that the father continue to have an ancillary role in the children s life such as a "favorite
7 uncle," but that someone else should be the children s primary parent Dr Borton did not
8 recommend that termination of parental rights occur between Mr Tsimbalyuk and his
9 children

10 1 18 The Department provided the father individual mental health counseling
11 with Jay Williamson, a licensed mental health provider with a domestic violence treatment
12 background The father engaged in counseling with Mr Williamson to address his
13 provisional diagnosis of anti-social personality disorder The father made some progress,
14 but would require more counseling with external monitoring in order to make progress
15 towards establishing a healthy self-disciplined life-style

16 1 19 While the court respects Mr Williamson's decision not to provide both
17 counseling and domestic violence treatment to the father, the court does not see any reason
18 to suggest that there is a conflict of interest with Mr Williamson providing both types of
19 treatment to the father, and thus the court rejects the social worker s claim While it may be
20 therapeutically inadvisable for the same therapist to provide both the claim that there is a
21 conflict of interest is unsupported and insupportable

22 1 20 The court finds the Department has proved by clear, cogent, and
23 convincing evidence that services ordered under RCW 13 34 130 have been expressly
24

1 and understandably offered or provided and all necessary services reasonably available,
2 capable of correcting the parental deficiencies within the foreseeable future have been
3 expressly and understandably offered or provided

4 1 21 Mr Tsimbalyuk continued to violate the no-contact order between himself
5 and Ms Irby when he was released from jail Mr Tsimbalyuk's testimony to the
6 contrary is not credible Because the court does not believe that Mr Tsimbalyuk will
7 separate from Ms Irby, the court by clear, cogent, and convincing evidence that there is
8 little likelihood that conditions will be remedied so that the children could be returned to
9 the father's care in the near future

10 1 22 The court does not believe it is in these children's best interests to have no
11 future contact with Mr Tsimbalyuk, which is the result of a termination It is only
12 speculation that the relative caregivers will permit the children to have contact with their
13 father following an adoption

14 1 23 Jaycob has resided out of parental care for three of his four years Oscar
15 has resided all but five of thirty-one months of his life out of parental care Both Jaycob
16 and Oscar look to their paternal aunt as their primary caregiver When Jaycob was placed
17 in parental care, he suffered developmentally Since he has been placed out of parental
18 care, he has made developmental strides

19 1 24 Peter has resided out of parental care for over two of his eight years He is
20 extremely bonded to his paternal grandmother, whom he looks to as his primary
21 caregiver

1 1 25 All three children are in need of a permanent home, given the instability
2 they have faced in their biological home and the length of time they have spent in out-of-
3 home care All three children are adoptable and have prospects for adoption

4 1 26 While the court recognizes that it is awkward for the petitioner to call
5 caregivers at a termination trial, the court suggests that narrow inquiry might be
6 elucidating to the court without treading upon the prohibited area of comparative fitness

7 1 27 The court is persuaded that a continued relationship with Mr Tsimbalyuk
8 while in the custody of relatives is in the children's best interests

9 1 28 While families, and particularly these families, would prefer to live
10 without the oversight of the Department and the court, the law provides that there are
11 permanent plans other than adoption

12 1 29 Ongoing dependency and placement in relative care would be sufficiently
13 stable and permanent without adoption

14 1 30 While there is evidence that the children's caregivers were willing and
15 able to adopt the children, the court is not persuaded that the caregivers would terminate
16 their relationship with the children if adoption was not the sole option

17 1 31 There was no dependency guardianship petition pending before this court

18 1 32 The court concludes that dependency guardianship or long-term relative
19 care would be in the best interests of the children because it would allow for Mr
20 Tsimbalyuk to maintain the right to see his children

21 1 33 The court, in the context of an ongoing dependency case, can provide the
22 relatives with the reasonable authority and the boundaries they need to control Mr
23 Tsimbalyuk's visitation

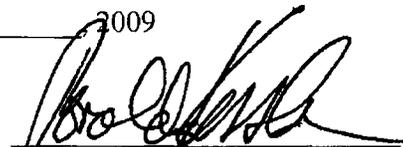
1 would be in the children's best interest rather than termination Although the court is not
2 obliged to consider a dependency guardianship or other third party custody arrangement
3 prior to granting termination, the law does not preclude the court from considering it in
4 the context of whether or not the finality of a termination is in the best interests of the
5 children

6 From the foregoing Findings of Fact and Conclusions of Law, the court enters the
7 following

8 **III ORDER**

9 3 1 The petition for termination of parental rights is denied and dismissed

10
11 DATED this 25th day of March 2009

12
13 
14 JUDGE RONALD KESSLER

Appendix B

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FILED
KING COUNTY WASHINGTON
MAY 12 2009
SUPERIOR COURT CLERK
BY LARRY D. FORD, SR.
DEPUTY

ORIGINAL

SUPERIOR COURT OF WASHINGTON FOR THE COUNTY OF KING
JUVENILE DEPARTMENT

IN RE DEPENDENCY OF

TSIMBALYUK, PETER PETROVICH
Dob 9/12/00
IRBY, JACOB JAMES
Dob 2/21/05
TSIMBALYUK, OSCAR LEONID
Dob 8/17/06

Minor Child(ren)

NO. 08-7-01084-6 SEA
08-7-01085-4 SEA
08-7-01086-2 SEA

ORDER TO SHOW CAUSE

It appearing that a motion of the Department of Social and Health Services, together with supporting declarations has been filed, and said motion requests an order vacating the order denying termination entered on March 25, 2009, and requests an order reopening the case for presentation of additional evidence pursuant to CR 60(b)(1)(3)(11),

IT IS HEREBY ORDERED that PETER TSIMBALYUK, or his attorney NIKOLE HECKLINGER, shall appear before this Court on the 2nd day of June, 2009 at 8 30 a m or as soon thereafter as this matter can be heard, before the Honorable Ronald Kessler, in Courtroom 2 of the King County Superior Court, Juvenile Division, and there to show cause, if any there may be, why the relief prayed for by the Department in said motion should not be granted

ORDER TO SHOW CAUSE WHY ORDER
DENYING TERMINATION SHOULD NOT
BE GRANTED

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800 Fifth Avenue Suite 2000
Seattle WA 98104 3188
(206) 464 7744

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~~IT IS FURTHER ORDERED~~ that copies of the motion, supporting affidavit and this order, shall be served upon the father, Peter Tsimbalyuk, or his attorney at least 14 days before the date set for hearing thereon

Denied

Dated this 12 day of May, 2009


JUDGE RONALD KESSLER

Presented by
ROBERT M MCKENNA
Attorney General

By *Trisha L McArdle*
TRISHA L McARDLE
Senior Counsel
WSBA #16371

FILED
09 MAY 13 AM 10 49
KING COUNTY
SUPERIOR COURT CLERK
SEATTLE WA

SUPERIOR COURT OF WASHINGTON FOR THE COUNTY OF KING
JUVENILE DEPARTMENT

IN RE DEPENDENCY OF

TSIMBALYUK, PETER PETROVICH ✓
Dob 9/12/00
IRBY, JACOB JAMES
Dob 2/21/05
TSIMBALYUK, OSCAR LEONID
Dob 8/17/06

NO 08-7-01084-6 SEA ✓
08-7-01085-4 SEA
08-7-01086-2 SEA

ORDER DENYING MOTION TO
VACATE

Minor Child(ren)

On May 11, 2009, pursuant to its filing of a motion to vacate the court's order denying petition for termination of the father's parental rights, the Department presented an *ex parte* Order to Show Cause pursuant to CR 60(b) requesting that a Show Cause hearing on the motion be set June 2, 2009. The court denied the Department's request to set a Show Cause hearing, and having denied said request for a hearing hereby

ORDERS that the Department's Motion to Vacate the order of March 25, 2009 denying termination of Peter Tsimbalyuk's parental rights to the above referenced children is also denied

Dated this 13 day of May, 2009


JUDGE RONALD KESSLER

ORDER GRANTING MOTION TO VACATE
ORDER DENYING TERMINATION AND
REOPEN CASE FOR FURTHER EVIDENCE
Rev 9 1 00 pp

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Presented by
ROBERT M MCKENNA
Attorney General

By 
TRISHA L MCARDLE
Senior Counsel
WSBA #16371

ORDER GRANTING MOTION TO VACATE
ORDER DENYING TERMINATION AND
REOPEN CASE FOR FURTHER EVIDENCE