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ASSIGNMENTS OF ERROR

Assignment of Error 1.

The trial court erred by granting an order terminating the parent-child relationship without sufficient evidence that the adverse conditions affecting the mother of the children would be remedied so that the children could be returned to the mother.

Assignment of Error 2.

The trial court erred by granting an order terminating the parent-child relationship without sufficient evidence that the continuation of the parent-child relationship clearly diminishes the children's prospects for early integration into a stable and permanent home and termination is in the best interest of the child.

Assignment of Error 3.

The trial court erred by considering evidence not presented at trial, but which was contained in separate dependency actions concerning the children and had met a burden of proof only by a preponderance of the evidence.

Assignment of Error 4.

The trial court erred by finding that the Department of Social and Health Services had met its obligations under the Federal Indian Child Welfare Act.

STATEMENT OF THE CASE

Petitioner, A.B. is the mother of C.B.(DOB 09/19/97) (C.P. Petition: Cause Number 04-7-559-5), T.B. (DOB 04/18/03)(C.P. Petition: Cause Number 04-7-574-9)and C.B. (DOB 02/16/01)(C.P. Petition: Cause Number 04-7-573-1). The childrens' fathers did not participate in the case or the raising of the children and had minimal contact with the children (C.P. Findings of Fact: 22, 23, 27) At the time of the trial neither father had been located.

The first contact that the mother and the children had with the Department of Social and Health Services was a referral made on May 29, 2002 by the Grays Harbor County Sheriff's Office. The social worker made contact with the mother a week later. The referral was made when a sheriff's deputy took a report from people who had been camping in the same area as the mother and children and had seen one of the children out in the campground begging for food. (RP, I. p.82) The social worker went to the home and described the home as having broken glass on the outside and an engine sitting on a hoist, together with other debris in the yard after going into the house, which she described as cluttered. The social worker spoke with A.B. who was cooperative and invited the social worker into the home. They talked about drug use, which the mother denied, she refused to take an urinalysis test at that time. The social worker went back two weeks later and found that the outside of the house had been cleaned up and there was not as

much clutter in the home. The social worker again offered the mother services. (RP, I. p.84)

Contact with the mother was again made in December, 2002 when a social worker contacted the mother after receiving allegations of neglectful treatment, lack of supervision, chronic head lice on the children and an allegation that there was marijuana on a table in her home. When the social worker came to the home, which was a small trailer, she was invited in. The social worker described it as quite crowded and small. He found some hazards such as a heater without much protection from clothing or other things that could get too close and two broken dishes on the counter. The social worker discussed these items with her, prepared a safety plan for the mother, to which she agreed to and signed.

The next contact was made by a referral to the Department of Social and Health Services by an Ocean Shores Police Officer who was called to the mother's home on August 23, 2003. The officer had gone to the home because of a call from a neighbor saying that a child had been lying underneath a dryer vent for some time. The officer arrived approximately 45 minutes later and found the child in the yard sleeping under a dryer vent. The child was C.B. who was age 5 at the time. (RP, I. p.9-10) The officer was not concerned that the child was cold, as the outside ambient temperature was probably in the 70s, but rather that the mother did not know where the child was. (RP, I. p.14)

The social worker next contacted the mother on August 26, 2003 concerning the allegation of C.B. sleeping under the drying vent earlier. The social worker attempted to engage the mother in services at that time. However, the mother did not feel that she needed services. Again a safety plan was prepared which was signed by the mother. The mother also agreed to do a drug screen. The Department agreed that the children would stay with the mother as long as she kept in 100% compliance with the contract and safety plan. (RP, II. p.6-8)

A petition alleging dependency and shelter-care was commenced September 5, 2003 after the drug screen returned positive for methamphetamine. (RP, II. p.12) At the beginning of the dependency action, the mother was offered services and participated in them. She began and completed parenting classes and an anger evaluation of which she attended only two sessions when she had to discontinue it because of attendance at an in-patient alcohol treatment program. She had a psychological evaluation and random urinalysis tests at least once a week during the dependency action for 17 months, all of which were negative, however on 5 of the tests, the creatinine levels were "out of kilter". She gave a hair sample for drug testing, which was negative and commenced an in-patient alcohol treatment program in January of 2005 and a 90 day out-patient after care program.. (RP, II. p.51)

During this time, the mother maintained weekly visitation with the

children. The visitation supervisors complained that the mother brought too many non-nutritious snacks and had a difficult time parting with the children. (RP, I. p.53, 56, 69-70) The supervisors complained that she also gave too much attention to the youngest child. (RP, I. p.61) This is in spite of the fact that one of the supervisors had applied for foster care and for adoption of the three children. (RP, II. p.18, 19)

In response to the visitation supervisors testimony, the children's therapist, observed one visiting session and found no inappropriate behavior or conduct by the mother. She observed for over an hour and all interactions between the children and the mother were totally appropriate. There were no signs of reactive attachment or signs of depression or oppositional defiance. (RP, I. p.98)

There was no adverse behaviors of the children reported to the therapist after the visitations. (RP, I. p.93) In addition, the therapist had testified that the time that the children had spent in foster care did not have a negative impact upon the children. (RP, I. p.96, 97, 105, 106)

On July 4, 2004 the mother was arrested for driving under the influence. She received a deferred prosecution and began an out-patient alcohol treatment program. (RP, I. p.22, 23) Unfortunately on October 31, 2004 the mother was again arrested for driving under the influence. She was convicted and received a 30 day jail sentence, 28 days of which were served in an alcohol treatment program. (RP, I. p.32-35)

On December 30, 2004 the mother began an intensive in-patient chemical dependency treatment program for women at Prosperity Counseling and Treatment Services. (RP, II. p.52-56) She completed the 28 day in-patient program with a good prognosis for recovery. At the conclusion of the in-patient treatment program, she was referred to St. Peter's for a 90 day out-patient after care program, which at the time of trial, she was just completing. (RP, II. p.59-65) Her progress in the program was described as "wonderful". (RP, II. p.65) She was described as being positive and focused and had actually become one of the leaders of the group. (RP, II. p.66) Again her prognosis was good.

During the time that the mother was in the after-care program, she became a member of Alcoholic Anonymous, where she was an active participant. So active, in fact, that she began chairing meetings and participating in leadership positions. (RP, III. p.24-28) The mother was described by her mother (RP, III. p.2-5), her step-father (RP, III. p.9-11), her neighbors (RP, III. p.16-17), friends of the family (RP, III. p.19-25) and her landlord (RP, III. p.21, 22) as having a complete change in attitude and behavior. Her outlook was brighter. She was willing to talk about her problems and accept advice and help. She had become focused and intent on correcting her past behaviors and her addiction to alcohol.

Shortly after the dependency action was started, it was reported to the Department of Social and Health Services by the mother that the children

were of Indian ancestry of the Cherokee and Lakota Sioux tribes. The case worker contacted the Bureau of Indian Affairs and was given a list of Lakota Sioux and Cherokee tribes to contact. Notices were sent to the tribes listed by the Bureau of Indian Affairs. There were some responses and some tribes did not respond. The responses indicated only that the children were not enrolled members of federally recognized tribes and were presented to the Local Indian Child Welfare Agency Commission (L.I.C.W.A.C.). L.I.C.W.A.C. meetings were not continued based on the information that they had that the children were not enrolled members of a tribe. That they were not Native American or Indian Children. No other work was done. There was no interviewing of the parents or grandparents or any attempt to contact the mother's family to determine Indian ancestry. (RP, III. p.30-33). The chairman of the Cowlitz Tribe who had met the mother in AA, discussed the Native American heritage of the children, had reviewed documentation showing death certificates of the mother's ancestors and other documents. The birth certificate of her mother indicating there was a "continuous line that shows Indian blood". (RP, III. p. 29).

The mother testified that her mother was Native American of the Lakota Sioux or Cherokee tribes. They were not enrolled nor were the children enrolled as members of the tribe. She also testified that members of her family carried on Native American traditions, specifically her aunt, nieces and nephews, who attended Native American pow-wows and

participated in other Native American activities. (RP, II. p. 82-86)

In the course of the Judge's oral decision (RP, III. p.45, l.13-19) the Judge mentioned that he had reviewed the file and "that the children, specifically, it was Cheyenne, I believe, had a deep rasping cough, she needed medical attention, and she was filthy". There was no evidence presented at the trial of this incident. Counsel for Appellant believes that this incident was mentioned in the allegation in the dependency action (See Exhibit 1). The Judge also mentioned in his oral decision "the likelihood is that the mother will and has the ability to put all of this behind her, however, the time frame does not allow it." (RP, III. p 49, l.12-15)

ARGUMENT

RCW 13.34.180 provides in part:

- (1) A petition seeking termination of a parent-child relationship may be filed in juvenile court by any party to the dependency proceedings concerning that child . . . and shall allege all of the following unless subsection (2) or (3) of this section applies:
 - (a) That the child has been found to be a dependent child;
 - (b) That the court has entered a dispositional order pursuant to RCW 13.34.130;
 - (c) That the child has been removed for will, at the time of the hearing, have been removed from custody of the parent for a period of at least six months pursuant to a finding of dependency;
 - (d) That the services ordered under RCW

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

(e) That there is little likelihood that conditions will be remedied so that the child can be returned to the parent in the near future. A parent's failure to substantially improve parental deficiencies within twelve months following the entry of the dispositional order shall give rise to a rebuttable presumption that there is little likelihood that conditions will be remedied so that the child can be returned to the parent in the near future. The presumption shall not arise unless the petitioner makes a showing that all necessary services reasonably capable of correcting the parental deficiencies within the foreseeable future have been clearly offered or provided. In determining whether the conditions will be remedied, the court may consider, but is not limited to the following factors:

- (I) Use of intoxicating or controlled substances so as to render the parent incapable of providing proper care for the child for extended periods of time or for periods of time that present a risk of imminent harm to the child, and documented unwillingness of the parent to receive and complete treatment or documented multiple failed treatment attempts; or
- (ii) Psychological incapacity or mental deficiency of the parent that is so severe and chronic as to render the parent incapable of providing proper care for the child for extended periods

of time or for periods of time that prevent that present a risk of imminent harm to the child, and documented unwillingness of the parent to receive and complete a treatment or documentation that there is no treatment that can render the parent capable of providing proper care for the child in the near future; and

- (f) That continuation of the parent and child relationship clearly diminishes the child's prospects for early integration into a stable and permanent home . . .

RCW 13.34.132 requires that for a petition seeking termination to be filed, the following requirements are met:

1. The court has removed the child from his or her home pursuant to RCW 13.34.130;
2. That termination is recommended by the supervising agency;
3. That termination is in the best interest of the child.

In In Re the Dependency of K.R. 75 Wn.App 781, 880 P.2d 88 (1994)

the Court of Appeals stated:

The termination court must find that the termination is in the child's best interest and the six allegations set forth in RCW 13.34.180 are established and that those elements be established by clear, cogent and convincing evidence. Supra at 791, See also Krause v. Catholic Community Services, 47 Wn.App 734-740, 737 P.2d 280 (1987)

In In Re the Dependency of K.R., supra, the trial court found that the mother had failed to comply with services ordered pursuant to the dependency order, however, records revealed that she had completed or was

presently participating in court ordered services. Although the factual scenario is different from the present case, A.B. had completed or was presently participating in court ordered services that could be provided to the Department. A.B. did not participate in one of the courses because the Department had stopped funding that type of treatment in the county in which A.B. lived. However, A.B. had found a similar program and had enrolled in it, even though that program was not approved by the Department. In addition, the court held, at 794, “That the State must show the current existence of an adverse condition, and further that there is little likelihood that this condition can be remedied”. In Re the Dependency of K.R., was appealed and reversed on other grounds. 128 Wn.2d 129, 904 P.2d 1132 (1995).

There must be a showing by the State that it is “highly probable that the welfare of the child will be enhanced by taking the child from the parents”. In Re May, 14 Wn.App 765, 545, P.2d 25 (1976); In Re Price, 13 Wn.App 437, 535 P.2d 475 (1975); In Re Houser, 15 Wn.App 231, 548 P.2d 333 (1976).

In the recent case In Re T.L.G., 126 Wn.App 181, 108 P.3d 156 (2005) the court discussed the burden of proof necessary to prove the requirement elements supporting an order terminating parental rights. Clear, cogent and convincing evidence necessary to establish the six statutory elements in RCW 13.34.180 exists when the ultimate fact in issue is shown

to be “highly probable”. The findings of the trial court must be affirmed if they are supported by substantial evidence. The court held that while the best interest of the child is of chief concern, they stated that “It is no slight thing to deprive a parent of the care, custody and society of a child or a child of the protection, guidance and affection of the parent”. Supra at 197, 198.

In the present case the evidence falls far short of proving by clear, cogent and convincing evidence that the services provided failed to correct the parental deficiencies within the foreseeable future, knowing that there was little likelihood that the mother’s conditions could be remedied so that the children could be returned to the mother in the near future. The evidence was that she had completed the parenting classes, had entered into an extensive alcohol treatment program, in which she excelled and showed leadership and had impressed friends, neighbors, landlords and family members with a complete change in her attitude, together with those of her counselors and treatment providers at the alcohol treatment facilities. The State attempted to show that this had an adverse effect upon the children. But their only showing of an adverse effect on the children was testimony of visitation supervisors. The children’s therapist refused to state that the children would be adversely affected by children remaining in foster care or for a length of time required by the mother to complete her services. The therapist indicated that the children’s prospects for early integration into a stable and permanent home was not diminished by the continued presence of the children in foster

care.

The court also in its oral decision made the statement that it had reviewed the file and stated: “That the children, specifically Cheyenne, I believe, had a deep rasping cough, she needed medical attention, and she was filthy”. There was no evidence whatsoever presented at the trial of this particular incident. It obviously had come from the court reading or hearing the dependency matters.

In In Re the Dependency of K.R., Supra the trial court had ruled that an issue regarding sexual deviancy had to be determined by res judicata in the dependency proceeding. The Court of Appeals held that there was a substantial difference between a dependency hearing and a termination petition. The key difference being that the dependency hearing is a preliminary, remedial, non-adversary proceeding that does not permanently deprive a parent of any rights and that a findings of dependency did not inevitably lead to a termination of parental rights. In Re The Dependency of K.R., Supra at 16, 17.

A dependency action is designed to protect children and help parents alleviate problems and to reunite the family. The burden of proof in a dependency action is by a preponderance of the evidence. Termination matters are completely different proceedings. The termination court must find that termination of the parent-child relationship is in the child’s best interest and that six allegations in RCW 13.34.180 are established. The

burden of proof also is different. These elements must be proved by clear, cogent and convincing evidence. The fact that the court read the dependency files and mentioned facts from the dependency file in his oral decision, indicates that he had taken this evidence and considered it as proven by the clear, cogent and convincing rule rather than by a preponderance of the evidence in the termination case.

The State presented evidence at the trial that it had obtained a list of the relevant tribes from the Bureau of Indian Affairs to notify for compliance with the Indian Child Welfare Act, 25 USC § 1901-23. However, the only indication of what the State did, was receive some responses from tribes indicating that the children were not enrolled members of a federally recognized tribe. However, the Indian Child Welfare Act requires more than that. It requires:

No termination of parental rights may be ordered in such proceeding in the absence of a determination supported by:

- (1) Evidence beyond a reasonable doubt, including
- (2) Testimony of qualified expert witnesses,
- (3) The continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. 25 USC § 1912(f)

Any party seeking . . . termination of parental rights to an Indian Child under State Law shall satisfy the courts that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and these efforts have proved unsuccessful. 25 USC § 1912 (d)

Guidelines have been set up in 44 F.Reg. 67, 586 which provide in

part:

- (a) When a State Court has reason to believe a child involved in a child custody proceeding is an Indian, the court shall seek verification of the child's status from either the Bureau of Indian Affairs or the child's tribe.
- (b)(i) The determination by a tribe that a child is or is not a member of that tribe is or is not eligible for membership in that tribe, or that the biological parent is or is not a member of that tribe is conclusive.
- (c) Circumstances under which a State Court has reason to believe a child involved in child custody proceeding is an Indian include (when) . . .
- (I) Any party to the case . . . informs the court that the child is an Indian child

RCW 13.34.070 now reads :

- (10,a) Whenever the court or the petitioning party in a proceeding under this chapter knows or has a reason to know that an Indian child is involved, the petitioning party shall promptly provide notice to the child's parent or Indian custodian and to the agent designated by the child's Indian tribe to receive such notices. Notice shall be by certified mail with return receipt requested. If the identity or location of the parent or Indian custodian or the tribe cannot be determined, notice shall be given to the Secretary of the Interior in the manner described in 25 C.F.R. 23.11. If the child may be a member of more than one tribe, the petitioning party shall send notice to all tribes the petitioner has reason to know may be affiliated with the child.
- (10,b) The notice shall:
 - (I) Contain a statement notifying the parent or

custodian in the tribe of the pending proceedings; and

- (ii) Notify the tribe of the tribe's right to intervene and/or request that the case be transferred to the tribal court.

In the present case, the State only determined that the children were not members of the indicated tribes. It did not inquire if the children were eligible for membership in any of the indicated tribes. They did not contact the mother or any of the children's relatives to indicate to them what must be done or what evidence they had to demonstrate that the children were eligible for membership in a federally recognized tribe. In In Re The Dependency of T.L.G., Supra at 191, the court held that tribal enrollment was not the only means of establishing Indian heritage.

CONCLUSION

Here the mother had participated in and completed courses that had been recommended by the State. She had completed all of the tasks assigned to her such as a psychological evaluation, drug screens, urinalysis, parenting classes and completion of an in-patient alcohol treatment program and the near completion of the after-care program. She had maintained visitation with the children. Her progress in her alcoholism recovery was remarkable. There was no evidence offered by the State to show that the continuation of the parent-child relationship diminished the children's prospects for an early integration into a stable and permanent home, nor was any evidence offered

that termination of the relationship was in the best interest of the children. The Judge was clearly troubled by this case. He did make the comment that “The likelihood is that the mother will and has the ability to put all of this behind her, however, the time frame does not allow it”. His concern seemed to be not that the mother could not remedy her parental deficiencies, but that it would take too long and harm the children. However, the evidence was contrary to this as presented by the children’s therapist, who did not and would not say that the delay was harming the children. The evidence before the court was tainted by the court taking into consideration in his decision evidence and findings in the dependency cases, which require a lesser burden of proof. The mother was ready to present evidence in contravention of the incidents described by the Judge in his oral decision. However, there was no evidence presented at the trial.

Respectfully submitted:



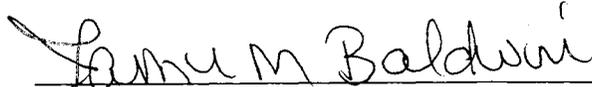
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said envelope containing: Trial Brief of Appellant

I declare under the penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed at Hoquiam, Washington on December 30, 2005



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