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COURT OF APPEALS

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STATE OF WASHINGTON

BY  DEPUTY

IN THE COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION II

In re the Welfare of:	COURT OF APPEALS NO.
M.R.K.,	33993-5-II
Minor(s).	MOTHER'S MOTION FOR ACCELERATED REVIEW

**A. IDENTITY OF MOVING PARTY**

The moving party is H.B., mother of the above-named minor child, whose parental rights were terminated by the court below.

**B. ASSIGNMENTS OF ERROR**

1. The State violated H.B.'s right to due process when it placed the child in relative placement in Grant's Pass, Oregon, making visitation prohibitively difficult for the Appellant, effecting a *de facto* termination of H.B.'s parental rights.

2. The State violated H.B.'s right to due process when her probation officer required, as part of H.B.'s conditions of probation, that she have no contact with M.R.K. unless she is in full compliance with the conditions of the Juvenile Court dependency review orders.

MOTHER'S MOTION FOR  
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3. The trial court denied the Appellant her constitutional right to due process when the court terminated her parental rights without granting a continuance in order to permit her to be present at all phases of the termination trial.

4. The trial court erred in entering Findings of Fact, Conclusions of Law, and Order of Termination of Parent-Child Relationship, terminating H.B.'s parental rights regarding her child M.R.K.

5. The trial court erred in entering Finding of Fact 1.2.

1.2 [H.B.] was in the Multnomah County Inverness Jail in Portland, Oregon on the day of trial with a scheduled release date of August 16, 2005. Although a short period of time is involved until her release, the court and counsel may not be able to schedule a continued hearing for several weeks. Ms. [B] has been in and out of jail and has not been present at all hearings during the course of the dependency proceedings. There is no certainty that she would attend the hearing, if continued, after her release from jail.

6. The trial court erred in entering Finding of Fact 1.3.

1.3 The mother was able to present testimony on her behalf by telephone. The mother is represented by very experienced counsel, Gayle Ihringer, and all of her rights to a meaningful hearing will be accommodated through representation by Ms. Ihringer.

7. The trial court erred in entering Finding of Fact 1.4.

- 1.4 It is in the best interests of the child to deny the motion to continue the trial.
8. The trial court erred in entering Finding of Fact 1.5.
- 1.5 The mother's addiction to methamphetamines has led to an inability to adequately parent the child.
9. The trial court erred in entering Finding of Fact 1.6.
- 1.6 The mother's case presents a troubled picture. It was noted that the ruling of the court of appeals affirming the order of dependency (Exhibit 9 at page 13), which describes the mother's deficiencies at the start of the dependency is very similar to present conditions.
10. The trial court erred in entering Finding of Fact 1.7.
- 1.7 The mother has been in and out of jail due to substance abuse. She failed to comply with the conditions of parole and probation in Oregon, which specifically included substance abuse treatment. The mother's continued substance abuse was demonstrated by positive urinalyses for methamphetamines.
11. The trial court erred in entering Finding of Fact 1.8.
- 1.8 The mother's record of compliance with the requirements of the Oregon court paralleled the dependency in Washington. Services were repeatedly ordered and the mother was unable to comply.
12. The trial court erred in entering Finding of Fact 1.9.
- 1.9 The substance abuse evaluations and treatment records indicate that the mother is

in denial of addiction and has a long term need for substance abuse treatment. Exhibit 15 shows the mother's use of methamphetamines began in 1999 and continued into 2005. The mother was in victim's stance. She testified that she had been clean and sober for 72 days, which corresponds to the start of her incarceration. In March 2004, Northwest Recovery Center (Exhibit 18) indicates that the mother was completely manipulative, and based on her behavior, she never intended to comply with expectations and had no motivation for positive change. Northwest Recovery Center recommended treatment for one year. The assessment in October 2004 (Exhibit 23) shows the mother was extremely resistant to treatment and denied her drug use. She appeared to use criminal thinking to justify her actions.

13. The trial court erred in entering Finding of Fact 1.10.

1.10 There is little or no hope that the mother will be in a position to remedy her addiction when she is released from jail. Her problems are long-standing and it will take a lengthy period of time to remedy her parental deficiencies if she wishes to do so.

14. The trial court erred in entering Finding of Fact 1.11.

1.11 The department expressly and understandably offered and re-offered the mother all necessary services, reasonably available and capable of correcting her parental deficiencies.

15. The trial court erred in entering Finding of Fact 1.12.

1.12 The child came into care with serious deficiencies and needs.

16. The trial court erred in entering Finding of Fact 1.13.

1.13 The major barrier to contact with her child was due to the mother's failure to willingly complete desperately needed services which were offered to her.

17. The trial court erred in entering Finding of Fact 1.14.

1.14 The mother was ably represented by her appointed attorney throughout the proceedings.

18. The trial court erred in entering Finding of Fact 1.15.

1.15 There is little likelihood that conditions which led to the dependency will be remedied so that the child can be returned to the mother in the near future.

19. The trial court erred in entering Finding of Fact 1.16.

1.16 The child needs permanence and continuing the parent and child relationship with her mother clearly diminishes her prospects for integration into a stable and permanent adoptive home. There is a preference in the statute for termination rather than guardianship for this child.

20. The trial court erred in entering Finding of Fact 1.17.

1.17 [H.B.] is unfit to continue the parent-child relationship.

21. The trial court erred in entering Finding of Fact 1.18.

1.18 The best interest of the child are served by termination of the mother's parental rights

22. The trial court erred in entering Conclusion of Law 2.2:

- 2.2 Good cause does not exist to continue the termination trial.
23. The trial court erred in entering Conclusion of Law 2.3.
- 2.3 The Findings of Fact as they relate to RCW 13.34.180(1)(a), (b), (c), (d), (e) and (f) have been proven by clear, cogent, and convincing evidence.
24. The trial court erred in entering Conclusion of Law 2.4.
- 2.4 Termination of the parent-child relationship is found to be in the child's best interests by a preponderance of the evidence.
25. The trial court erred in entering Conclusion of Law 2.5.
- 2.5 The parent-child relationship between the above-named minor child and [H.B.] should be terminated pursuant to RCW 13.34.190.
26. The trial court erred in finding that the State successfully established that there is little likelihood that conditions will be remedied so that the child can be returned to her mother in the near future pursuant to RCW 13.34.180(1)(e).
27. The trial court erred in finding that the State successfully established that continuation of the child's relationship with her mother will diminish the child's prospects for early integration into a stable and permanent environment pursuant to RCW 13.34.180(1)(f).
28. The trial court erred in finding that termination of the Appellant's parental rights is in the child's best interests.

**C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Was the Appellant denied due process under the U.S. Const. Amend. XIV and Washington Const. Art. I, § 3 where the Department placed the child in relative care with the child's paternal grandmother in Grants Pass, Oregon, located in southern Oregon, making visitation difficult for the mother, who resided in the Portland area? Assignments of Error No. 1, 4, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 23, and 24.

2. Was the Appellant denied due process under the U.S. Const. Amend. XIV and Washington Const. Art. I, § 3 where the Appellant's probation officer required that the mother be in full compliance with the orders of the Juvenile Court in order to be able to have visitation with M.R.K., and that visitation with the child without being in compliance with the Juvenile Court orders would result in a probation violation? Assignments of Error No. 2, 4, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 23, and 24.

3. Was the Appellant denied due process under the U.S. Const. Amend. XIV and Washington Const. Art. I, § 3 where the Court did not grant the motion to continue the termination trial until the mother was released from custody and defense counsel was back from vacation, where counsel requested a continuance of six to eight weeks? Assignments of Error No. 3, 5, 6, 7, and 22.

4. Did the trial court err in finding that the Department established that there is little likelihood that conditions will be remedied so that the child can be returned to the mother in the near future where her probation officer required H.B. to be in compliance with the Juvenile Court orders in order to have visitation with M.R.K., and where the mother did not visit the child after she was placed in relative care in Grants Pass, Oregon? Assignments of Error No. 18, 23, 24, and 26.

5. Did the trial court err in finding that the State successfully established that continuation of the child's relationship with the Appellant will diminish the child's prospects for early integration into a stable and permanent environment where her probation officer required H.B. to be in compliance with the Juvenile Court orders in order to have visitation with M.R.K., and where the mother did not visit the child after she was placed in relative care in Grants Pass, Oregon? Assignments of Error No. 19, 23, 24, and 27.

6. Did the court err in terminating the Appellant's parental rights where the Department failed to establish that the child's best interests are served by terminating the mother's rights? Assignments of Error No. 24 and 28.

**D. DISPOSITION OF THE TRIAL COURT**

The Honorable Barbara D. Johnson terminated the parental rights of the Appellant following a termination trial held August 10, 2005 in the

Clark County Superior Court. Findings of Fact, Conclusions of Law and Order of Termination were entered on October 14, 2005. CP at 17-21.

Attachment A.

**E. DISPOSITION URGED BY MOVING PARTY**

Appellant H.B. requests reversal of the order of termination, and requests that this matter be remanded to the trial court for dismissal of the termination petition with prejudice, or in the alternative, remanded for new trial.

**F. CLERK'S PAPERS AND REPORT OF PROCEEDINGS**

Clerk's Papers and Verbatim Report of Proceedings have been furnished to the Court. The Findings of Fact, Conclusions of Law and Order of Termination are attached hereto as Attachment A and incorporated by reference.

**G. STATEMENT OF THE CASE**

**1. Procedural History:**

H.B. is the mother of M.R.K., who was born October 7, 2000. CP at 1; RP at 146. J.K. is the father of M.R.K. CP at 2. H.B. appeals from the ruling of Clark County Superior Court Judge Barbara Johnson, entered October 14, 2005, granting the State's petition for termination of her parental rights. CP at 17-21. Attachment A.

The Department of Children and Family Services [DCFS] filed dependency petitions regarding M.R.K. on April 18, 2003. CP at 2; Exhibit 1. The child was found to be dependant as to H.B. by order entered July 1, 2003. CP at 2. Dispositional orders as to H.B. were entered July 8, and amended September 3, 2003. CP at 2; Exhibit 3.

The Department filed a petition for termination regarding M.R.K. on November 30, 2004. CP at 1-5. The matter came on for termination trial before Judge Johnson on August 10, 2005. On August 2, H.B.'s counsel moved to continue the trial until H.B.'s anticipated release from jail on August 16. RP at 4. Due to counsel's upcoming vacation, she requested a continuance of six to eight weeks. RP at 5. The State opposed the motion, arguing that H.B. would be allowed to appear telephonically at termination on August 10. RP at 6. Judge Johnson found that there was "no certainty that [H.B.] actually would be attending the hearing, in that she has attended some and has not attended some and has been in and out of jail." RP at 9. The court ruled that if arrangements can be made to have her testify by telephone, she would be adequately represented and therefore denied the request for continuance. RP at 10.

Following the termination trial on August 10, Judge Johnson found that the Department had proved the requirements of RCW 13.34.180 by clear, cogent, and convincing evidence and had also proved by a

preponderance of the evidence that it is in the best interests of the child to terminate H.B.'s parental rights. RP at 187-90. An order terminating the parent/child relationship as to H.B. was entered October 14, 2005. CP at 17-21.

The court entered the following Findings of Fact and Conclusions of Law:

#### FINDINGS OF FACT

1.1 [H.B.] was personally served and represented by appointed counsel throughout the proceedings.

1.2 [H.B.] was in the Multnomah County Inverness Jail in Portland, Oregon on the day of trial with a scheduled release date of August 16, 2005. Although a short period of time is involved until her release, the court and counsel may not be able to schedule a continued hearing for several weeks. Ms. [B] has been in and out of jail and has not been present at all hearings during the course of the dependency proceedings. There is no certainty that she would attend the hearing, if continued, after her release from jail.

1.3 The mother was able to present testimony on her behalf by telephone. The mother is represented by very experienced counsel, Gayle Ihringer, and all of her rights to a meaningful hearing will be accommodated through representation by Ms. Ihringer.

1.4 It is in the best interests of the child to deny the motion to continue the trial.

1.5 The child involved herein, [M.R.K.], is the daughter of [H.B.] and [J.K.], and was born on October 7, 2000.

1.6. The child has been a dependant of the State of Washington, as to [H.B.], under the supervision of the Clark county Juvenile Court since July 1, 2003. The court entered a [sic] dispositional orders pursuant to RCW 13.34.130.

1.7 The child was removed from her mother's case on October 18, 2002 and placed in foster care and the care of maternal relatives. On April 6, 2004, she was placed in the home of her paternal grandmother where she remained at the time of the hearing.

1.8 The mother's addiction to methamphetamines has let to an inability to adequately parent the child.

1.6 The mother's case presents a troubled picture. It was noted that the ruling of the court of appeals affirming the order of dependency (Exhibit 9 at page 13), which describes the mother's deficiencies at the start of the dependency is very similar to present conditions.

1.7 The mother has been in and out of jail due to substance abuse. She failed to comply with the conditions of parole and probation in Oregon, which specifically included substance abuse treatment. The mother's continued substance abuse was demonstrated by positive urinalyses for methamphetamines.

1.8 The mother's record of compliance with the requirements of the Oregon court paralleled the dependency in Washington. Services were repeatedly ordered and the mother was unable to comply.

1.9 The substance abuse evaluations and treatment records indicate that the mother is in denial of addiction and has a long term need for substance abuse treatment. Exhibit 15 shows the mother's use of methamphetamines began in 1999 and continued into 2005. The mother was in victim's stance. She testified that she had been clean and sober for 72 days, which corresponds to the start of her incarceration. In March 2004, Northwest

Recovery Center (Exhibit 18) indicates that the mother was completely manipulative, and based on her behavior, she never intended to comply with expectations and had no motivation for positive change. Northwest Recovery Center recommended treatment for one year. The assessment in October 2004 (Exhibit 23) shows the mother was extremely resistant to treatment and denied her drug use. She appeared to use criminal thinking to justify her actions.

1.10 There is little or no hope that the mother will be in a position to remedy her addiction when she is released from jail. Her problems are long-standing and it will take a lengthy period of time to remedy her parental deficiencies if she wishes to do so.

1.11 The department expressly and understandably offered and re-offered the mother all necessary services, reasonably available and capable of correcting her parental deficiencies.

1.12 The child came into care with serious deficiencies and needs.

1.13 The major barrier to contact with her child was due to the mother's failure to willingly complete desperately needed services which were offered to her.

1.14 The mother was ably represented by her appointed attorney throughout the proceedings.

1.15 There is little likelihood that conditions which led to the dependency will be remedied so that the child can be returned to the mother in the near future.

1.16 The child needs permanence and continuing the parent and child relationship with her mother clearly diminishes her prospects for integration into a stable and permanent adoptive home. There is a preference in the statute for termination rather than guardianship for this child.

1.17 [H.B.] is unfit to continue the parent-child relationship.

1.18 The best interest of the child are served by termination of the mother's parental rights.

#### CONCLUSIONS OF LAW

2.1 This Court has jurisdiction over: the person of the above-named minor child; the subject matter; and [H.B.], mother of the minor child; and all other persons claiming paternal interest in said child.

2.2 Good cause does not exist to continue the termination trial.

2.3 The Findings of Fact as they relate to RCW 13.34.180(1)(a), (b), (c), (d), (e) and (f) have been proven by clear, cogent, and convincing evidence.

2.4 Termination of the parent-child relationship is found to be in the child's best interests by a preponderance of the evidence.

2.5 The parent-child relationship between the above-named minor child and Holly Boggs should be terminated pursuant to RCW 13.34.190.

2.6 The Indian Child Welfare Act, 25 U.S.C.A. §§ 501-596, does not apply to the proceeding.

2.7 The Servicemembers Civil Relief Act, 50 App. U.S.C.A. §§ 501-596, does not apply to this proceeding.

CP at 18-21. Attachment A.

H.B. timely filed Notice of Appeal to the Court of Appeals, Division II on November 9, 2005. CP at 57. Pursuant to RAP 18.13(b) this appeal has been automatically noted for accelerated review.

**2. Trial Testimony:**

The Department of Child and Family Services filed dependency petitions regarding M.R.K. on April 18, 2003. CP at 2; Exhibit 1. The child was found dependent as to H.B. in July, 2003. CP at 2; Exhibits 2 and 3. The child was removed from H.B.'s care on October 18, 2002. RP at 11. She was placed with a maternal aunt prior to establishment of the dependency, and then placed in foster care for eight months. M.R.K. went to live with the father's mother in April, 2004. Exhibit 10. M.R.K. has been placed with her parental grandmother in Grants Pass, Oregon, since April 6, 2004. RP at 108.

The case originated as a voluntary placement agreement, and was assigned to DCFS social worker Alice McGrew in February, 2003. RP at 15. H.B. was in the jail at the time. RP at 16. Ms. McGrew testified that H.B. was incarcerated for 75 days in January and December, 2003. RP at 36.

Ms. McGrew stated that she wanted to offer a mental health evaluation for H.B., but that H.B. did not address her alleged substance abuse issue, and therefore no evaluation was done. RP at 18. Exhibit 16. The social worker stated that the Department wanted a period of at least six months of sobriety. RP at 18. H.B. completed some urinalysis tests that were clean, but the social worker stated that after a while H.B. just

stopped taking the tests. RP at 19. Social worker Kathy Hammersley assumed the case from Ms. McGrew in December, 2003. RP at 106.

The visitation arrangement when H.B. was placed with the aunt early in the case was informal. RP at 21. Ms. McGrew stated that H.B. came by a couple times in a month or maybe only three or four times in a couple months or maybe only three to four times in a couple months.” RP at 21. After M.R.K. was moved to foster care, H.B. attended approximately 33 percent of her visitations. RP at 23. Ms. McGrew stated that H.B. was often late or did not show up for visits at all. RP at 23. In April, 2004, M.R.K. was moved to her paternal grandmother’s house in Grants Pass, Oregon. The Department provided bus tickets to H.B. so she could visit, but she did not do so. RP at 23.

H.B. was required to attend drug treatment pursuant to a drug conviction in Oregon. RP 24. Exhibit 13. The first dependency review was November 18, 2003. She was referred for a psychological evaluation, intensive outpatient, substance abuse group, and random urinalysis tests. RP at 25. Ms. McGrew alleged that H.B. used methamphetamine. RP at 29. Exhibits 14, 15, 16, 17, 18, 19, 23, 25, 28, 29.

Scott Nielsen, a parole and probation officer with the Multnomah County, Oregon, Department of Community Justice, had H.B. on his caseload in July, 2004, following her release from custody on a drug

conviction. RP at 53, 54. Exhibits 13, 28. As part of her release, she was required to have no contact with M.R.K. without written approval of her parole officer. RP at 59. Exhibit 29. Mr. Nielsen testified that he told her that "he was going to have to do some checking before" he would give permission to visit M.R.K. RP at 74. He wrote a letter giving her permission to have contact "as long as she's in compliance with everything through CPS." RP at 74. He stated that it would be a violation of her conditions of supervision if she visited M.R.K. while not in compliance. RP at 74.

H.B. testified by telephone from the Inverness Jail. RP at 144. H.B. stated that she did not visit her child in Grants Pass, Oregon, and that the child was not transported to Washington for visitation. RP at 131. She was not permitted to make telephone calls to the child, but was permitted to write and send gifts. RP at 131. She stated that she did not visit M.R.K. in Grants Pass because to do so would be a violation of her conditions of supervision, and that she would run the risk of reincarceration if she violated the terms of supervision. RP at 170.

H.B. had custody of M.R.K. for two years until her arrest on a warrant. RP at 148. She remained in jail for two days and subsequently signed a voluntary placement agreement. RP at 148. The VPA placed M.R.K. with her brother and his wife. She was in jail for 76 days during

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that period. RP at 149. Her visits were later reduced to one hour a week, until she was jailed again in April, 2004. RP at 149. She served 89 days. RP at 149.

H.B. testified that she was set to be released from Inverness Jail on Monday night. RP at 161. She testified that she had been drug free for 72 days. RP at 161.

Following her testimony she was taken off the line and the trial continued with closing arguments. RP at 171.

## H. ARGUMENT

### 1. THE MOTHER WAS DENIED HER CONSTITUTIONAL RIGHT TO DUE PROCESS WHERE THE ACTIONS OF THE STATE EFFECTED A DE FACTO TERMINATION OF HER PARENTAL RIGHTS

Parental rights are a fundamental liberty interest protected by the constitution. *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982). Therefore, the State may disturb the family unit only to protect a child's right to condition of minimal nurture, health, and safety. RCW 26.44.010; *In re Frederiksen*, 25 Wn. App. 726, 734, 610 P.2d 371 (1971), review denied, 94 Wn.2d 1002 (1980).

Intervention by the State into the life of the family, including the removal of a child or children from the home and termination of parental rights implicates the "most essential aspect of family privacy . . . the right

of the family to remain together without coercive inference of the awesome power of the State.” *Duchenese v. Sugarman*, 566 F.2d 817, 825 (9<sup>th</sup> Cir. 1977). Our courts have emphatically repudiated the view that “all children are wards of the State and that the State and its agencies have an unhampered right to determine what is best for a child.” *In re May*, 14 Wn. App. 765, 766, 545 P.2d 25, review denied, 87 Wn.2d 1006 (1976). The State may not disrupt and destroy the family unit simply because the child might have a better home with someone else. Rather, the court must determine that the parent’s conduct has been such that he or she has abdicated or forfeited his or her parental rights. *May*, 14 Wn. App at 768.

Nevertheless, the government has a right and obligation as *parens patriae* to intervene to protect the child when the parent’s actions or inactions endanger the child’s physical or emotional welfare. *In re Sumey*, 94 Wn.2d 757, 762, 621 P.2d 10 (1980). The State’s purported goal in dependency matters is to nurture the family unit and do all it can to see the unit remains intact “unless a child’s right to condition of basic nurture, health, or safety is jeopardized.” RCW 13.34.020; *In re Ramquist*, 52 Wn. App. 854, 861-62, 765 P.2d 30 (1988).

The primary purpose of dependency adjudication is to allow the court to order review measures and to preserve and amend family bonds, and to alleviate the problems that prompted the State’s initial

interventions. *Krause v. Catholic Community Services*, 47 Wn. App. 734, 744, 737 P.2d 280, *review denied*, 108 Wn. 2d 1035 (1987). The State must establish the existence of six conditions contained in RCW 13.34.180(1) before a court can approve a termination petition by clear, cogent, and convincing evidence.<sup>1</sup> Clear, cogent and convincing evidence exists only “when the ultimate fact at issue is shown by the evidence to be ‘highly probable.’” *In re Dependency of K.R.*, 128 Wn.2d 129, 141, 904

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<sup>1</sup> RCW 13.34.180 (1) provides:

(1) A petition seeking termination of a parent and child relationship may be filed in juvenile court by any party to the dependency proceedings concerning that child. Such petition shall conform to the requirements of RCW 13.34.040, shall be served upon the parties as provided in RCW 13.34.070(8), 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 or will, at the time of the hearing, have been removed from the 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 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 present a risk of imminent harm to the child, and documented unwillingness of the parent to receive and complete 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.

P.2d 1132 (1995). Findings of fact in a termination case must be supported by evidence more substantial than in the ordinary civil case. *In re Pawling*, 101 Wn.2d 392, 399, 679 P.2d 916 (1984); *In re Hall*, 99 Wn.2d 842, 849, 664 P.2d 1245 (1983).

Once these factors are established, the court must still determine whether termination is in the best interests of the child. RCW 13.34.190.<sup>2</sup> *In re Hall*, 99 Wn.2d 842, 848-49, 664 P.2d 1245 (1983). *In re Churape*, 43 Wn. App. 634, 638-39, 719 P.2d 127 (1986).

2. **PLACEMENT OF THE CHILD IN GRANTS PASS, OREGON, IN APRIL, 2004 WITH THE CHILD'S PATERNAL GRANDMOTHER, AND THE CONDITIONS OF H.B.'S PROBATION EXPLICITLY PREVENTING HER FROM VISITING M.R.K. UNLESS IN COMPLIANCE WITH THE DEPENDENCY ORDER, EFFECTED A DE FACTO TERMINATION OF H.B.'S PARENTAL RIGHTS**

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<sup>2</sup>RCW 13.34.190 Order terminating parent and child relationship—Findings. After hearings pursuant to RCW 13.34.110 or 13.34.130, the court may enter an order terminating all parental rights to a child only if the court finds that: (1)(a) The allegations contained in the petition as provided in RCW 13.34.180(1) are established by clear, cogent, and convincing evidence; or (b) The provisions of RCW 13.34.180(1) (a), (b), (e), and (f) are established beyond a reasonable doubt and if so, then RCW 13.34.180(1) (c) and (d) may be waived. When an infant has been abandoned, as defined in RCW 13.34.030, and the abandonment has been proved beyond a reasonable doubt, then RCW 13.34.180(1) (c) and (d) may be waived; or (c) The allegation under RCW 13.34.180(2) is established beyond a reasonable doubt. In determining whether RCW 13.34.180(1) (e) and (f) are established beyond a reasonable doubt, the court shall consider whether one or more of the aggravated circumstances listed in RCW 13.34.132 exist; or (d) The allegation under RCW 13.34.180(3) is established beyond a reasonable doubt; and (2) Such an order is in the best interests of the child.

Because parental rights are a fundamental liberty interest, the due process clause of the Fourteen Amendment protects parents' rights to the custody, care, and companionship of their children. *In re Key*, 119 Wn.2d 600, 609, 836 P.2d 200 (1992), *cert. denied*, 507 U.S. 927 (1993); *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S. Ct. 1208, 31 L.Ed.2d 551 (1972). These rights cannot be abridged without due process of law. *Key*, 119 Wn.2d at 609; *see also Santosky*, 455 U.S. at 754 ("When the state moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures"); *In re Luscier*, 84 Wn.2d 135, 137, 524 P.2d 906 (1974) (the appellate court's role is to carefully review the hearing to assure procedural fairness as required by due process of law); *In re McGee*, 36 Wn. App. 660, 663, 679 P.2d 933 (parents have cognizable and substantial interest which is constitutionally protected, and there must be protection of the parent's due process rights), *review denied*, 101 Wn.2d 1018 (1984).

In the case at bar, the mother was afforded visitation rights by the Department. She visited with M.R.K. while the child was placed in the care of an aunt and while in foster care pursuant to the voluntary placement agreement that she signed in 2002. In April, 2004, however, the Department moved the child and placed her with the paternal

grandmother in Grants Pass, Oregon, where she remained at the time of the trial. The mother did not visit the child from that date onward.

It is anticipated that the State will argue that the mother was given bus passes, therefore mitigating the distance between the mother and child, who is located in southern Oregon. The mother submits, however, that the distance from Portland to Grants Pass, necessitating a considerable amount of travel, is unreasonably onerous and created a substantial obstacle to visitation.

The unreasonableness of the State's action was amplified by the inability of the mother to visit, call or otherwise contact M.R.K. without incurring the risk of being returned to jail for a probation violation pursuant to an unrelated drug conviction. Scott Nielsen, her probation officer, did not permit her to visit M.R.K. unless she was in compliance with the order of the dependency court. Exhibit 29. This was contradictory to the language of the dependency order. The jurisdiction of the Probation Department over a Juvenile Court matter was not explained, nor was proof presented that the criminal court had concurrent jurisdiction in a Juvenile Court matter.

It is conceded that the mother was not in full compliance with the juvenile court orders. Nevertheless, she was permitted visitation pursuant to orders entered following dependency review hearings, and she

exercised that right to visitation at least a portion of the time prior to April, 2004. Her probation officer, however, effected a *de facto* termination of her parental rights by prohibiting visitation with M.R.K. unless in full compliance with the dependency order. The effect of the probation requirement was clear: H.B. stated that she was unable to visit M.R.K. in Grants Pass. She testified that she “was not allowed to go to Grants Pass, or it would be a violation of my probation.” RP at 170. The action of the probation officer made termination a *fiat accompli*.

3. **THE MOTHER WAS DENIED HER CONSTITUTIONAL RIGHT TO DUE PROCESS WHERE THE TRIAL COURT DENIED COUNSEL’S MOTION TO CONTINUE THE TRIAL UNTIL AFTER H.B.’S RELEASE FROM JAIL IN ORDER TO BE PRESENT**

“The essence of due process is the right to be heard.” *In re Myricks*, 85 Wn.2d 252, 254, 533 P.2d 841 (1975). And to ensure due process, RCW 13.34.090 provides:

Any party has a right to be represented by an attorney in all proceedings under this chapter, to introduce evidence, to be heard in his or her own behalf, to examine witnesses, to receive a decision based solely on the evidence adduced at the hearing, and to an unbiased fact finder.

RCW 13.34.090(1); *Key*, 119 Wn.2d at 611.

Moreover, Washington courts apply a three-prong test in considering the nature and extent of due process protections to which a

parent is entitled in termination proceedings; (1) the parent's interests; (2) the risk of error created by the procedure used by the State' and (3) the State's interest supporting use of challenged procedure. *Key*, 119 Wn.2d at 610-11; *Krause v. Catholic Community Services*, 47 Wn. App. 734, 738, 737 P.2d 280, *review denied*, 108 Wn.2d 1035 (1987) (quoting *Santosky*, 455 U.S. at 754.).

In *In re Darrow*, 32 Wn. App. 803, 649 P.2d 858, *review denied*, 98 Wn.2d 1008 (1982), Division I analyzed these three factors in considering what degree of due process must be afforded to parents who are incarcerated during a termination trial. More specifically, the Court addressed whether due process requires the physical presence if incarcerated parents at trial.

In analyzing that question, the *Darrow* Court noted that the North Dakota Supreme Court addressed the same issue in *In re F.H.*, 283 N.W.2d 202 (N.D. 1979). Based on its review of cases from various jurisdictions, the North Dakota court concluded that due process does not require a parent's physical presence at trial. Rather, due process is satisfied if the parent appears through counsel and by deposition or other means of discovery. *F.H.*, 183 at 209-10. The *Darrow* Court agreed and held, "The right to appear personally and defend is not guaranteed by due

process so long as the prisoner is afforded an opportunity to defend through counsel *and* by deposition or similar evidentiary techniques.” *Darrow*, 32 Wn.App. at 808 (emphasis added). The *Darrow* court noted that in cases where a parent is not immediately available to appear at trial, “a continuance after presentation of [the State’s] case in chief is one means of assuring the parent’s right to defend,” *Darrow*, 32 Wn.App. at 809.

In the case at bar, the H.B. was able to appear by telephone from the jail and give testimony. In addition, she was represented by counsel throughout the termination proceeding. In this case however, the parent was very shortly getting to be released from the jail. Her counsel added eight weeks to the length of continuance requested. Rather than weigh the *Darrow* factors, the trial court merely looked at her previous appearances in another, separate case and found that it was. that she was unlikely to appear. The proceeding that the court looked to in making its determination was not a termination matter, but the underlying dependency action. This is a separate action, filed under a different cause number, and with a different purpose than the termination trial. The stakes at termination are much higher; a parent has an even grater motivation to attend a termination trial than dependency.

Moreover, the risk of error by proceeding without the mother's presence was outweighed by her parental rights. The right to parent is a fundamental right that must be afforded full due process protection. The trial court erred by refusing to continue the matter until counsel should return from vacation. The inconvenience or prejudice to the state would have been minimal.

The court's ruling denying the motion for continuance violated H.B.'s constitutional due process guarantees. *Darrow* sets forth the trial court's procedural obligation. Although H. B. had the benefit of counsel at trial, she was never provided with a means to personally appear at all stages of the proceeding and to assist counsel in defending against the petition, and reversal is merited.

4. **THE STATE FAILED TO ESTABLISH THAT THERE IS LITTLE LIKELIHOOD THAT CONDITIONS WILL BE REMEDIED SO THAT THE CHILD CAN BE RETURNED TO HER IN THE NEAR FUTURE AS REQUIRED BY RCW 13.34.180(1)(e)**

The State must prove by clear, cogent and convincing evidence that there is little likelihood those conditions will be remedied so that the children can be returned home in the near future. RCW 13.34.180(1)(e). The conditions that led to the original finding of dependency must still exist at the time of the termination. *Krause vs. Catholic Community*

*Services*, 47 Wn. App. 734, 737 P.2d 280 (1987), *review denied*, 108 Wn. 2d 1035 (1987).

The action of the State to preclude the mother from any visitation with M.R.K. served as a *de facto* termination of H.B.'s rights. In the absence of visitation, the State failed to meet its burden of proof that conditions will be remedied so that the child can be returned home in the near future. Without visitation, which the Appellant maintains was unfairly denied to her, a finding that conditions cannot be remedied so that the children can be returned in the near future becomes *fait accompli*.

5. **THE STATE FAILED TO ESTABLISH THAT CONTINUATION OF H.B.'S RELATIONSHIP WITH HER CHILDREN WOULD DIMINISH THEIR PROSPECTS FOR EARLY INTEGRATION INTO A STABLE AND PERMANENT ENVIRONMENT AS REQUIRED UNDER RCW 13.34.180(1)(f).**

Before granting a petition for termination, the court must find "that continuation of the parent and child relationship clearly diminishes the child's prospects for early integration into a stable and permanent home." RCW 13.34.180(1)(f). This factor focuses on the relationship between the child and parent, not custody. The fact that the child's chance of adoption is necessarily diminished is not sufficient. This factor is present in all cases. *See, In re Churape*, 43 Wn. App. 634, 639, 719 P.2d 127 (1986). In the present case there was insufficient evidence presented at trial to

establish the diminished prospects for early integration into a stable environment without terminating the parent and child relationship. There is simply no evidence before the Court that permitting H.B. to maintain or resume her relationship with her child would hamper or impair her chances for integration into a stable and permanent environment at a later date.

6. **THE STATE FAILED TO PROVE BY A PREPONDERANCE OF EVIDENCE THAT TERMINATION OF H.B.'S PARENTAL RIGHTS IS IN THE CHILD'S BEST INTERESTS AS REQUIRED PURSUANT TO RCW 13.34.190**

The issue of weighing the best interests of the children is not at bar unless and until DCFS establishes all six elements of RCW 13.34.180. Assuming *arguendo* that the State has satisfied all provisions of RCW 13.34.180, the State must still prove by a preponderance that termination is in the children's best interests. The overriding goal of a termination proceeding is to serve the best interests of the child. *In re A.W.*, 53 Wn. App. 22, 33, 765 P.2d 307 (1988). At termination, the State is required to show by a preponderance of the evidence that termination is in the best interest of the children. RCW 13.34.190(2); *In re Dependency of A.S.*, 101 Wn. App. 60, 6 P.3d 11, 19 (2000). The factors involved in determining the "best interests" of a child are not capable of specification. Instead, each case must be decided upon its own merits and facts. *In re Ashauer*, 93 Wn.2d 689, 695, 611 P.2d

1245 (1980). In the present case, for the reasons argued *supra*, the State has not met its burden of showing that termination is for the child's best interest.

The trial court's pronouncements regarding the child's best interests were merely a conclusionary statement that termination is in their best interests, based in part upon the absence of evidence of a continuing bond between the parent and children, a bond that could have been promoted by providing visitation. By setting up an unreasonable hurdle for the parent, a finding that the state fulfilled RCW 13.34.190 became a self-fulfilling prophecy. The state unfairly and unreasonably capitalized upon its failure to provide necessary services, and reversal is required.

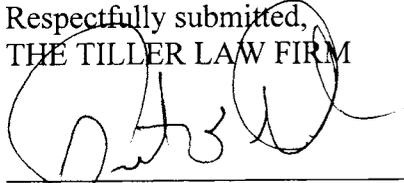
The State has not proven by a preponderance of the evidence that it is in the child's best interest that H.B.'s parental rights be terminated as required in RCW 13.34.190.

#### **I. CONCLUSION**

For the reasons set forth above, the Appellant respectfully requests that the trial court's Findings, Conclusions and Order be reversed in their entirety, and the case be remanded to the trial court with instructions that the Petition for Termination be dismissed with prejudice.

DATED: March 8, 2006.

Respectfully submitted,  
THE TILLER LAW FIRM



PETER B. TILLER - WSBA NO. 20835  
Of Attorneys for Mother

**CERTIFICATE**

I certify that I mailed a copy of the foregoing Motion for Accelerated Review, postage prepaid on March 8, 2006, to the following:

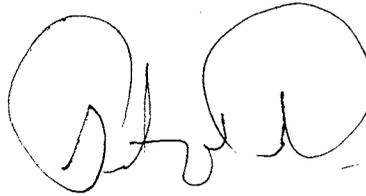
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Mr. David Ponzoha  
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WA State Court of Appeals  
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CASA/GAL  
3609 Main Street  
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Ms. H.B.  
5400 NE 40<sup>th</sup> Avenue  
Vancouver, WA 98661

Dated: March 8, 2006.



PETER B. TILLER - WSBA NO. 20835  
Of Attorneys for Mother

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STATE OF WASHINGTON

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**OCT 14 2005**

JoAnne McBride, Clerk, Clark Co.

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**SUPERIOR COURT OF WASHINGTON FOR CLARK COUNTY**

IN RE THE INTEREST OF:  
  
KING, MARINA R.  
DOB: 10-07-00

NO. 04-7-00907-5  
  
FINDINGS OF FACT, CONCLUSIONS  
OF LAW, AND ORDER OF  
TERMINATION OF PARENT-CHILD  
RELATIONSHIP OF HOLLY BOGGS,  
MOTHER

**THIS MATTER** came on regularly before the undersigned of the above-entitled court on August 10, 2005, for a hearing on the Petition for Termination of Parent-Child Relationship filed herein. Persons appearing at the hearing were: Linda Staples, attorney for Joseph King; Gayle Ihringer, attorney for the mother Holly Boggs; Kathy Hammersley, DSHS social worker; Bonnie Y. Terada, Assistant Attorney General; and Diane Warren, C.A.S.A, guardian ad litem.

**PRETRIAL MATTER**

The mother, by and through her attorney, renewed her motion to continue the termination trial for six to eight weeks at which time she will have been released from incarceration in Portland, Oregon.

The following witnesses were called and testified at the hearing: Alice McGrew and Kathy Hammersley, DSHS Social Workers; Scott Nielsen, Parole and Probation Officer, Multnomah County Department of Community Justice; Jeanne Ryan, Corrections Counselor, Multnomah County Department of Community Justice; Diane Warren, C.A.S.A., Guardian ad Litem; and Holly Boggs, mother (by telephone).

**ORIGINAL**

39  
SL

1 The court having considered the testimony of the witnesses and the other evidence  
2 presented at the hearing, the argument of counsel, and having reviewed the records and files  
3 herein; and the court being otherwise advised in the premises, now makes the following:

4 **STATEMENT OF SIBLING RELATIONSHIP**

5 The child's siblings are not subject to the jurisdiction of the court.

6 **1.0 FINDINGS OF FACT**

7 1.1 Holly Boggs was personally served and represented by appointed counsel  
8 throughout the proceedings.

9 1.2 Holly Boggs was in the Multnomah County Inverness Jail in Portland, Oregon on  
10 the day of trial with a scheduled release date of August 16, 2005. Although a short period of time  
11 is involved until her release, the court and counsel may not be able to schedule a continued  
12 hearing for several weeks. Ms. Boggs has been in and out of jail and has not been present at all  
13 hearings during the course of the dependency proceedings. There is no certainty that she would  
14 attend the hearing, if continued, after her release from jail.

15 1.3 The mother was able to present testimony on her behalf by telephone. The mother  
16 is represented by very experienced counsel, Gayle Ihringer, and all of her rights to a meaningful  
17 hearing will be accommodated through representation by Ms. Ihringer.

18 1.4 It is in the best interests of the child to deny the motion to continue the trial.

19 1.5 The child involved herein, Marina King, is the daughter of Holly Boggs and  
20 Joseph King, and was born on October 7, 2000.

21 1.6 The child has been a dependent of the State of Washington, as to Holly Boggs,  
22 under the supervision of the Clark County Juvenile Court since July 1, 2003. The court entered a  
23 dispositional orders pursuant to RCW 13.34.130.

24 1.7 The child was removed from her mother's care on October 18, 2002 and placed in  
25 foster care and the care of maternal relatives. On April 6, 2004, she was placed in the home of her  
26 paternal grandmother where she remained at the time of the hearing.

1           1.8     The mother's addiction to methamphetamines has led to an inability to adequately  
2 parent the child.

3           1.6     The mother's case presents a troubled picture. It was noted that the ruling of the  
4 court of appeals affirming the order of dependency (Exhibit 9 at page 13), which describes the  
5 mother's deficiencies at the start of the dependency is very similar to present conditions.

6           1.7     The mother has been in and out of jail due to substance abuse. She failed to  
7 comply with the conditions of parole and probation in Oregon, which specifically included  
8 substance abuse treatment. The mother's continued substance abuse was demonstrated by  
9 positive urinalyses for methamphetamines.

10          1.8     The mother's record of compliance with the requirements of the Oregon court  
11 paralleled the dependency in Washington. Services were repeatedly ordered and the mother was  
12 unable to comply.

13          1.9     The substance abuse evaluations and treatment records indicate that the mother is  
14 in denial of addiction and has a long term need for substance abuse treatment. Exhibit 15 shows  
15 the mother's use of methamphetamines began in 1999 and continued into 2005. The mother was  
16 in victim's stance. She testified that she had been clean and sober for 72 days, which corresponds  
17 to the start of her incarceration. In March 2004, Northwest Recovery Center (Exhibit 18)  
18 indicates that the mother was completely manipulative, and based on her behavior, she never  
19 intended to comply with expectations and had no motivation for positive change. Northwest  
20 Recovery Center recommended treatment for one year. The assessment in October 2004 (Exhibit  
21 23) shows the mother was extremely resistant to treatment and denied her drug use. She appeared  
22 to use criminal thinking to justify her actions.

23          1.10    There is little or no hope that the mother will be in a position to remedy her  
24 addiction when she is released from jail. Her problems are long-standing and it will take a  
25 lengthy period of time to remedy her parental deficiencies if she wishes to do so.

26

1 1.11 The department expressly and understandably offered and re-offered the mother  
2 all necessary services, reasonably available and capable of correcting her parenting deficiencies.

3 1.12 The child came into care with serious deficiencies and needs.

4 1.13 The major barrier to contact with her child was due to the mother's failure to  
5 willingly complete desperately needed services which were offered to her.

6 1.14 The mother was ably represented by her appointed attorney throughout the  
7 proceedings.

8 1.15 There is little likelihood that conditions which led to the dependency will be  
9 remedied so that the child can be returned to the mother in the near future.

10 1.16 The child needs permanence and continuing the parent and child relationship with  
11 her mother clearly diminishes her prospects for integration into a stable and permanent adoptive  
12 home. There is a preference in the statute for termination rather than guardianship for this child.

13 1.17 Holly Boggs is unfit to continue the parent-child relationship.

14 1.18 The best interest of the child are served by termination of the mother's parental  
15 rights.

## 16 2.0 CONCLUSIONS OF LAW

17 2.1 This court has jurisdiction over: the person of the above-named minor child; the  
18 subject matter; and Holly Boggs, mother of the minor child; and all other persons claiming  
19 parental interest in said child.

20 2.2 Good cause does not exist to continue the termination trial.

21 2.3 The Findings of Fact as they relate to RCW 13.34.180(1)(a), (b), (c), (d), (e) and  
22 (f) have been proven by clear, cogent, and convincing evidence.

23 2.4 Termination of the parent-child relationship is found to be in the child's best  
24 interests by a preponderance of the evidence.

25 2.5 The parent-child relationship between the above-named minor child and Holly  
26 Boggs should be terminated pursuant to RCW 13.34.190.



1 ROB MCKENNA  
Attorney General

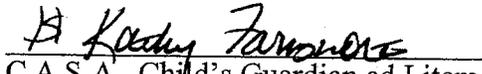
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4 BONNIE Y. TERADA  
Assistant Attorney General  
WSBA # 17335

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6 APPROVED AS TO FORM AND NOTICE  
OF PRESENTATION WAIVED:

7  
8 

9 GAYLE A. IHRINGER  
Attorney for Mother  
WSBA # 9612

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11   
12 C.A.S.A., Child's Guardian ad Litem

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