

NO. 49737-9-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

IN RE THE DEPENDENCY OF:

A.Z.B., Jr.,
Minor Child,

A.B. (FATHER),
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Christine Schaller, Judge

BRIEF OF APPELLANT/MOTION FOR ACCELERATED REVIEW

Skylar T. Brett
Attorney for Appellant

Law Office of Skylar Brett
P.O. Box 18084
Seattle, WA 98118
(206) 494-0098
skylarbrettlawoffice@gmail.com

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ISSUES AND ASSIGNMENTS OF ERROR..... 1

STATEMENT OF FACTS AND PRIOR PROCEEDINGS..... 3

ARGUMENT..... 8

**I. The state presented insufficient evidence to establish
that the child was dependent..... 8**

**II. The state failed to present the evidence necessary to
justify out-of-home placement for the child. 13**

A. The court erred by finding that there was no parent
available to care for the child in the home when both
parents were, in fact, ready and willing to act as placement.
14

B. The state failed to make reasonable efforts to preclude
the need for out-of-home placement. 15

CONCLUSION 17

TABLE OF AUTHORITIES

WASHINGTON CASES

In re Dependency of M.S.D., 144 Wn. App. 468, 182 P.3d 978 (2008) ... 11

In re Dependency of R.W., 143 Wn. App. 219, 177 P.3d 186 (2008)..... 13

In re Dependency of S.M.H., 128 Wn. App. 45, 115 P.3d 990 (2005) 11

In re Dependency of T.L.G., 126 Wn. App. 181, 108 P.3d 156 (2005) 9, 10

In re J.F., 109 Wn. App. 718, 37 P.3d 1227 (2001) 11

In re S.G., 140 Wn. App. 461, 166 P.3d 802 (2007) 12

In re Welfare of A.B., 168 Wn.2d 908, 232 P.3d 1104 (2010), *as amended*
(Sept. 16, 2010)..... i, 12, 1

In re Welfare of X.T., 174 Wn. App. 733, 300 P.3d 824 (2013)..... 10

Matter of B.P. v. H.O., 186 Wn.2d 292, 376 P.3d 350 (2016) 9, 10, 17

Matter of Welfare of JB, Jr., --- Wn. App. ---, --- P.3d ---, 47903-6-II,
2016 WL 7449400 (Wash. Ct. App. Dec. 28, 2016) 9

Miles v. Miles, 128 Wn. App. 64, 114 P.3d 671 (2005) 9

State v. Fuentes, 183 Wn.2d 149, 352 P.3d 152 (2015) 14

WASHINGTON STATUTES

RCW 13.34.020 13

RCW 13.34.030 7, 8, 14

RCW 13.34.110 9

RCW 13.34.130 13, 14, 15, 16, 17

RCW 26.44.063 13

ISSUES AND ASSIGNMENTS OF ERROR

1. Substantial evidence does not support the court's finding of dependency.
2. The court erred by finding the child dependent.
3. The court erred by finding that the father's mental health diagnosis "...leads to concerns that he may engage in severe emotional outbursts that would affect [the child]'s development." CP 45.
4. The court erred by entering a finding of fact based solely on hearsay testimony.
5. The court erred by entering Finding of Fact 2.3.
6. The court erred by entering Conclusion of Law 3.4.

ISSUE 1: A parent's mental illness, alone cannot form the basis for a dependency. Rather, there must be some evidence that the parent's mental health affects his/her parenting. Is the court's finding of dependency supported by insufficient evidence when the state showed only that the parents had been diagnosed with mental health conditions, not that their conditions affected their parenting?

7. The court erred by ordering the child into out-of-home placement. CP 45.
8. The court erred by finding that "it is currently contrary to the child's welfare to return home." CP 45.
9. The court erred by finding that "there is no parent or guardian available to care for the child." CP 45.

ISSUE 2: A dependent child may not be ordered into out-of-home placement unless (a) there is no parent available, (b) there is no parent willing to care for the child, or (c) The court finds, by clear, cogent, and convincing evidence, a manifest danger exists that the child will suffer serious abuse or neglect if the child is not removed from the home. Did the court err and relieve the state of its burden of proof by ordering out-of-home placement based on the finding that the parents were

unavailable when they were ready and willing to take the child into their home at any time?

10. The court erred entering Finding of Fact 2.5.

ISSUE 3: The court may order a dependent child into out-of-home placement only if the state proves that it has made reasonable efforts to eliminate the need for removal or that “the health, safety, and welfare of the child cannot be protected adequately in the home.” Did the court err by finding that the child could not be adequately protected in the home when there was no evidence that he was placed at any risk of harm while living with his parents?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

A.Z.B., Sr. is the father of A.Z.B., Jr., who was born in October 2014. RP 8.

The father, mother, and child lived next door to the child's paternal grandmother. RP 17. The grandmother sometimes helped to care for the child during the day. RP 17-18. She also drove the mother to the child's medical appointments. RP 356. Occasionally, the grandmother took the child to his appointments with the Women, Infants, and Children (WIC) program by herself. RP 356.

At one such appointment, shortly before the child's first birthday, a WIC employee mistakenly believed that the child did not have any health insurance and had not received any medical care. Ex. 18, p. 1.¹ She also mistakenly believed that the child was living with his grandmother and that his parents were not around. Ex. 18, p. 1.

Based on these beliefs, the WIC employee made a referral to the Department of Social and Human Services (the department), alleging medical neglect. Ex. 18.

The department found that the allegations of medical neglect were unfounded. RP 114, 122. In the meantime, however, the department

¹ In fact the child did have medical insurance and his parents had taken him to the doctor multiple times. RP 40; Ex. 17.

learned that both parents had been previously diagnosed with mental health issues. RP 90, 93.

The department removed the child from his home and asked the court to find him dependent. CP 207-17, 237-40.

At the fact-finding hearing, the child's grandmother testified that the child did not live with her but that she helped babysit regularly and visits the family every day. RP 341. She said that she took the child to some of his medical appointments because her car worked and the parents' car did not. RP 356. She said she was happy to help out and to give the parents a break. RP 373.

She said that all of the child's needs were met by his parents. RP 379.

Dr. Landon Poppleton testified regarding his psychological evaluations of the parents. RP 136-221. He noted that the father "demonstrate[d] several parenting behaviors that have been associated with positive outcomes in children." Ex. 2, p. 11. These included speaking warmly to the child, flexibly accommodating the child's needs, and nurturing behaviors. Ex. 2, p. 11. He found that the father and child were bonded to one another. Ex. 2, p. 12.

Dr. Poppleton diagnosed the father with paranoid schizophrenia. Ex. 2, p. 11.² He noted that a mental health condition, alone, does not preclude a parent from caring for a child. RP 144. Rather, parenting ability depends on the severity of the condition and the parents' functioning. RP 144.

Dr. Poppleton found that the father had good insight into his condition, which was a positive sign. RP 156. He found that the father had a better prognosis than many other people with schizophrenia because of the nature of his illness, his understanding of his symptoms, and his family support. RP 194-95.

Dr. Poppleton testified that, statistically speaking, children of parents with schizophrenia have a more difficult time meeting developmental milestones. RP 145.

He noted, however, that the father's apparent ability to control his symptoms through self-talk would decrease the risk to this child, in particular. RP 207. Dr. Poppleton also said that he did not have any information indicating that the father's condition had had any negative impact on the child. RP 214. He said that he did not see anything out of the ordinary in his observation of the family. RP 214.

² Neither of the parents were receiving mental health treatment at the time of their evaluations. *See* Ex. 2-3. The father underwent treatment several years before, where he learned skills for coping with his symptoms. RP36.

Dr. Poppleton diagnosed the child's mother with persistent depression, social anxiety, post-traumatic stress disorder (PTSD), a possible psychotic disorder, and a possible intellectual disability. Ex. 3, p. 10. He found that these conditions had the ability to affect the mother's attachment to her child, but also noted that the mother was attentive to the child and demonstrated numerous pro-social behaviors with her son. Ex. 3, p. 11. He found that the mother was clearly bonded with her child. Ex. 3, p. 12.

Dr. Poppleton also noted that it was a protective factor for the child that the parents were able to reach out for support from the grandmother and other extended family. RP 181, 188.

The department social worker also testified that untreated mental health conditions don't necessarily present a safety risk to a child. RP 299. But she still said that the father was not safe and appropriate for the child because he was unwilling to develop a working relationship with the department and was not receiving further mental health treatment. RP 301.

The social worker felt that the mother was not an appropriate parent because she also was not receiving mental health treatment and needed a neurocognitive assessment. RP 302-02. The social worker

claimed that the mother needed more parenting skills, but did not point to any specific skills that she lacked. RP 302.

The court found the child dependent under RCW 13.34.030(6)(c), concluding that he had no parent capable of adequately caring for him. CP 45.

The court did agree with the department's allegations that the child had been neglected. CP 45.

The court's findings of fact were limited to the following:

After the immunizations that [the child] received at birth, doctor's appointments and WIC appointments that [the child] attended were scheduled by the paternal grandmother.

[The child] had missed some of his immunizations while he was in the care of his parents.

While in his parent's [sic] care, [the child] spent a significant amount of time in the care of his paternal grandmother.

[The father]'s psychological evaluation indicates that he suffers from paranoid schizophrenia. This leads to concerns that he may engage in severe emotional outbursts that would affect [the child]'s development.

[The mother]'s psychological evaluation indicates that she suffers from PTSD due to past sexual abuse, and persistent depressive disorder. Although undiagnosed, [the mother] also scored well below average in intelligence testing.

[The mother] often differs [sic] to [the father].

Both parents love and care for their child.

CP 44-45.

The trial court also ordered that the child remain in out-of-home placement. CP 45. The court made this finding based on the conclusion only that “there is no parent or guardian available to care for the child.” CP 45.

The court did not find that the department had offered services in a reasonable effort to prevent out-of-home placement. CP 46. Instead, the court found that such services were not necessary because “the health, safety, and welfare of the child cannot be adequately protected in the home.” CP 46.

This timely appeal follows. CP 256.

ARGUMENT

I. THE STATE PRESENTED INSUFFICIENT EVIDENCE TO ESTABLISH THAT THE CHILD WAS DEPENDENT.

A “dependent child” is defined, *inter alia*, as one who:

Has no parent, guardian, or custodian capable of adequately caring for the child, such that the child is in circumstances which constitute a danger of substantial damage to the child's psychological or physical development.

RCW 13.34.030(6)(c).

The state bears the burden of proving that a child is dependent by a preponderance of the evidence.³ RCW 13.34.110(1).

Mental illness is not, in and of itself, evidence that a parent is incapable of caring for his/her child. *In re Dependency of T.L.G.*, 126 Wn. App. 181, 203, 108 P.3d 156 (2005). “Children may not be removed from their homes merely because their parents are mentally ill.” *Id.*

Rather, the court must look to a person’s actual parenting ability. *Id.*

Here, the state did not present any evidence that the father’s mental health conditions affected his parenting, much less that they made him incapable of caring for his child.

In fact, the court found only that the father’s conditions create a risk that he may engage in emotional outbursts in front of the child. CP 45. The court did not find that the child had been placed at risk of any other type of harm by the father’s mental health diagnoses.

But the only evidence of any type of emotional outburst by the father was offered as hearsay evidence by the social worker.⁴ RP 330-331.

³ The trial court’s legal conclusions must be supported by its findings of fact. *Miles v. Miles*, 128 Wn. App. 64, 70, 114 P.3d 671 (2005). Its findings of fact must be supported by substantial evidence. *Matter of B.P. v. H.O.*, 186 Wn.2d 292, 313, 376 P.3d 350 (2016).

Substantial evidence is “evidence that would persuade a fair-minded rational person of the truth of the declared premise.” *Matter of Welfare of JB, Jr.*, --- Wn. App. ---, --- P.3d ---, 47903-6-II, 2016 WL 7449400, at *8 (Wash. Ct. App. Dec. 28, 2016).

The social worker was not even sure if the child had been present when the father became upset on that one occasion at the department office. RP 331.

The court's finding that the father posed a risk of exposing the child to damaging emotional outbursts is not supported by the evidence and must be vacated. *B.P.*, 186 Wn.2d at 313.

The only other indication that the father's mental illness posed a risk to the child was Dr. Poppleton's assertion that, statistically, children of parents with those conditions are more likely to experience difficulty reaching developmental milestones. RP 145. But Dr. Poppleton also said that he had no indication that the father's condition, specifically, had any negative impact on the child. RP 214. Dr. Poppleton also noted that the father's apparent ability to control his symptoms through self-talk would decrease the risk to his child. RP 207.

A dependency based on Dr. Poppleton's statistical evidence would amount to impermissible removal of the child from the home "merely because [his] parents are mentally ill." *T.L.G.*, 126 Wn. App. at 203.

⁴ The social worker's hearsay testimony cannot form the basis of a substantive finding of fact. *In re Welfare of X.T.*, 174 Wn. App. 733, 738-39, 300 P.3d 824 (2013). The court's finding regarding alleged emotional outbursts by the father must be vacated on that basis alone. *Id.*

Accordingly, the dependency cannot stand based on the court's findings regarding the parents' mental health diagnoses. *Id.*

But the court's only other findings in support of the dependency are those that the parents relied on the child's grandmother for support and babysitting. CP 44-45. Those findings of fact do not support the conclusion that the parents are incapable of meeting the child's needs.

In analogous contexts, the Court of Appeals has found that leaving children alone with third parties only represents a parental deficiency when those third parties pose a known risk of harm to the child. *See e.g. In re Dependency of M.S.D.*, 144 Wn. App. 468, 481, 182 P.3d 978 (2008) (court erred by finding child dependent based on exposure of child to the mother's boyfriend who had a criminal history but posed no risk to the child); *In re Dependency of S.M.H.*, 128 Wn. App. 45, 57, 115 P.3d 990 (2005) (mother put her children at risk of harm by permitting them to see their father who had admitted to sexually abusing children in the past and who had been recommended to have no contact with any children); *In re J.F.*, 109 Wn. App. 718, 731, 37 P.3d 1227 (2001) (mother put child at risk by sending her on a road trip with a near stranger who had extensive violent criminal history and was prohibited from seeing his own children).

Here, the state did not present any evidence that the child was harmed by spending time with his grandmother. *See RP generally.*

Indeed, well-functioning families regularly rely on grandparents for assistance with childcare. Here, the grandmother lived next door to the parents and child, saw the family daily, provided babysitting help when needed, and helped ensure that the child made it to his medical appointments.

In other cases, the department regards the support of extended family as a positive thing for a family unit. *See e.g. In re S.G.*, 140 Wn. App. 461, 469, 166 P.3d 802 (2007); *In re Welfare of A.B.*, 168 Wn.2d 908, 923, 232 P.3d 1104 (2010), *as amended* (Sept. 16, 2010).

Here, the parents' ability to rely on their natural support network represents a strength, not a weakness.

The state did not present any evidence (and the court did not find) that the child had been put at risk of any real harm while in the care of his parents. The facts that the court did find -- that the parents had been diagnosed with mental health disorders and that they relied on the child's grandmother for parenting support -- are insufficient to justify a dependency finding.

The court's dependency finding must be reversed for insufficient evidence.

II. THE STATE FAILED TO PRESENT THE EVIDENCE NECESSARY TO JUSTIFY OUT-OF-HOME PLACEMENT FOR THE CHILD.

Parents have a fundamental liberty interest in the care and custody of their children. *In re Dependency of R.W.*, 143 Wn. App. 219, 224, 177 P.3d 186 (2008).

In dependency matters, the state's goal is to nurture the family unit and to keep the family intact "unless a child's right to conditions of basic nurture . . . health, or safety is jeopardized." RCW 13.34.020.

The child's best interest is the primary concern in making placement decisions. *R.W.*, 143 Wn. App. at 223. However, it is presumed that the child's best interest is in remaining with his or her family, and the state should remove a child from parental care only if it finds risk to the child's health, safety, and welfare and reasonable efforts have been made by DSHS to prevent or eliminate the need for that removal. RCW 13.34.130(5).

Moreover, the Legislature has clearly and unambiguously declared its intent that the disposition of a dependency case shall be the one "that least interferes with family autonomy" while still protecting the child. RCW 13.34.130(1)(a). The Legislature has further declared that it finds "removing the child from the home has the effect of further traumatizing the child . . ." RCW 26.44.063.

- A. The court erred by finding that there was no parent available to care for the child in the home when both parents were, in fact, ready and willing to act as placement.

The court may not order out-of-home placement for a dependent child unless:

- (a) There is no parent or guardian available to care for such child;
- (b) The parent, guardian, or legal custodian is not willing to take custody of the child; or
- (c) The court finds, by clear, cogent, and convincing evidence, a manifest danger exists that the child will suffer serious abuse or neglect if the child is not removed from the home ...

RCW 13.34.130(5).

In short, in cases in which the child's parents are both available and willing to care for him/her, the statutory scheme creates a significantly higher burden (clear, cogent, and convincing evidence of a manifest danger of serious abuse or neglect) than that required to find dependency alone. RCW 13.34.130(5).

Here, however, the court skirted the requirement of that higher finding by ruling that the parents were not actually available to care for the child in their home. CP 45.

The term "available" is not defined by the statute. *See* RCW 13.34.030. Accordingly, it must be construed according to its plain meaning. *State v. Fuentes*, 183 Wn.2d 149, 160, 352 P.3d 152 (2015).

The parents in this case had a home that was appropriate for the child. RP 67-68. They were ready and willing to care for the child fulltime. RP 425.

The parents were available for an in-home placement according to the plain meaning of that term.

The court erred by ordering an out-of-home placement based on the conclusion that the parents were not available to care for the child.

This error relieved the state of its burden of proving by clear, cogent, and convincing evidence that there was a manifest danger of serious abuse or neglect if the child was not placed out of the home – a burden that the state would likely not have been able to meet in this case. RCW 13.34.130(5).

The court's order for out-of-home placement must be vacated. RCW 13.34.130(5).

B. The state failed to make reasonable efforts to preclude the need for out-of-home placement.

Because of its interest in preserving the family and preventing trauma to the child being separated from his or her parents, the legislature has specified that a child will be forced into an out-of-home placement "only" if the state proves that it has made reasonable efforts to prevent or

eliminate the need for removal of the child from the family. RCW 13.34.130(2).

To that end, the dependency statute requires the department to provide a family with services to preclude out-of-home placement and requires the court to list those services that have been offered in the placement order. RCW 13.34.130(5).

The only exception to the “reasonable efforts” requirement is for cases in which “the health, safety, and welfare of the child cannot be protected adequately in the home.” RCW 13.34.130(5).

In ordering this child placed out of the home, the trial court did not point to any services that had been provided in a reasonable effort to maintain in-home placement. CP 46. Instead, the court eluded that requirement by finding that the child’s health, safety, and welfare could not be adequately protected in the home. CP 46.

But that conclusion is not supported by the court’s findings of fact or by the state’s evidence at the hearing. Indeed, the court’s only finding specifying any risk to the child in the home is speculation that he may have been exposed to outbursts on the part of the father. CP 45. As argued above, that finding is not supported by the evidence and must be vacated.

The court's finding that the child could not be adequately protected in the home is not supported by the evidence and must be vacated. *B.P.*, 186 Wn.2d at 313.

Out-of-home placement is precluded in this case because the state failed to undertake reasonable efforts to permit the child to remain in his parents' home. RCW 13.34.130(5). The court's order for out-of-home placement must be vacated. RCW 13.34.130(5).

CONCLUSION

The state's evidence and the court's findings of fact are insufficient to justify a finding of dependency. The court's dependency order must be reversed.

In the alternative, the court erred by finding that no parent was available for an in-home placement. The court also erred by failing to require the state to make reasonable efforts to prevent the need for out-of-home placement. The court's order placing the child out of his parents' home must be reversed.

Respectfully submitted on January 24, 2017.



Skylar T. Brett, WSBA No. 45475
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief/Motion for Accelerated Review postage prepaid, to:

A.B. (father)
20027 Steelhead Ct. SE
Tenino, WA 98589

I delivered an electronic version of the brief, using the Court's filing portal, to:

Attorney General's Office
NashC@atg.wa.gov
shsappealnotification@atg.wa.gov

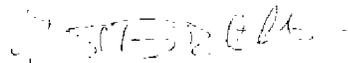
Lisa Tabbut, attorney for mother
ltabbutlaw@gmail.com

Lise Ellner
liseellnerlaw@comcast.net

I filed the Appellant's Opening Brief/Motion for Accelerated Review electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on January 24, 2017.



Skylar T. Brett, WSBA No. 45475
Attorney for the Appellant

ELLNER LAW OFFICE

January 24, 2017 - 4:42 PM

Transmittal Letter

Document Uploaded: 6-497379-Appellant's Brief.pdf

Case Name: In re A.Z.B., Jr.

Court of Appeals Case Number: 49737-9

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Skylar T Brett - Email: skylarbrettlawoffice@gmail.com

A copy of this document has been emailed to the following addresses:

shsappealnotification@atg.wa.gov

NashC@atg.wa.gov

liseellnerlaw@comcast.net

ltabbutlaw@gmail.com