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NO. 51381-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

IN RE THE WELFARE OF K.M.T.

M.T.,

Appellant,

v.

C.M. and E.M.,

Respondents.

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

APPELLANT'S OPENING BRIEF

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A. INTRODUCTION

This is a second appeal following this Court's reversal of the first order terminating M.T.'s parental rights. M.T. is a veteran who served two tours of duty in Afghanistan with the United States Army. Just before his first deployment, his girlfriend broke up with him, then told him she was pregnant. She gave birth while M.T. was serving on convoy duty in Afghanistan, and cut off all contact with him when the child was just a few months old. She married another man and wanted her new husband to adopt the child. They petitioned for termination of M.T.'s rights while he was serving his second tour of duty in Afghanistan.

M.T. has been medically discharged from the Army and wishes to develop a relationship with his daughter. The trial court nevertheless granted the termination petition, without finding that M.T. is unfit to parent or that his failure to perform parental duties was "under circumstances showing a substantial lack of regard for his parental obligations." This Court reversed for these reasons, and did not reach M.T.'s challenge to the sufficiency of the evidence for termination.

On remand, the trial court still failed to find either unfitness or circumstances showing a substantial lack of regard. Moreover, the record would not have supported such a finding. This Court should reverse and remand for dismissal of the petition for insufficient evidence.

B. ASSIGNMENTS OF ERROR

1. The trial court erred and did not comply with this Court's mandate when it failed to address unfitness or "substantial lack of regard" in its revised findings of fact, conclusions of law, and order terminating parental rights.

2. Insufficient evidence supports the termination order.

3. In the absence of substantial evidence, the trial court erred in entering Finding of Fact 2.7.3.¹

4. In the absence of substantial evidence, the trial court erred in entering Finding of Fact 2.7.4.

5. The trial court erred in entering Conclusion of Law 3.2.

C. ISSUES

1. In the first appeal of the termination order, this Court reversed and remanded because the trial court failed to find M.T. was an unfit parent or that any failure to perform parental duties was under circumstances showing a substantial lack of regard for parental obligations. The findings entered following remand do not address these

¹ The challenged order is at CP 326-29. It is not attached to the brief because it contains the parties' full names in numerous places. *See* General Order 2017-1. Note that, as with the original termination order, this order mistakenly uses the mother's first name when describing the child in Finding 2.4.

issues. Did the trial court fail to comply with this Court's mandate?

(Assignment of Error 1).

2. Due process prohibits termination of parental rights unless the proponent proves, by clear, cogent, and convincing evidence, that the parent is "unfit." In the private termination/adoption context, this requirement is satisfied only if the proponent proves the parent's failure to perform parental duties occurred under "circumstances showing a substantial lack of regard for his or her parental obligations." Does insufficient evidence support the termination of M.T.'s rights, where any "failure" on M.T.'s part occurred under circumstances where he was thousands of miles away serving two tours of duty in Afghanistan, and the mother of the child cut off all contact with him? (Assignments of Error 2-5).

D. STATEMENT OF THE CASE

1. M.T. serves two tours of duty with the Army in Afghanistan while his ex-girlfriend has their child and cuts off contact.

M.T. joined the United States Army in August of 2006 at the age of 20, and eventually rose to the rank of sergeant. RP (4/23/15) 89-90. While he was stationed at Fort Lewis (now Joint Base Lewis-McChord) in

the early summer of 2009, he dated C.M..² RP (4/23/15) 91. C.M. ended the relationship after just a few weeks. RP (4/21/15) 37, 40.

In July of 2009, five days before M.T. was deployed to Afghanistan, C.M. told him she was pregnant. RP (4/23/15) 91; *In re K.M.T.*, 195 Wn. App. 548, 552, 381 P.3d 1210 (2016). Because the two had barely dated, and because M.T. was on the verge of going to war, he suggested abortion. RP (4/21/15) 39. C.M. decided against it, and the two began discussing parenting plans and child support. Their relationship was fragile and the discussions were heated. During the next several months, while M.T. was serving his country thousands of miles away, he and C.M. had contentious conversations online and by telephone, arguing about potential custody arrangements and other issues. RP (4/21/15) 40, 44, 48, 53-58, 60-61; RP (4/23/15) 202, 204, 208-09; Exs. 1, 2, 5.³

Some time after K.M.T. was born in March, C.M. took her to the pediatrician because she was sick. C.M. did not feel the doctor was responsive, so she called M.T. in Afghanistan and put him on the phone with the doctor. M.T. yelled at the pediatrician, including using some

² At the time, her initials were C.S.. Ex. 1; RP (4/21/15) 49.

³ Exhibits 1, 2, and 5 are online conversations between C.M. and M.T. while M.T. was in Afghanistan. The Ms presented these exhibits, and C.M. acknowledged that many of her portions of the conversations are missing from the exhibits. She also admitted and that she, like M.T., was “mean.” RP (4/23/15) 157; Ex. 5 at 1.

offensive language, in an effort to ensure K.M.T.'s medical needs were being addressed adequately. RP (4/21/15) 57-58; RP (4/23/15) 143.

M.T.'s intervention was "heroic and, apparently, got the job done. The kid got the care." RP (4/23/15) 209 (trial court's ruling).

After serving in Afghanistan for a year, M.T. returned to Washington briefly in the summer of 2010. As soon as his airplane landed, he was served with a temporary restraining order preventing him from seeing K.M.T. RP (4/21/15) 68; RP (4/23/15) 95. M.T. immediately went to court and succeeded in having the order dismissed. RP (4/23/15) 95. He was able to meet and spend time with his daughter before being deployed again. RP (4/21/15) 48; RP (4/23/15) 95-97.

M.T. was stationed in Missouri for four months starting in October, 2010. RP (4/23/15) 97-98. Around the same time, C.M. cut off all contact with him. RP (4/23/15) 97; *K.M.T.*, 195 Wn. App. at 553. After four months of training in Missouri, M.T. was stationed in Germany, where he was based for the next three and a half years. RP (4/23/15) 98, 104. During that time, he was again deployed to Afghanistan in 2012. RP (4/23/15) 98; *K.M.T.*, 195 Wn. App. at 553.

Over the years when M.T. was thousands of miles away enduring life-threatening circumstances, he wanted to Skype with his young daughter, but C.M. blocked all of M.T.'s online contact attempts and

refused his calls. RP (4/23/15) 102, 163; CP 15; *K.M.T.*, 195 Wn. App. at 553-54. She also returned a check he sent for presents, and even sent back a gift M.T.'s mother had sent for K.M.T. RP (4/23/15) 162; *K.M.T.*, 195 Wn. App. at 553. She said did so because she did not want to have to write a thank-you note. RP (4/23/15) 162-63.

2. The child's mother wants her new husband to adopt the child, so she petitions for termination of M.T.'s rights.

Also during this time, C.M. met and married E.M., and they eventually had two children together. RP (4/21/15) 32-33. Although M.T. had sent C.M. small monthly checks during the first year of K.M.T.'s life, and also paid all of the past-due child support at the end of that year, his wages were no longer garnished after C.M. married E.M.. RP (4/23/15) 98, 164-66, 180.

The Ms wanted E.M. to adopt K.M.T., so they petitioned to terminate M.T.'s parental rights while M.T. was still serving abroad. CP 1. The petition was stayed under the Servicemembers' Civil Relief Act. RP (4/21/15) 6, 27.

In March 2014, M.T. was medically discharged from the Army, and he moved in with his parents in Ohio. RP (4/23/15) 89-90, 104-05. As a result of his service, M.T. suffered from PTSD, a back injury, and a traumatic brain injury. RP (4/23/15) 89-90, 105-06; *K.M.T.*, 195 Wn.

App. at 554. M.T. lived with his parents because of the trauma and because money was tight while he waited for paperwork to be processed. After four months, the V.A. rated him 100 percent disabled because of his war injuries. *K.M.T.*, 195 Wn. App. at 554; RP (4/23/15) 105-06.

While M.T. was in Ohio awaiting his medical paperwork, he was served with E.M.'s adoption petition. RP (4/23/15) 106. M.T. came to Washington briefly in the summer of 2014, but he continued to live with his parents in Ohio while he ensured his financial stability. RP (4/23/15) 107-08. Once those matters were settled, he planned to take advantage of the V.A.'s vocational rehabilitation program. RP (4/23/15) 108. M.T. opposed termination of his parental rights, and wished to develop a relationship with his daughter. RP (4/23/15) 106, 129-32.

3. M.T.'s parental rights are terminated despite the absence of a finding that M.T. is unfit or that he demonstrated a substantial lack of regard for his parental duties.

The case nevertheless proceeded to trial. M.T. testified about his desire to have a relationship with his daughter and the futility of his efforts to do so in light of C.M.'s refusal to communicate with him while he was based abroad and serving two tours of duty in Afghanistan. RP (4/23/15) 89-135. He thanked E.M. for being a good stepfather to K.M.T., and emphasized that he was "not trying to strip her from the family that she

has.” RP (4/23/15) 132, 150. Rather, he just wanted K.M.T. to be able to have the additional benefit of a relationship with her biological father and his family. RP (4/23/15) 129-32.

M.T. stated that it would not be in K.M.T.’s best interests to terminate her biological father’s rights: “I think that the best interest for [K.M.T.] would be to have her entire family. Everybody loves her in my family.” RP (4/23/15) 130. M.T. explained that it was important to allow his involvement in K.M.T.’s life now, while she is still young, so that she does not suffer adverse psychological effects in the future. RP (4/23/15) 149. He said, “I don’t want her to grow old and get told that you have a father, but he wasn’t there for you, when I really want to be here for her.” (4/23/15) RP 149.

M.T. plans to move back to Washington and petition for a parenting plan that would permit K.M.T. to spend time with him even though the mother and stepfather have primary custody. RP (4/23/15) 149. He is sensitive to the fact that he and K.M.T. have not seen each other in a long time, and wants to approach their reintroduction with care. He said, “However slowly it may be, I’m willing to go [as] slowly as she sees fit.” RP (4/23/15) 150. M.T. also noted that his V.A. benefits would cover K.M.T.’s college education. RP (4/23/15) 133.

Following testimony and closing arguments, the court issued its ruling. RP (4/23/15) 200-212. The court did not find that M.T. was unfit or that his failure to perform parental duties was under circumstances demonstrating a substantial lack of regard for those duties. RP (4/23/15) 200-212; CP 29-31; *K.M.T.*, 195 Wn. App. at 557. On the contrary, the judge recognized that “under the circumstances of an infant and [M.T.] being 7,000 miles or so away, it is harder to be a parent in the more traditional sort of sense of holding the child, feeding the child, reading the child a bedtime story, which is so critical to being a parent.” RP (4/23/15) 201. The court found that both C.M. and M.T. squabbled about custody, money, and child care in 2009 and 2010, and that when M.T. yelled at the pediatrician from the phone in Afghanistan, it was because C.M. sought his help and because both parents were very concerned about the child’s condition. RP (4/23/15) 202-09.

The court found that although M.T. was verbally abusive toward C.M., C.M. was responsible for cutting off all contact and preventing M.T. from performing the parenting functions that might be possible from a long distance in a war zone. RP (4/23/15) 209-10. The court said:

Leaving the country is a big deal here. It is a big deal as part of this case because M.T. spent most of his time outside the country during all of this. It is difficult, I would think, by any measure, for somebody to try to establish a relationship with an infant who is, basically, incapable of

much communication whatsoever, at least for quite some time, by social media and even by the phone. Skype might have been nice.

RP (4/23/15) 200.

The court characterized M.T. as giving up emotionally after C.M. prevented him from developing a relationship with the child. RP (4/23/15) 211. Although he acknowledged that M.T.'s efforts to parent appeared "futile" in light of C.M.'s intransigence and M.T.'s service in Afghanistan, the judge faulted M.T. for his failure to keep trying. RP (4/23/15) 210-11.

The court told M.T.:

You were not well-equipped to deal with anything at that time because you were under stress in the service. Those are all genuine things that are going on here, but you know, life goes on and this child deserved better.

RP (4/23/15) 211.

The court recognized the positive impact that a relationship with a birth parent has on a child, and stated, "One worries if by terminating your parental rights, we are actually doing harm to [K.M.T.]." RP (4/23/15) 212. But because K.M.T. was living full-time with her mother and stepfather and had barely seen M.T., the court ruled that termination was in the child's best interest. RP (4/23/15) 213. Brief written findings and an order terminating the parent-child relationship were entered on May 8, 2015 without a hearing. CP 29-33.

4. This Court reversed because of failure to find unfitness or substantial lack of regard for parental duties, but the trial court re-entered the termination order without making those findings.

M.T. appealed and raised several issues. This Court rejected two of his arguments, but agreed that reversal was required because the trial court did not find he was an “unfit” parent, i.e., that M.T.’s failure to perform parental duties was under circumstances showing a substantial lack of regard for parental obligations. *K.M.T.*, 195 Wn. App. at 557-64. This Court reversed the termination and adoption orders and remanded for consideration of these issues on the existing record. *Id.* at 563-64, 568-69. This Court did not reach M.T.’s argument challenging the sufficiency of the evidence supporting termination. *Id.* at 564 n.4.

On remand, M.T. moved for dismissal of the termination petition. CP 314-16. The trial court denied the motion and instead signed new Findings, Conclusions, and Order terminating parental rights. CP 326-29. The new order did not include a finding of unfitness or a finding of circumstances demonstrating a substantial lack of regard for parental duties. CP 326-29.

E. ARGUMENT

The right to a parent-child relationship is a fundamental liberty interest protected by the Fourteenth Amendment. Accordingly, a court may not terminate a parent's rights unless it finds the person is currently unfit to parent. This Court held this requirement could be satisfied by making the statutory finding that a parent's failure to perform parental duties occurred under circumstances showing a substantial lack of regard for those obligations.

But here, the trial court did not make either finding – even after this Court remanded for that purpose. More problematically, the record *would not support* such a finding. M.T. was thousands of miles away in a war zone and the child's mother cut off all contact with M.T. Insufficient evidence supports the termination order, and this Court should reverse the termination and adoption orders and remand for dismissal of the petition.

1. The trial court did not comply with this Court's mandate; the revised findings do not address unfitness or substantial lack of regard for parental duties.

As noted, this Court reversed because the trial court had not made the findings necessary to terminate a parent's rights under the Due Process Clause and the statute. *K.M.T.*, 195 Wn. App. at 551-52; U.S. Const. amend. XIV; RCW 26.33.120(1). Due process requires a finding of unfitness prior to termination. *K.M.T.*, 195 Wn. App. at 551; *see In re the*

Welfare of A.B., 168 Wn.2d 908, 920-21, 232 P.3d 1104 (2010). This Court held that this mandate can be satisfied by compliance with the statutory requirements. *K.M.T.*, 195 Wn. App. at 551. But here, “the trial court failed to address under RCW 26.33.120(1) whether clear, cogent, and convincing evidence established that MT’s failure to perform parental duties was ‘under circumstances showing a substantial lack of regard for his or her parental obligations.’” *Id.* This Court concluded:

We reverse the trial court’s termination and adoption orders. We remand for the trial court to address, consistent with this opinion and based on the existing record, whether under RCW 26.33.120(1) clear cogent, and convincing evidence establishes that MT’s failure to perform parental duties was under circumstances showing a substantial lack of regard for his or her parental obligations and for other proceedings.

Id. at 552.

On remand, the court did not address this question. CP 326-29; RP (10/6/17) 15-18. Neither the word “unfitness” nor the phrase “substantial lack of regard” were mentioned at the hearing. RP (10/6/17) 14-21. The written Findings, Conclusion, and Order do not include a finding of unfitness. CP 326-29. They do not include a finding of circumstances showing a substantial lack of regard for parental obligations. CP 326-29.

To be sure, in his oral ruling the judge expressed a contempt for M.T. that might be viewed as implying a finding of unfitness. RP

(10/6/17) 15-18. But this contempt was inconsistent with the court's attitude toward M.T. at the termination trial and inconsistent with the evidence presented at that trial. *See K.M.T.*, 195 Wn. App. at 562-63; RP (4/23/15) 200-12. Moreover, given this Court's explicit direction, it was improper to exclude the requisite findings from the written order. *Cf. State v. Kilburn*, 151 Wn.2d 36, 39 n.1, 84 P.3d 1215 (2004) ("A trial court's oral decision has no binding or final effect unless it is formally incorporated into findings of fact, conclusions of law and judgment.").

The trial court did enter two new findings proposed by the mother: the second clause in finding 2.7.3 is new and all of finding 2.7.4 is new. *Compare* CP 328 *with* CP 30-31. These new findings are not supported by substantial evidence.

The record refutes the mother's claim that M.T. is unreliable and uninterested in being a parent. CP 328. M.T. was thousands of miles away serving two tours of duty in a war zone. RP (4/23/15) 91-92, 98, 200-01. He tried to communicate with the mother about K.M.T., but the mother cut off all contact. RP (4/23/15) 97-98, 102, 162-63, 210. After M.T. was discharged from the army, he flew from his parents' home in Ohio to Washington state to fight termination. RP (4/23/15) 89-135. When his rights were terminated, no one told M.T. he had the right to court-appointed counsel on appeal, so he filed a notice of appeal himself,

ordered the transcripts himself, and called numerous appellate attorneys begging for pro bono assistance before finally being directed to an appellate public defender. As M.T. said at trial, “I don’t want [K.M.T.] to grow old and get told that you have a father, but he wasn’t there for you, when I really want to be here for her.” RP (4/23/15) 149.

The mother also added to the findings that M.T. is “even scary and potentially dangerous.” CP 328. These vague, inflammatory allegations were not in the original findings, and with good reason. At trial, although the court found that M.T. was verbally abusive at times, it found that *both* C.M. and M.T. squabbled about custody, money, and child care. RP (4/23/15) 201-10. The court recognized that the exhibit the mother introduced contained M.T.’s worst statements but omitted her own: “this has been cherry-picked to some great extent.” RP (4/23/15) 201. The court also recognized that when M.T. yelled at the pediatrician on the phone from Afghanistan, it was because C.M. sought his help and because both parents were very concerned about the child’s condition. RP (4/23/15) 209. The court even went so far as to describe M.T.’s intervention as “heroic”:

He makes a big scene of things, if anything, although it’s not pleasant, it was heroic and, apparently, got the job done. The kid got the care. That shows some concern for her, and it shows some concern for the child. He did pay

support for a while. Maybe he had to be prompted to it in the first place, but he finally wound up doing that.

RP (4/23/15) 209.

Instead of entering the mother's proposed new findings, the court should have addressed the issues this Court ordered it to address on remand. Nevertheless, this Court should not simply remand again for the trial court to make the requisite findings. As explained below, and as argued but not reached in the first appeal, insufficient evidence was presented to support termination. Accordingly, this Court should reverse and remand for vacation of the termination and adoption orders.

2. Insufficient evidence supports the termination order.

- a. A parent's rights may not be terminated absent clear, cogent, and convincing evidence that the parent is unfit – i.e., that any failure to perform parental duties occurred under circumstances showing a substantial lack of regard for those duties.

The right to parent is a fundamental liberty interest protected by the Due Process Clause. U.S. Const. amend. XIV; *Meyer v. Nebraska* 262 U.S. 390, 399, 43 S. Ct. 625, 67 L. Ed. 1042 (1923); *In re J.D.*, 42 Wn. App. 345, 347, 711 P.2d 368 (1985). A parental rights termination proceeding “seeks not merely to infringe that fundamental liberty interest, but to end it.” *Santosky v. Kramer*, 455 U.S. 745, 759, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982). Given the “unique kind of deprivation” sought, the

“interest in the accuracy and justice of the decision” is “a commanding one.” *Id.* (rejecting “preponderance of the evidence” standard for termination proceedings because it is insufficient to protect the vital right to parent).

In light of the vital interest at stake, due process prohibits termination of parental rights unless the proponent proves, by clear, cogent and convincing evidence, that the parent is “unfit.” *A.B.*, 168 Wn.2d at 918-19; *In re the Interest of H.J.P.*, 114 Wn.2d 522, 527-28, 789 P.2d 96 (1990). The proponent may satisfy this requirement by proving all elements of the termination statute by clear, cogent and convincing evidence. *K.M.T.*, 195 Wn. App. at 559-60.

The termination statute at issue here is RCW 26.33.100, which permits a private party seeking adoption to petition the court to terminate the rights of the biological parent. The petition will be granted only:

upon a showing by clear, cogent, and convincing evidence that it is in the best interest of the child to terminate the relationship and *that the parent has failed to perform parental duties under circumstances showing a substantial lack of regard for his or her parental obligations* and is withholding consent to adoption contrary to the best interest of the child.

RCW 26.33.120 (1) (emphasis added).

Although the “best interest of the child” is listed first, the threshold question is “whether the parent has failed to perform parental duties under

circumstances showing a substantial lack of regard for his or her parental obligations.” *H.J.P.*, 114 Wn.2d at 531; *In re the Adoption of McGee*, 86 Wn. App. 471, 474, 937 P.2d 622 (1997). These “parental obligations” include (1) expressing love and affection for the child, (2) expressing personal concern over the health, education and general welfare of the child, (3) supplying the necessary food, clothing and medical care, (4) providing an adequate domicile, and (5) furnishing social and religious guidance. *H.J.P.*, 114 Wn.2d at 531 (citing *In re Pawling*, 101 Wn.2d 392, 398, 679 P.2d 916 (1984)). The court must resolve this question before it can consider the best interests of the child. *McGee*, 86 Wn. App. at 474; *H.J.P.*, 114 Wn.2d at 531-32.

The statute explicitly incorporates the constitutionally required standard of proof: the proponent of termination must show the necessary elements by clear, cogent and convincing evidence. RCW 26.33.120 (1). This means that “the ultimate fact in issue must be shown by evidence to be highly probable.” *In re Seago*, 82 Wn.2d 736, 739, 513 P.2d 831 (1973). (internal quotations omitted). On appeal, the court evaluates whether the trial court’s findings are supported by substantial evidence in light of the clear, cogent, and convincing standard. *Id.*

- b. The mother failed to prove unfitness or substantial lack of regard for parental obligations; M.T. was serving two tours of duty in Afghanistan and the child's mother cut off all contact.

Here, insufficient evidence supports termination in light of the clear, cogent, and convincing standard. The mother was performing parental duties without M.T. because M.T. was serving in a war zone thousands of miles away, and the mother cut off contact with him. These facts do not demonstrate that M.T. was unfit or that M.T.'s failure to perform parental duties was under circumstances showing a substantial lack of regard for parental obligations.

J.D. is instructive. There, a married couple in Alaska separated when the wife was pregnant with their second child. *J.D.*, 42 Wn. App. at 346. She moved to Washington with their young son, while the father stayed in Alaska. *Id.* A few months later, she gave birth to their second child in Washington. *Id.*

Although the father occasionally called and sent cards and gifts, he visited the children only once in the next three years, and this was the only time he met the second child. *Id.* at 346-47. He paid some child support for almost a year and a half, but then lost his job and made no child support payments for the next two years. *Id.* at 347.

In the meantime, the mother remarried and wanted her husband to adopt the children. *Id.* The father refused to consent to the stepparent's adoption, so the mother and stepfather petitioned for termination of the father's rights. *Id.* The trial court granted the petition, but this Court reversed. *Id.*

This Court indicated it was "mindful of the great value courts attach to parental rights," and that it was important to ensure that "clear, cogent, and convincing" evidence supports an order terminating this important right. *J.D.*, 42 Wn. App. at 347-48. The court ruled that the termination order in that case was not supported by sufficient evidence in light of this heightened standard. *Id.* at 349-50.

As to the "parental obligations" prong, this Court noted:

Mr. Huffman testified to significant personal and job-related problems immediately following the 1982 petition for dissolution which made long distance travel to Washington prohibitive and ultimately resulted in his loss of employment and ability to pay support. Although total failure to support is not condoned, neither can we say, based on Mr. Huffman's circumstances, that he *voluntarily* failed to care for or support his children or was guilty of a *willful*, substantial lack of regard for parental obligations.

J.D., 42 Wn. App. at 349 (emphases in original). The Court further explained:

These children are so young and far away from their father, compliance with the *Pawling* requisites is extremely difficult. It is obvious the requisite communications and

external evidence of love and caring of necessity would have to be made almost exclusively through the custodial parent. Distance alone, the miles between Alaska and Washington State, is a barrier to visitation, particularly to the unemployed.

Id. at 349-50.

The failure of proof on the “parental obligations” prong alone required reversal, so the Court did not reach the “best interests” issue. However, the Court noted that maintaining the biological father’s rights would not significantly hamper the bond between the children and their stepfather, but termination could cause substantial emotional harm to the biological father and the children. *Id.* at 350.

Here, as in *J.D.*, insufficient evidence supports termination of M.T.’s rights. As in *J.D.*, distance prevented the father from performing the duties that the custodial parent would necessarily perform. *J.D.*, 42 Wn. App. at 349 -50. M.T.’s circumstances were even more difficult than those of the father in *J.D.*: M.T. was farther away, he was serving on convoy duty in a war zone, and the mother cut off communication with him. Thus, given that this Court held insufficient evidence supported termination in *J.D.*, the same must be true here.

The trial court recognized the problem, but failed to draw the required legal conclusion. The court found that C.M. cut off contact with

M.T. when M.T. was far away serving in the Army. RP (4/23/15) 209-10.

The court said:

Leaving the country is a big deal here. It is a big deal as part of this case because [M.T.] spent most of his time outside the country during all of this. It is difficult, I would think, by any measure, for somebody to try to establish a relationship with an infant who is, basically, incapable of much communication whatsoever, at least for quite some time, by social media and even by the phone. Skype might have been nice.

RP (4/23/15) 200.

The judge indicated it was a “close” case, RP (4/23/15) 200, and

stated:

I do think there is an element of truth to the idea that while the statute requires that the parent has failed to perform parental duties under circumstances showing a substantial lack of regard for her or his parenting obligations, *under the circumstances of an infant and [M.T.] being 7,000 miles or so away*, it is harder to be a parent in the more traditional sort of sense of holding the child, feeding the child, reading the child a bedtime story, which is so critical to being a parent.

RP (4/23/15) 201 (emphasis added).

In other words, the court seemed to be saying that while the statute required certain findings, it was not possible to make that finding under the circumstances of this case. *See id.* But instead of drawing the conclusion that termination was therefore inappropriate, the court terminated M.T.’s rights anyway.

Ultimately, the court committed the same error committed in *J.D.*: it terminated parental rights based on a best-interests determination, regardless of circumstances. The court noted that M.T. was based in Germany and serving two tours of duty in Afghanistan, and that the mother cut off communication with him, but said:

You were not well-equipped to deal with anything at that time because you were under stress in the service. Those are all genuine things that are going on here, but you know, life goes on and this child deserved better.

RP 210-11. This is an insufficient basis to terminate parental rights.

Because the Ms presented insufficient evidence that any failure to perform parental duties was under “circumstances showing a substantial lack of regard for parental obligations,” this Court should reverse.

- c. The Ms failed to prove that termination was in the child’s best interest.

Although the above failure on its own requires reversal, this Court should also hold that insufficient evidence supports the “best interest” finding. There was no showing that permitting M.T. to retain his parental rights would somehow weaken K.M.T.’s bond with her stepfather. *See J.D.*, 42 Wn. App. at 350. And as M.T. testified, terminating his rights might cause harm to K.M.T. in the form of future feelings of abandonment. RP (4/23/15) 149. It is not in her best interest to risk this psychological damage, or to deprive her of the opportunity to develop a

bond with her biological father and extended family. *See* RP (4/23/15) 212 (Trial court states, “One worries if by terminating your parental rights, we are actually doing harm to [K.M.T.]”).

M.T. simply wants to have a relationship with his child, and wants the child to have the benefit of a relationship with him and the rest of her biological paternal family. RP (4/23/15) 129-32, 149-50. He plans to petition for a parenting plan that would allow the child to spend time with him, while also continuing to live with her mother and stepfather. RP 149-50. Such an arrangement, under which a child is loved by both biological and stepparents, is a typical and presumably beneficial family arrangement in this country. *See, e.g.*, Rose M. Kreider & Renee Ellis, U.S. Census Bureau, *Living Arrangements of Children: 2009* 5-6 (Issued June 2011) (showing that over 30% of children do not live with both biological parents). There was an insufficient showing that this typical arrangement would not be in K.M.T.’s best interests.

In sum, the Ms failed to prove the prerequisites to termination by clear, cogent, and convincing evidence. This Court should reverse.

F. CONCLUSION

As trial counsel noted, “there is something that is just offensive to one’s sense of justice” about terminating the rights of a father who tried to establish a relationship with his daughter but was thousands of miles away serving his country in a war zone. RP (4/23/15) 194.

Termination of parental rights is the “family law equivalent of the death penalty.” *In re F.M.*, 163 P.3d 844, 851 (Wy. 2007). As such, it may not be ordered absent strict compliance with constitutional and statutory standards. The termination order here violates due process, and is supported by insufficient evidence of the statutory elements. Accordingly, M.T. respectfully requests that this Court reverse the termination and adoption orders, and remand for dismissal of the termination petition.

DATED this 5th day of April, 2018.

Respectfully submitted,

/s Lila J. Silverstein

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

IN RE K.M.T.)	
MINOR CHILD,)	
)	
)	
M.T.,)	NO. 51381-1-II
)	
)	
APPELLANT FATHER.)	
)	

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