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NO. 51381-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

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IN RE THE WELFARE OF K.M.T.

M.T.,

Appellant,

v.

C.M. and E.M.,

Respondents.

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

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APPELLANT'S REPLY BRIEF

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## A. INTRODUCTION

As noted in the opening brief, M.T. is a veteran who was stationed in Germany and served two tours of duty in Afghanistan with the United States Army. During that time, his girlfriend broke up with him, had their child, cut off contact, married another man, and petitioned to terminate M.T.'s rights. M.T. does not wish to remove his daughter from her stable home, but he wishes to have a relationship with her and for her to have the benefit of a relationship with him and his family. Because the mother and her husband did not prove by clear, cogent, and convincing evidence that M.T. is unfit or that he has a substantial lack of regard for parental obligations, the termination order should be reversed.

The mother's response brief is legally flawed, factually inaccurate, and morally offensive. It is legally flawed because it claims the mother does not have to prove present parental unfitness when in fact this is a constitutional requirement. It is factually inaccurate because it claims M.T. "has taken zero action to enforce his rights" when in fact he has been fighting for years for his and his daughter's rights to have a relationship. And it is morally offensive because it claims M.T. "abandoned" K.M.T. in 2010, when in fact M.T. was serving his country fighting a war thousands of miles away. This Court should reverse.

B. ARGUMENT IN REPLY

- 1. The revised findings do not address unfitness or substantial lack of regard for parental duties; contrary to the mother's argument, the document entered before the court appointed counsel for M.T. is not a substitute.**

As noted in the opening brief, the Amended Findings of Fact, Conclusions of Law, and Order Terminating Parental Rights does not comply with this Court's mandate. It does not find that M.T. is presently unfit and does not find that any failure to perform parental duties was under circumstances showing a substantial lack of regard for parental obligations. Br. of Appellant at 12-16; CP 326-29.

In response, the mother correctly notes that the trial court filed another document, titled "Order on Mandate," which concludes M.T.'s "failure to perform parental duties showed a substantial lack of regard for his or her parental obligations given the circumstances of this case." CP 96; Br. of Respondent at 8. But this document is not an appropriate substitute for findings and conclusions. The later-filed Findings of Fact, Conclusions of Law, and Order does *not* incorporate by reference the Order on Mandate – and with good reason. CP 326-329.

First, the Order on Mandate is completely inconsistent with the overall record at trial and the trial court's original oral ruling. *See* RP

(4/23/15) 200-210; *In re K.M.T.*, 195 Wn. App. 548, 552-54, 381 P.3d 1210 (2016).<sup>1</sup>

Second, the trial court did not appoint counsel for M.T. until weeks after the “Order on Mandate” had been filed – even though the court had previously entered an order of indigency and permitted private counsel to withdraw. CP 374-75, 404-05. Thus, unlike the mother and stepfather, M.T. was completely unaware of this document and had no ability to contest it until after counsel was appointed. Once counsel was appointed, the court held a hearing and entered Findings and Conclusions. Those Findings and Conclusions are again inadequate. Br. of Appellant at 12-16.

However, this Court need not reach this issue. As explained below and in the opening brief, the far greater problem is one this Court did not reach in the first appeal: Insufficient evidence supports the termination order. The termination and adoption orders should be vacated.

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<sup>1</sup> The “Order on Mandate” relies to a great extent on the mother’s self-serving exhibits, which omitted most of the mother’s portions of online conversations in which both she and M.T. argued. At trial, the court recognized that both the mother and M.T. were verbally abusive toward each other, and that the mother’s exhibits were “cherry-picked to some great extent.” RP (4/23/15) 201; *see also* RP (4/23/15) 157, 161 (mother admits many of her statements are missing and that she was “mean” also).

As for the allegation that M.T. failed to provide the exhibits to this Court, that is incorrect. M.T. already provided them in the last appeal. If M.T. forgot to redesignate the exhibits this Court already has, he apologizes. This Court has the exhibits, and both parties have cited them.

## **2. Insufficient evidence supports the termination order.**

As explained in the opening brief, insufficient evidence supports the termination order. Br. of Appellant at 12, 16-25. The mother and her husband did not present clear, cogent, and convincing evidence that M.T. is unfit to have a parental relationship with K.M.T. The evidence at trial demonstrated that M.T. was serving his country in Afghanistan and Germany during the vast majority of the period at issue, and that the mother refused to let M.T. speak to, Skype with, or send gifts for his daughter while he was abroad. RP (4/23/15) 200, 210; *K.M.T.*, 195 Wn. App. at 552-53. Now that M.T. is back in the United States, he wishes to develop a relationship with his daughter while respecting her stable home and custody arrangement with the mother and stepfather. This Court should reverse the termination order so that M.T. and K.M.T. may establish the relationship to which they are legally entitled.

- a. Contrary to the mother's argument, the Constitution prohibits termination absent clear, cogent, and convincing evidence of present unfitness.

The mother incorrectly claims clear and convincing proof of present parental unfitness is required only when a court terminates a parent's rights under RCW Ch. 13.34, and not when it terminates a parent's rights under RCW Ch. 26.33. Br. of Respondent at 12-16. The mother misunderstands the law.

Clear and convincing proof of present parental unfitness is a *constitutional* requirement, not a statutory requirement. *In re Parental Rights to B.P.*, 188 Wn.2d 292, 312-13, 376 P.3d 350 (2016). Therefore, it applies regardless of which statute authorizes termination.

In *B.P.*, for example, the Supreme Court explained that “[t]he only statutory prerequisite at issue” in the case was whether all necessary services were provided under RCW 13.34.180(1). *Id.* at 312. “The other prerequisite to termination at issue in this case is the *nonstatutory* prerequisite of parental unfitness.” *Id.* (emphasis added). “The State may not terminate a parent’s rights without showing that the parent is *currently* unfit to parent the child in question.” *Id.* at 312-13 (emphasis added) (citing *In re Welfare of A.B.*, 168 Wn.2d 908, 918, 232 P.3d 1104 (2010)). The failure to prove present parental unfitness by clear and convincing evidence “violates due process clause protections.” *Id.* at 313; U.S. Const. amend. XIV; Const. art. I, § 3. Thus, regardless of which statute applies, the Constitution prohibits termination absent clear and convincing proof of present parental unfitness. *See id.* at 312-13.

*B.P.* is consistent with earlier cases. Indeed, it cites *A.B.*, which M.T. relied on extensively in his prior appeal and cited again in the opening brief in this appeal. In *A.B.*, the Court stated, “we hold that a parent has a *constitutional due process* right not to have his or her

relationship with a natural child terminated in the absence of a trial court finding of fact that he or she is *currently unfit* to parent the child.” *A.B.*, 168 Wn.2d at 920 (emphases added).

Because the issue is constitutional, cases involving Title 26 terminations have similarly held that clear and convincing proof of present parental unfitness is required. *See In re the Interest of H.J.P.*, 114 Wn.2d 522, 527-28, 789 P.2d 96 (1990). In *H.J.P.*, the Supreme Court recognized that “regardless of which statutory scheme was employed[,]” the standard of proof for termination of a parent-child relationship was the same. *Id.* at 530. The Court endorsed an opinion of this Court stating, “if a parent is not shown to be unfit at the time of the parental rights termination proceeding, termination is improper.” *Id.* (quoting *Krause v. Catholic Comm'ty Servs.*, 47 Wn. App. 734, 742, 737 P.2d 280, *review denied*, 108 Wn.2d 1035 (1987)). It is perplexing that the mother ignores this binding precedent.

Of course, past behavior is relevant to determining present fitness. *See In re Welfare of C.B.*, 134 Wn. App. 942, 958-59, 143 P.3d 846 (2006) (considering past performance but reversing termination order where parent was improving). But, as explained below and in the opening brief, the mother did not prove that M.T.’s past behavior demonstrates he is presently unfit to have a relationship with his daughter.

- b. The mother failed to meet her burden of proof to show M.T. is unfit; M.T. was serving in Afghanistan while the mother cared for the child, and M.T. has been fighting for years to have a relationship with his child.

During the vast majority of time at issue in this case, M.T. was serving on convoy duty in Afghanistan and stationed in Germany. RP (4/23/15) 91, 98, 200; *K.M.T.*, 195 Wn. App. at 552-53. The mother cut off contact with him, refused to facilitate his contact with his daughter, and even moved to Illinois for over a year without telling him. RP (4/23/15) 210; *K.M.T.*, 195 Wn. App. at 553-54. Under these circumstances, the mother and her husband failed to prove by clear and convincing evidence that M.T. is unfit. Stated differently, they failed to prove that M.T.'s circumstances showed a substantial lack of regard for K.M.T.

Notwithstanding the above facts and law, the mother claims she met her burden to prove termination was proper. Br. of Respondent at 5-21. These claims are unconvincing.

The mother wrongly implies that M.T. physically abused her, when the record is clear that the only type of "abuse" that occurred was *verbal* abuse perpetrated by both parties. RP (4/23/15) 210. That M.T. and the mother were verbally abusive to each other no more proves unfitness than the stepfather's misconduct discharge from the military proves his

unfitness. *See* CP 357 (Report of Adoption Investigator states stepfather “joined the Army and after two years was kicked out for misconduct”). Both of K.M.T.’s biological parents and her stepfather are fit, even though all three are human and therefore have not behaved perfectly. The only problem is that one of K.M.T.’s biological parent’s rights has been terminated, contrary to the statute and the due process guarantees of the Constitution.

The mother also states, apparently without a hint of irony, that “the court house doors have been open to [M.T.] and he has taken zero action to enforce his rights.” Br. of Respondent at 1. It is unclear what the mother thinks these years of litigation have been about.

M.T. has taken extensive action to enforce his rights and the rights of his child to have a relationship with him. He fought the mother’s termination petition in the trial court, providing moving testimony about his military service and his concern for K.M.T.’s best interest. 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, 149-50. 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.<sup>2</sup>

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.

After the trial court terminated his parental rights despite stating it was a "close case," M.T. appealed. CP 367-71. He did so *pro se*, because no one told him he had the right to appeal or the right to court-appointed counsel on appeal if he could not afford an attorney. He filed his own designation of clerk's papers and statement of arrangements, and

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<sup>2</sup> The mother claims M.T. missed the first day of trial because he did not care. Br. of Respondent at 2. This is incorrect. M.T. lived in Ohio with his parents because money was tight. The reason he missed the first day of trial was because of a miscommunication, not a lack of care. As soon as he realized the mistake, he immediately flew to Washington and participated in the second day of trial. RP (4/21/15) 5-18; *K.M.T.*, 195 Wn. App. at 555.

scrambled to pay the filing fee and to try to pay the court reporter in installments. CP 372-73.<sup>3</sup> He called several appellate attorneys, asking them to take his case pro bono because he could not afford to pay. He did all of this from Ohio.

A private attorney finally advised him that he might have the right to court-appointed counsel, and connected him with an appellate public defender. Eventually, the trial court signed an order of indigency, and appellate counsel was appointed. CP 374-75. M.T. continued to fight for his and his daughter's rights to a relationship, and won a partial victory in this Court. *K.M.T.*, 195 Wn. App. at 551-52.

Following remand, when M.T. did not hear from the trial court or the public defender's office, he contacted appellate counsel seeking advice. Appellate counsel also had received no information, but contacted the Department of Assigned Counsel and filed a Motion for Appointment of Counsel in the trial court. CP 376-403. As noted above, apparently some proceedings had occurred without notice to M.T. or appointment of counsel for M.T., but he continued to take action to enforce his rights anyway.

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<sup>3</sup> There is no CP number for the Statement of Arrangements because M.T. filed it in this Court, not realizing it was supposed to be filed in superior court. This Court stamped it filed on July 13, 2015.

When the trial court entered Amended Findings and Conclusions, M.T. again appealed, and briefing has again been filed in this Court. M.T. has vigorously acted to vindicate the right to a parent-child relationship.

The mother not only ignores the last several years during which M.T. has gone to unusual lengths to enforce his and his daughter's rights, but also implies that M.T. should have taken action immediately upon his discharge from the military. Br. of Respondent at 8. But M.T. suffered a traumatic brain injury, a back injury, and Post Traumatic Stress Disorder as a result of his military service. RP (4/23/15) 89-90, 105-06; *K.M.T.*, 195 Wn. App. at 554. Immediately following his return, he had to readjust to civilian life, attempt to address his physical pain and mental health, and rely on his parents for financial support while he waited for disability benefits to be awarded. *See id.* Under these circumstances, to describe M.T. as unfit borders on offensive. *See* RP (4/23/15) (in closing trial counsel states, "There is something that is just offensive to one's sense of justice about this.").

The mother also discusses alleged facts about a person whose initials are "M.L.W." Br. of Respondent at 19-20. This section appears to be taken from a stock brief. It has no bearing on this case, and it should be disregarded.

- c. The mother failed to meet her burden to show termination is in the child's best interest; no one is trying to remove K.M.T. from her stable home, but she and her biological father have a right to a relationship.

Finally, the mother and stepfather failed to prove by clear and convincing evidence that termination is in K.M.T.'s best interest. This constitutes an independent basis for reversal. Br. of Appellant at 23-25.

The response brief argues termination is in the child's best interest because she needs a "stable home" and "custodial continuity." Br. of Respondent at 22-23. This is a straw man. M.T. already explained in the opening brief and at trial that he does not wish to remove K.M.T. from her stable home. Just as thousands of divorced parents who remarry have custody arrangements in which one couple has primary custody and the other biological parent has visitation, M.T. recognizes that what is best for K.M.T. is to remain in the mother's and stepfather's custody but also have a relationship with him and his family. Br. of Appellant at 23-25; RP (4/23/15) 129-32, 149-50. The mother and stepfather did not present clear and convincing proof that this common arrangement would not be in K.M.T.'s best interest.

Indeed, if anything, termination may cause the child psychological harm in the future, because no matter how dedicated the stepfather is, the child may suffer feelings of abandonment if she has no relationship with

her biological father. *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.]”). As this Court stated in reversing termination in another case, a biological father’s contact with the child “would not significantly undermine the important bond between the child[] and [her] step-father.” *In re J.D.*, 42 Wn. App. 345, 350, 711 P.2d 368 (1985). The benefit to be derived by termination and adoption “appears minimal compared to the potential emotional and mental impact the termination could have” on the child and her biological father. *Id.* For this independent reason, this Court should reverse.

C. CONCLUSION

For the reasons set forth above and in the opening brief, 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 September, 2018.

Respectfully submitted,

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