

FILED
Court of Appeals
Division II
State of Washington
1/13/2020 3:17 PM

NO. 53292-1

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

In re the Welfare of

K.B.

Minor Child.

**BRIEF OF RESPONDENT,
DEPARTMENT OF CHILDREN, YOUTH, AND FAMILIES**

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I. INTRODUCTION

Throughout K.B.'s dependency case, only one fact prevented R.P. from beginning visits with K.B. and forming a relationship with the child: R.P.'s refusal to complete genetic testing. Though he had multiple opportunities to do so, he maintained his refusal for three years before the trial court terminated his parental rights. R.P. does not dispute that he has no relationship with K.B. He also does not dispute that he failed to complete genetic testing, the singular task the juvenile court ordered him to do before he could begin such a relationship.

R.P. challenges the trial court's finding that this refusal led to his unfitness to parent K.B. He also argues that the Department did not provide him all necessary services to correct his parental deficiency. Based on sufficient evidence, the trial court properly found that R.P. repeatedly refused to remove his only barrier to forming a relationship with K.B. The trajectory of this case was within R.P.'s control, but he failed to exercise that control. This Court should affirm.

II. RESTATEMENT OF THE ISSUES

Over a three-year dependency, the juvenile court consistently ordered R.P. to complete genetic testing as a condition to beginning visitation with K.B. He refused to comply with the social worker's referrals and the Guardian ad Litem's offer of assistance, and he does not dispute that

as a result he lacks a relationship with K.B. Did the trial court properly find that (1) R.P. is unfit to parent K.B. and (2) the Department offered R.P. all reasonably available necessary services capable of correcting his parental deficiencies within the foreseeable future?

III. RESTATEMENT OF THE CASE

K.B. is a four-year-old boy born in January 2016. Clerk's Papers (CP) at 204, (Finding of Fact (FF) 2.3). Though his dependency case began when he was born, K.B. spent the first 15 months of his life with his mother in an in-home dependency. CP at 205 (FF 2.8). He was removed from his mother's care in April 2017, and was eventually placed with a foster family where he has lived ever since.¹ CP at 205 (FF 2.8). K.B. has thrived in this foster placement and they wish to adopt him. CP at 206 (FF 2.17).

K.B.'s biological father is unknown.² CP at 134. His legal father is R.P. because of his marriage to K.B.'s mother at the time of K.B.'s birth. CP at 204 (FF 2.5). R.P. is 30 years the mother's senior. Ex. 1 at 1. R.P. has never had visitation with K.B. through the dependency case. CP at 205 (FF 2.9). This fact is due solely to R.P.'s refusal to comply with the juvenile court's order to complete genetic testing before building a relationship with

¹ The trial court terminated the mother's parental rights in September 2018 after she relinquished her parental rights with an Open Communication Agreement. CP at 120, 123, 125. K.B.'s mother is not a party to this appeal.

² The trial court terminated John Doe's parental rights as to K.B. in September 2018, after he was found in default earlier the same year. CP at 37, 134.

K.B., despite having over three years to do so. Report of Proceedings (RP) at 77, 99. The only interactions K.B. has had with R.P. were brief, and in violation of the juvenile court's order, while K.B. was an infant in his mother's care. CP at 205 (FF 2.9). However, this information came through R.P.'s own self-serving statements to the social worker and Guardian ad Litem (GAL). RP at 28, 64, 95. Although he sometimes asked the social worker about K.B.'s well-being in foster care, he spent much time during meetings making accusations against the mother and talking about their relationship. RP at 76, 83, 94. Many of his conversations with the GAL focused on the mother's actions as well. RP at 95, 99.

Two facts remained unchanged throughout K.B.'s dependency with R.P. First, the juvenile court's order that he complete genetic testing before beginning visitation with K.B., and second, R.P.'s refusal to do so. Ex. 2 at 7; Ex. 6 at 7; Ex. 7 at 7, 10-11; Ex. 8; Ex. 9 at 11; Ex. 12 at 7, 10; Ex. 13 at 7, 11; Ex. 15 at 7, 12; Ex. 17 at 7, 11, 12; RP at 26, 31, 75. R.P. asked the juvenile court to order visitation several times over the case, but the court denied the requests. RP at 60-61.

R.P. squandered multiple opportunities to complete genetic testing. Before making any referrals, the social worker discussed testing with R.P. and offered to refer him but he was resistant and refused. RP at 26-27. Regardless of R.P.'s response, the social worker made three different

referrals for genetic testing when he finally indicated he might comply: October 27, 2017, November 14, 2017, and December 5, 2017. RP at 26; CP at 205 (FF 2.12). He did not actually take advantage of these referrals. CP at 205 (FF 2.12). The social worker communicated the referrals to R.P. through phone calls and text messages. RP at 27. In addition, the GAL, Ms. Hasler, offered to complete the testing when she was traveling to Spokane, Washington, where R.P. resided. CP at 205 (FF 2.12). Again, R.P. refused. CP at 205 (FF 2.12).

The social worker and GAL identified R.P.'s parental deficiency as lack of bond with K.B. RP at 32, 96. This negatively affects his ability to parent the child because K.B. does not know R.P. and removing him to a stranger would be traumatic. RP at 33. Building that bond through increased contact over time would take nine months to a year while the social worker and GAL evaluated their interactions through supervision and further services. RP at 35-36, 97.

After a contested trial over three days, the trial court found that R.P. was unfit to parent K.B. and terminated his parental rights. CP at 203, 205, 207. The trial court found the Department had offered R.P. all reasonably available necessary services capable of correcting his parental deficiencies within the foreseeable future. CP at 205 (FF 2.13). As to the issue of

completing paternity testing before beginning visitation, the trial court made the following findings of fact that R.P. assigns error on appeal:

2.14 Three years have passed since this dependency began. Multiple judicial officers in the dependency action have reviewed the court order for [R.P.] to complete genetic testing, both during the regular review hearings and through [R.P.]’s motions. All of these judicial officers have continued to require him to complete genetic testing before he could access visitation. The Department adhered to these court orders by not offering [R.P.] visitation. [R.P.]’s lack of visitation is to due [sic] his failure to comply with this court order. Although available and clearly communicated to him, [R.P.] repeatedly refused a service critical to his establishing a relationship with [K.B.].

2.15 There is little likelihood that conditions will be remedied so that the above-named child can be returned to either parent in the near future. [R.P.] is currently unfit to parent [K.B.]. [R.P.] lacks any relationship with this child, and this lack of relationship is his current parental deficiency. It would take [R.P.] 9-12 months to correct this deficiency. Such a timeframe is not in [K.B.]’s near future. Per court order, [R.P.] must complete paternity testing before he can begin visitation to build a bond with the child. [R.P.] has not completed paternity testing.

CP at 205-06. Following entry of these findings and an order terminating his parental rights, R.P. appeals. CP at 208.

IV. ARGUMENT

R.P. challenges three of the trial court’s findings of fact relating to his unfitness to parent K.B. and the Department’s provision of necessary

services: Findings 2.13, 2.14, and 2.15.³ Br. of Appellant at 2. Because sufficient evidence supports the findings, this Court should affirm.

A. Elements of a Parental Rights Termination Trial

Although parents have a fundamental liberty interest in the custody and care of their children, the Washington State Legislature has prescribed a statutory scheme that balances this liberty interest with the child’s right to a safe and healthy environment. *In re Dependency of K.D.S.*, 176 Wn.2d 644, 652, 294 P.3d 695 (2013). The Washington State Supreme Court has recognized that “it is the court’s duty to see that [parental] rights yield, when to accord them dominance would be to ignore the needs of the child.” *In re Welfare of Aschauer*, 93 Wn.2d 689, 695, 611 P.2d 1245 (1980).

Before a trial court may terminate parental rights, it must apply a two-step test. First, the trial court must find that the Department proved the six elements of RCW 13.34.180 by clear, cogent, and convincing evidence. *In re Welfare of S.V.B.*, 75 Wn. App. 762, 768, 880 P.2d 80 (1994). Clear, cogent, and convincing evidence exists when the evidence shows that the ultimate fact in issue is “highly probable.” *In re Dependency of K.D.S.*, 176 Wn.2d at 653 (citation omitted). Second, the trial court must find by a

³ R.P. assigns error to Finding of Fact 2.15, the “little likelihood” finding, but he does not argue that RCW 13.34.180(1)(e) was not satisfied. Br. of Appellant at 2; CP at 205 (FF 2.15). Therefore, this brief will focus on the unfitness language in that finding.

preponderance of the evidence that termination of the parent-child relationship is in the child's best interest. *In re Welfare of A.J.R.*, 78 Wn. App. 222, 228, 896 P.2d 1298 (1995). The Department must prove the six elements of RCW 13.34.180 before the trial court may evaluate the best interests of the child. RCW 13.34.190(1)(a)(i), (b); *see also In re Dependency of H.W.*, 92 Wn. App. 420, 425, 961 P.2d 963 (1998).

In an appeal of a parental rights termination order, this Court affords the trial court broad discretion and its decision is entitled to great deference on review. *In re Welfare of Aschauer*, 93 Wn.2d at 695. The appellate court will not disturb the trial court's factual findings if substantial evidence supports them. *In re Dependency of Chubb*, 112 Wn.2d 719, 729, 773 P.2d 851 (1989). Substantial evidence supports a premise when the evidence is sufficient to persuade a fair-minded, rational person of the truth of the declared premise. *In re Welfare of C.B.*, 134 Wn. App. 942, 953, 143 P.3d 846 (2006). In termination proceedings, "because [the Department] is required to prove each of the statutory allegations by clear, cogent[,] and convincing evidence, the evidence must be substantial enough to allow the [appellate] court to conclude that the allegations are 'highly probable.'" *In re Dependency of A.V.D.*, 62 Wn. App. 562, 568, 815 P.2d 277 (1991) (citation omitted). By claiming insufficiency of the evidence, the parent admits the truth of the Department's evidence and all

reasonably drawn inferences from it. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); *State v. Madarash*, 116 Wn. App. 500, 509, 66 P.3d 682 (2003).

The appellate court should rely heavily on the trial court's factual findings. "In proceedings to terminate parental rights, we give particular deference to the trial court's advantage derived from having the witnesses before it." *In re Dependency of A.M.*, 106 Wn. App. 123, 131, 22 P.3d 828 (2001). Thus, an appellate court does not weigh evidence or make credibility determinations. *In re Welfare of C.B.*, 134 Wn. App. at 953.

B. The Trial Court Relied on Sufficient Evidence to Find that R.P. Was Not Fit to Parent K.B.

For the entire three years that R.P. was involved in K.B.'s dependency, he refused to resolve the only barrier to forming a relationship with the child. R.P. does not dispute that he has no relationship with K.B. Thus, the trial court did not err in finding that R.P. was unfit to parent three-year-old K.B. when R.P. was a stranger to him after R.P. steadfastly refused to follow the juvenile court's consistent order.

Although parents have a fundamental liberty interest in their children, the state can infringe on that interest when the parent endangers the child's physical or emotional welfare. *In re Welfare of C.S.*, 168 Wn.2d 51, 54, 225 P.3d 953 (2010). Before terminating parental rights,

the trial court must find, either explicitly or implicitly, that the parent is unfit to parent the child. *In re the Welfare of A.B.*, 168 Wn.2d 908, 921, 232 P.3d 1104 (2010).

More than sufficient evidence supports the trial court's finding that R.P. is unfit to parent K.B. because he lacks any relationship with the child. The only interactions R.P. has had with K.B. were brief and in the child's infancy when he was in his mother's care. CP at 205 (FF 2.9).⁴ Even this brief visitation was in violation of the juvenile court's order that he complete paternity testing before beginning visitation. *E.g.*, Ex. 2 at 7. R.P. has never had visitation, and therefore a relationship with K.B., during this dependency. CP at 205 (FF 2.9).

R.P.'s ability to establish a relationship with K.B. and build to increased visitation and reunification was entirely within his control. Instead, R.P. spent three years refusing to comply with the juvenile court's order for paternity testing. RP at 77, 99. R.P. was fixated on the mother's actions during this case and his relationship with her. RP at 76, 83, 94-95, 99. His interest in K.B. extended only to asking the social worker about K.B.—he ignored multiple opportunities to complete a single, short test that would have allowed him to know K.B.

⁴ R.P. does not challenge Finding of Fact 2.9. Therefore, it is a verity on appeal. *In re Interest of J.F.*, 109 Wn. App. 718, 722, 37 P.3d 1227 (2001).

Both the social worker and the GAL testified to their opinion that R.P.'s lack of relationship with K.B. was his parental deficiency. RP at 32, 96. The social worker explained that this affects R.P.'s ability to parent K.B. because R.P. is essentially a stranger to him and reunification at the late stage of the case at trial would have been traumatic to the child. RP at 33. By claiming insufficiency of the evidence, R.P. admits the truth of this evidence and all reasonable inferences. *Salinas*, 119 Wn.2d at 201; *Madarash*, 116 Wn. App. at 509.

Contrary to R.P.'s argument on appeal, the trial court properly considered K.B.'s emotional well-being in relation to R.P. when it found R.P.'s current parental unfitness. *In re Welfare of C.S.*, 168 Wn.2d at 54; Br. of Appellant at 8-15. As the Washington State Supreme Court has already recognized, the parent's ability to form a bond with the child is an appropriate consideration when finding parental unfitness. *In re Parental Rights to K.M.M.*, 186 Wn.2d 466, 491, 379 P.3d 75 (2016). Indeed, the court's paramount consideration in any action in a dependency or termination case is the child's right to basic nurture, health, and safety. RCW 13.34.020.

R.P. is correct that lack of bond should not be a parental deficiency where it might be remedied through additional services. Br. of Appellant at 9; *In re Parental Rights to B.P.*, 186 Wn.2d 292, 321, 376 P.3d 350

(2016). But here the juvenile court repeatedly ordered R.P. to complete genetic testing both as a service and before beginning visitation with K.B. CP at 205 (FF 2.10). No sort of attachment therapy or parent-child therapy could have begun until the juvenile court allowed R.P. to have contact with K.B. Further, R.P.'s analogy to his lack of bond with K.B. to his foster parents is misplaced. Br. of Appellant at 13. R.P.'s relationship with K.B. was the subject of trial, not the foster parents' relationship with him.

The evidence produced at trial was sufficient for the trial court to find that R.P. is unfit to parent K.B. based upon his lack of relationship with K.B. Therefore, this Court should affirm. *In re Dependency of Chubb*, 112 Wn.2d at 729.

C. The Trial Court Relied on Sufficient Evidence to Find that the Department Offered R.P. All Necessary Services

R.P. cannot point to any service the Department failed to provide him that was reasonably available and capable of correcting his parental deficiency in the near future. Sufficient evidence supports the trial court's finding that the Department provided R.P. all necessary services.

The Department must offer a parent any service necessary to address a condition that precludes reunification with the child. *In re Dependency of A.M.M.*, 182 Wn. App. 776, 793, 332 P.3d 500 (2014). Importantly here, the statute defines a necessary service as only those that are "reasonably

available” and “capable of correcting the parental deficiency within the foreseeable future.” RCW 13.34.180(1)(d). Where a service was never appropriate to offer the parent given the context of the case, the service is not “necessary.” *In re Parental Rights to K.M.M.*, 186 Wn.2d at 480-81. Furthermore, providing a parent a particular service is futile when the parent is unwilling or unable to participate, and the Department need not offer the service. *Id.* at 483 (citations omitted); *In re Dependency of Ramquist*, 52 Wn. App. 854, 861, 765 P.2d 30 (1988).

R.P. seems to argue that visitation and attachment therapy were necessary services that the Department denied him. Br. of Appellant at 23-24. In fact, these services were neither reasonably available nor capable of correcting his parental deficiency in the near future. Each one of the juvenile court’s dependency orders contained an order that R.P. complete genetic testing before visitation could begin, and R.P. refused. Ex. 2 at 7; Ex. 6 at 7; Ex. 7 at 7, 10-11; Ex. 8; Ex. 9 at 11; Ex. 12 at 7, 10; Ex. 13 at 7, 11; Ex. 15 at 7, 12; Ex. 17 at 7, 11, 12; RP at 26, 31, 75. Building a bond with K.B. sufficient to achieve reunification would have taken nine months to a year. RP at 35-36, 97.

As the trial court found, the Department was following the juvenile court’s repeated orders by not offering R.P. visitation before he completed genetic testing. CP at 205 (FF 2.14). Furthermore, visitation is not a

service. *In re Dependency of T.H.*, 139 Wn. App. 784, 792, 162 P.3d 1141 (2007). As R.P. implicitly acknowledges, reunification or attachment therapy require visitation at the time of the service. *See* Br. of Appellant at 24. Those services, then, were also not reasonably available because R.P. was not visiting the child.

The Department repeatedly provided R.P. the only service necessary for him to establish a relationship with K.B. given the juvenile court's order: genetic testing. The social worker discussed testing with R.P. and later made three different referrals for him to complete it. RP at 26-27; CP at 205 (FF 2.12). Even the GAL offered to visit him in Spokane to complete the testing. CP at 205 (FF 2.12). R.P. refused to engage any of these offers. CP at 205 (FF 2.12).

R.P. attempts to challenge the juvenile court's paternity testing order in this appeal. Br. of Appellant at 21. In fact, R.P. asked the juvenile court to change its order several times without success. RP at 60-61. But these orders are not before the appellate court on R.P.'s appeal of the termination order. The trial court properly found, based on sufficient evidence, that the Department provided R.P. all necessary services and this finding should not be disturbed on appeal. *In re Dependency of Chubb*, 112 Wn.2d at 729.

V. CONCLUSION

Sufficient evidence supports the trial court's findings of fact that R.P. was unfit to parent K.B. and the Department provided him all necessary services to correct his parental deficiency. Beginning visitation with K.B. was entirely within R.P.'s control and he simply refused to exercise it. K.B. himself created the conditions that led to termination of his parental rights. This Court should affirm.

RESPECTFULLY SUBMITTED this 13th day of January, 2020.

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DECLARATION OF SERVICE

I, Kim Wilcox, declare under penalty of perjury under the laws of the state of Washington that the following is true and correct:

On January 13, 2020, I caused a true and correct copy of the Brief of Respondent to be filed electronically with the Court of Appeals, Division II, and to be served on the parties electronically through the Court's filing system.

SIGNED in Tacoma, Washington, this 13th day of January, 2020.



Kim Wilcox
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January 13, 2020 - 3:17 PM

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