

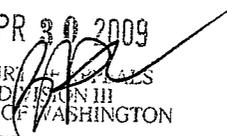


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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By 

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

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In Re: D.R. & A.R.

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**RESPONDENT'S BRIEF**

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ROBERT M. MCKENNA  
Attorney General

KELLY E. KONKRIGHT  
Assistant Attorney General  
WSBA #33544  
1116 W. Riverside  
Spokane, WA 99201  
(509) 456-3123

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## I. INTRODUCTION

The mother, Tonya Roberts, has filed this appeal, claiming the Stevens County Superior Court, erred in terminating her parental rights as to two of her children D.R. and A.R.

On February 5, 2004, Ms. Roberts signed a voluntary placement agreement placing D.R. and A.R. in an out-of-home placement with the Department of Children and Family Services. On March 2, 2004, the Department of Social and Health Services (hereinafter the Department) filed a Dependency Petition regarding both D.R. and A.R. RP 26-27.

The Department had several concerns regarding Ms. Roberts including her emotional instability, two attempted suicides, domestic violence between Ms. Roberts and her boyfriend, Mr. Philemon Perry, physical abuse from Mr. Perry, the children witnessing sexual activity, the possibility of drug and alcohol use, lack of supervision of the children, and the condition of the home. RP 27. Furthermore, the Department was concerned over the behavior of D.R. and A.R. which indicated "that something horribly wrong had been going on in their life." RP 32.

On May 6, 2004, the court found D.R. and A.R. dependent, and entered an order of dependency pursuant to RCW 13.34.030. Approximately three years after the dependency of D.R. and A.R. was established, the Department of Social and Health Services petitioned for

termination of parental rights. The court conducted a trial which occurred over several days: March 20, 2008, April 8, 2008, April 16, 2008, April 30, 2008, June 10, 2008, and August 25, 2008. After hearing testimony from all the parties, the court issued a decision terminating both Mr. Roberts' and Ms. Roberts' parental rights. The court's findings and conclusions were supported by the evidence.

- A. Did The Trial Court's Order Terminating Ms. Roberts Parental Rights Comport With The Requirements Of Due Process Of Law?**
- B. Did The Trial Court Properly Find That There Is Little Likelihood That Conditions Could Not Be Remedied In The Near Future?**
- C. Did The Trial Court Properly Find That Continuation Of The Parent-Child Relationship Would Clearly Diminish The Children's Prospects For Early Integration Into A Stable And Permanent Home?**
- D. Did The Trial Court Properly Find That Termination Was In The Best Interests Of The Children?**
- E. Did The Trial Court Properly Enter Finding Of Fact 11, As It Is Supported By Substantial Evidence In The Record?**
- F. Did The Trial Court Properly Enter Finding Of Fact 17, As This Finding Does Not Overlook Substantial Evidence In The Record That The Guardian Ad Litem Inadequately Represented The Interests Of Either D.R. Or A.R.?**
- G. Did The Trial Court Abuse Its Discretion In Not Appointing Counsel For The Adolescent D.R., And, If So, Did It Substantially Prejudice The Mother's Defense?**

## II. COUNTERSTATEMENT OF THE FACTS

The children, D.R. (DOB: 3/22/1996), and A.R. (DOB: 4/30/1997), are the daughter and son of Tonya R. Roberts and Larry E. Roberts. Mr. Roberts, D.R., and/or A.R., have not appealed the decision terminating parental rights. D.R. and A.R. were born and spent the first few years of their lives in the state of Missouri. RP 24. In Missouri, both D.R. and A.R. were involved in a dependency and were removed from Ms. Roberts' care for a nine month period. RP 36. The Missouri dependency was based on abuse and neglect, as there had been reports of lice, domestic violence, and the children observing sexual activity. RP 38. Further, there were also concerns regarding Ms. Roberts' relationship with a man who was incarcerated for a murder he committed or participated in, and her belief that "he might be a good role model for her children one day." RP 38.

The children also exhibited sexualized behaviors, "At the age of four [A.R.] was trying to have sex with his sister, who was then five. [D.R.] disclosed that [A.R.] tried to put his peepee into her butt...and that it hurt." RP 49. Shortly thereafter, A.R. was institutionalized in Missouri in a psychiatric hospital. RP 49. Further, the children have disclosed that they "have seen movies of naked people...that they've seen their mom and other partners have sex, or [D.R.] called it humping." RP 50. D.R. said to

a little boy "I really like little boys when they're naked." RP 50. When A.R. was six years old, he was observed standing in front of a little boy, lifting his shirt and "manipulating his nipples while gyrating his hips..." RP 50.

In early 2003, Ms. Roberts and the children relocated to Washington, where Ms. Roberts' father and step-mother resided. RP 670. Ms. Roberts became involved in a relationship with Philemon Perry, which lasted over a two year period. RP 643. There was emotional and physical abuse in the home at the hands of Mr. Perry. RP 648, 52-53. "Both children expressed fear and anger because [Mr. Perry] hit them...hit their mom, and would make her cry." RP 52-53. Indeed, during the dependency while Ms. Roberts was residing with Mr. Perry, Ms. Roberts would come to visitation appointments with D.R. and A.R. with bruises, teeth knocked out, and once had a black eye. RP 90.

From November of 2003, through January of 2004, the Department received seven referrals regarding Ms. Roberts and the children. RP 23. These referrals included allegations that Ms. Roberts had a problem paying her electricity bill, that the power was turned off, and that the children were cold. RP at 24. The second referral in November of 2003, related to a disclosure by D.R. to her special education teacher that Ms. Roberts' boyfriend Phil hit D.R. with a hair brush and "when he's really

mad, he hits her with a coat hanger.” RP 24. The third referral was dated December 8, 2003, and related to D.R. reporting to a counselor that “Mom’s boyfriend hits her with a belt. And, when asked if [D.R.] had told her mom she states, ‘No, because it is a secret.’” RP 24. The fourth referral was from December 15, 2003, where a school nurse heard Ms. Roberts tell D.R., “[y]ou are not to tell,” while Ms. Roberts’ arm was wrapped tightly around D.R.’s neck. RP 24.

The fifth referral was from December 23, 2003, from the maternal grandfather. RP 24. He reported that Ms. Roberts “attempted suicide...and was taken to the Chewelah hospital. She took medication including pain pills and hydrocodone. The children are being left in the care of Philemon Perry, who uses marijuana and is violent. The grandparents didn’t know when the mom would be released.” RP 25. The grandfather also reported that the children had been removed from their mother’s care in Missouri for nine months.” RP 25. Further, Ms. Roberts testified that she attempted to commit suicide by taking prescription pain medication while the children were in the home. RP 647.

On January 30, 2004, there was a referral that Ms. Roberts attempted suicide again by taking a handful of pills, the home is a mess, and that a lot of partying with drugs and alcohol was taking place in the home while the children were in their rooms. RP 25. The seventh referral

arose from a disclosure by A.R. to the social worker that “he had a bruise on his hip that he got from Phil whopping him.” RP 25.

In January of 2004, Ms. Roberts voluntarily placed D.R. and A.R. in the maternal grandfather and step-grandmother’s care. RP 26, 65-66. Subsequently, Ms. Roberts called the Department and reported that a couple months prior to the children’s placement with the maternal grandparents, there was an episode where the maternal grandfather had “become very angry with [A.R.] and had grabbed him by the hair, shook him, then...knocked him into the wall.” RP 26. Ms. Roberts was approached by Angela Newport, a CPS investigator and the social worker, and the children were voluntarily placed in foster care. RP 26.

During this period of voluntary placement, many services were offered to Ms. Roberts, including a parenting and bonding assessment, a psychological evaluation, a drug and alcohol evaluation, individual counseling, and parenting classes. RP 28-29.

On March 2, 2004, the Department filed a dependency petition. RP 26-28. The petition listed concerns regarding Ms. Roberts’ emotional and mental instability, depression, as well as her two attempted suicides, domestic violence between Ms. Roberts and her significant other, Mr. Perry, disclosures by the children of physical abuse from Mr. Perry, the children witnessing sexual activity, the possibility of drugs and

alcohol, lack of supervision of the children, and the condition of the home. RP 26-28, 39, 41. Further, at the time dependency was filed, Ms. Roberts was unemployed and appeared "completely overwhelmed with the children's behaviors, not being able to handle them." RP 39, 41.

On May 7, 2004, the order of dependency was entered along with a disposition order. RP 84. Ms. Roberts was ordered to complete a chemical dependency assessment and to follow recommended treatment, random urinalysis testing, a psychological evaluation, a mental health assessment, counseling, a parenting assessment, parenting classes, and home visits. RP 84-85.

Ms. Roberts eventually participated in a parenting and bonding assessment with Sue Elg, a psychological evaluation with Dr. Wert, a parenting class at Stevens County Counseling, and some individual counseling. RP 28-30, 88.

Dr. Wert, diagnosed Ms. Roberts with depressive disorder not otherwise specified, post-traumatic stress disorder, dependent personality disorder with depressive, self-defeating and borderline features or traits, and a GAF score, measuring her ability to care for herself and function, of 40 to 50, where 70s and 80s would be more normal. RP 87. Dr. Wert reported "Tonya Roberts at this point may have psychological and

emotional problems which would preclude her ability to adequately care for two young children.” RP 87.

Ms. Roberts was also not consistent with her mental health counseling with Paula Culler. RP 89. She missed approximately one third of her counseling appointments. RP 89.

Ms. Roberts completed a drug and alcohol evaluation. RP 30-31. She did not complete the recommended intensive outpatient treatment, stating she did not believe that she needed it. RP 30-31. Specifically, Ms. Roberts stated “that her use was when she was really depressed, and other than that, then she doesn’t use.” RP 30-31. However, Ms. Roberts disclosed that she had used alcohol in 2003 or 2004 and illegal drugs, including marijuana in 2005. RP 649. By her own admission, Ms. Roberts was using “about a quarter of weed a day.” RP 650. Despite the court order, Ms. Roberts never participated in the recommended intensive outpatient treatment for her substance abuse. RP 32, 85. She did complete some UA testing, but this eventually “fizzled out,” and she discontinued testing. RP 30, 85.

Additionally, between June and August of 2004, the social worker offered services to deal with the domestic violence taking place between Ms. Roberts and Mr. Perry. RP 91. The social worker “all but begged her to go to Family Support Center to get some help.” RP 90.

The children's behavior during the dependency was very difficult. The social worker, Cheryl Grimm, testified that the first time she met D.R. and A.R. she observed them behind a one-way mirror. RP 32. She described A.R. as "the most incredibly angry young man [she had] ever had the opportunity to witness. He was screaming at the top of his lungs, 'I hate you,' 'I hate you,' 'I hate you.'" RP 33. During this encounter, A.R. also violently stabbed a pencil into a paper, threw things across the room, and stated "I just want to kill him," and "I just want to take a knife and slice his head off." RP 34. A.R. was referring to his foster parents' 18 month-old son, who he had recently had an altercation with. RP 34.

Other issues taking place included D.R. and A.R. getting up and wandering through the foster homes in the night, both children in the middle of the night shaving the family pet down to the skin with a dull pair of scissors, A.R. urinating on the floor, A.R.'s behavior with the 18 month-old child, A.R. ruining furniture with a knife, and A.R. stabbing a fire poker through a tent, narrowly missing someone inside while camping. RP 34-35. D.R. was diagnosed with attention deficit disorder and hyperactivity. RP 38. She would steal, and was destructive which included tearing sheets, writing on the walls, destroying furniture by stabbing, tearing and cutting. RP 38-39.

A.R.'s issues also included total emotional breakdowns where he would fall on the floor, kick, scream, and wet his pants for forty-five minutes to an hour. RP 53. Also, he would ride his bicycle as hard and fast as he could and crash into trees and the side of garages, pick it up, throw it, stomp on it, and scream in rage. RP 54.

In August of 2004, Dr. Guzzardo evaluated A.R. and diagnosed him with post traumatic stress disorder, attention deficit hyperactivity disorder of a combined type, mood disorder, adjustment disorder, a reading disorder, a language disorder, physical abuse of a child, rule out sexual abuse of a child, borderline intellectual functioning, and chronic instability. RP 61.

A.R. went into his third foster home on September 1, 2004. RP 54. The first night he was there he "defecated across their brand new carpeting in their living room...[and] [h]e smeared it on the bedroom walls. RP 54. At school, it took seven to ten staff people to control A.R. as he would kick, hit, bite, pinch and bark. RP 54. He was violent and was unable to control himself. RP 55. A.R. was also displaying sexualized behavior in the foster home. RP 55. In August of 2005, this foster family called the social worker and asked her to remove A.R. RP 56.

In September of 2005, A.R. was placed in a therapeutic foster home in the Tri-Cities. RP 57. Shortly thereafter, he was removed

because he spray painted the foster parents' horse trailer; destroyed the house by punching holes in the wall, wrote on the walls, and broke a door; and law enforcement was called to A.R.'s school as he was throwing rocks at the principal. RP 58. Later in 2005, A.R. was again placed with his maternal grandfather and step-grandmother. RP 58.

D.R. resided in four different placements throughout the dependency, including the voluntary placement with the maternal grandfather and step-grandmother, the receiving placement, the Bugg foster home, and a therapeutic foster home. RP 73. D.R.'s behavioral issues while in foster care included stealing, destructive behaviors, wandering the house at night, and shaving a dog with scissors. RP 67. D.R. also allegedly killed two chickens while residing in Mrs. Bugg's foster home, and was caught trying to drown the foster parent's puppy. RP 67. She was also caught trying to suffocate an invalid grandmother who lived in the Bugg foster home. RP 68.

When the social worker, Cheryl Grimm, first met D.R., she "wanted to be a strip-teaser in a bar." RP 68. D.R.'s education had suffered, as she could not tell time, was a poor reader, her math skills were "abysmal," and she could not identify different currency. RP 68. During visitation, D.R. would struggle to get Ms. Roberts' attention because Ms. Roberts was busy dealing with A.R. RP 68. D.R. also exhibited

sexualized behaviors including on occasion crawling underneath the seats of the school bus, coming up between high school boys' legs and touching their genital areas. RP 69.

Visits between Ms. Roberts and the children also raised concerns. At outdoor visitation sessions, A.R. would lay directly on top of his mother, exemplifying his sexualized behaviors. RP 95. At one visitation session, Ms. Roberts asked D.R. to "give her hugs and loves" and D.R. ignoring her mother chased a fly around the room, caught it, ate it, and only then kissed his mother. RP 96. Also, when Ms. Roberts requested attention from D.R., D.R.'s response was to lie on the sofa and put her feet in Ms. Roberts face. RP 96. After visitation sessions, the children would have times of heightened activity, uncontrollable behavior, acting out, not following rules, not listening, and generalized defiance. RP 96-97. Eventually D.R. and A.R.'s visitation sessions were separated, as A.R. was in constant demand of Ms. Roberts' attention and D.R. would get angry and remove herself. RP 97. At one particular joint visitation session where the children had not seen each other for a six week period, A.R. came around a corner and the "instant he saw [D.R.] he pulled down his pants and wiggled his penis at [D.R.]." RP 98.

Around September of 2004, visitation between the mother and the children was suspended as a result of the children's behavioral issues, such

as acting out before and after visitation sessions. RP 94, 100, 108. The social worker, Cheryl Grimm testified that visitation made the children "very rocky," "tumultuous," that it was a significant disruption, and that they needed stabilization in their placements. RP 100, 108. Regarding suspension of visitation, Ms. Grimm consulted with Sue Elg, Jim Allen, and the guardian ad litem, Lu Haynes. RP 100.

On May 15, 2007, A.R. was admitted to the Children's Study and Treatment Center (CSTC), which is the most restrictive placement for a child his age, partially due to being classified as a Sexually Aggressive Youth (SAY). RP 308, 329. When A.R. was admitted there, his diagnosis consisted of attention deficit hyperactivity disorder, combined type, post traumatic stress disorder, oppositional defiant disorder, borderline intellectual functioning, psychosocial stressors including exposure to intimate partner violence, severe child neglect and physical abuse, and exposure to pornography and prostitution. RP 312-313. His CGAF score was 35, which measures his functioning on a 1 to 100 scale. RP 313. Dr. Jeremiah Norris, A.R.'s psychologist stated that his diagnosis at the time of trial still included attention deficit hyperactivity disorder, combined type, post traumatic stress disorder, chronic sub-type, oppositional defiant disorder, borderline intellectual functioning. RP 314.

A.R. has had difficulty at the CSTC. A.R. is classified as a sexually aggressive youth (SAY). RP 341. At the CSTC, he was involved in an incident where he was banging on the window to get attention, pressing his naked body against the window. RP 347. He also solicited peers to engage in sexual activity. RP 327-328. While at CSTC, A.R. made a disclosure that "his mom had touched his penis three times at age five [and]...that his sister did at age three." RP 374. Dr. Norris testified that A.R. would not be able to be discharged to a normal foster family and that "if he were to—even to go into an unskilled foster home or even just a busy foster home, I think we could expect regression pretty quickly." RP 341, 349. Regarding D.R.'s placement at the time of trial, social worker, Monica Accord testified that that D.R.'s placement was "willing to keep her as long as possible." RP 590.

At trial, counsel for Ms. Roberts made a request to the court that D.R. be appointed counsel, as it was two days from her twelfth birthday. RP 165. The court asked the guardian ad litem, Lu Haynes to "take up that issue," discussing appointment of counsel for D.R. RP 165-166. On April 8, 2008, the guardian ad litem stated that she would communicate with D.R.'s therapist, Dr. Lisa Estelle regarding the appointment of counsel for D.R. RP 410. At trial on April 16, 2008, the guardian ad litem stated that after discussion with her program manager, and D.R.'s foster parent, she came to

the conclusion that she did not want to discuss appointment of independent counsel with D.R. RP 418. Reasons for this included D.R.'s cognitive disabilities, as both the GAL and the foster mother believed that D.R. would not understand the ramifications of having an attorney. RP 418-419.

The GAL also discussed appointment of independent counsel for D.R. with D.R.'s therapist, Dr. Lisa Estelle. RP 419. Dr. Estelle stated in an email to the GAL,

I am concerned that a lawyer for [D.R.]...would only add to her anxiety and contribute to her getting her hopes up and later being disappointed again. I am not informed about how an attorney for her would benefit her currently and do not know the legal requirements for representation of a 12-year-old who is significantly limited in cognitive skills, language, comprehension, and insight. I am confident that Judge Baker would have these answers and be the best one to decide if [D.R.] needs her own attorney.

RP 419.

The court expressed that the guardian ad litem approached the appointment of independent counsel for D.R. in "the right way." RP 425. The court also expressed concern over "throw[ing] [D.R.] into a tailspin," and stated that as a result of her anxiety disorder, that it would not be right for the guardian ad litem to approach her directly. RP 426. The court noted that Dr. Estelle communicated what she thought to the GAL and that the GAL communicated with the court. Further, the court was concerned

about the prospect of getting another attorney involved and the interruption that this would cause in the trial. RP 426. The court also noted that the “overriding issue is that [appointment of independent counsel] will not be of any real assistance to [D.R.]...or to the court...” RP 427. As a result, the court denied Ms. Roberts’ and Mr. Roberts’ motion to appoint independent counsel for D.R. RP 427.

After a full trial on March 20, 2008, April 8, 2008, April 16, 2008, April 30, 2008, June 10, 2008, and August 25, 2008, the court issued a decision terminating Ms. Roberts’ parental rights as to both D.R. and A.R. RP 782.

### III. LAW AND ARGUMENT

Parents have a constitutionally protected right to the care, custody, and companionship of their child. *In the Matter of Sumey*, 94 Wn.2d 757, 762, 621 P.2d 108 (1980). However, parents’ constitutional rights are not absolute. When a parent’s actions, decisions, or inability to act seriously conflict with the physical or mental health of the child, the parents’ rights must be balanced against both the child’s right to basic nurture, safety, and physical and mental health, and the State’s right and responsibility to intervene to protect the child. RCW 13.34.020; *Krause v. Catholic Cmty. Svcs.*, 47 Wn. App. 734, 743, 737 P.2d 280 (1987). Therefore, the dominant concern on review should be the safety and welfare of the child.

RCW 13.34.020; *In the Matter of Sego*, 82 Wn.2d 736, 738, 513 P.2d 831 (1973).

To this end, the parent does not have unlimited time to correct his deficiencies. The law creates a sense of urgency by requiring that a petition for termination of parental rights be filed whenever the child has been in foster care for 15 of the past 22 months, unless compelling reasons excuse the requirement. RCW 13.34.145(1)(c). The law's focus on permanency reflects the importance of security and stability in a child's life, as well as a child's need for continuity and permanency in relationships. *See*, Joseph Goldstein, Anna Freud & Albert Solnit, *Beyond the Best Interests of the Child* (2d ed. 1979). Additionally, the law views the passage of time from the child's perspective, not the parent's. *In re Dependency of T.R.*, 108 Wn. App. 149, 164-65, 29 P.3d 1275 (2001) (foreseeable future must be viewed from the eyes of the child).

In a termination proceeding, the trial court is afforded broad discretion and its decision is entitled to great deference on review. The findings of the trial court will only be disturbed on appeal if they are not supported by substantial evidence. *In the Matter of H.J.P.*, 114 Wn.2d 522, 532, 789 P.2d 96 (1990). 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 Sego*, 82 Wn.2d at 739; accord *In re the Dependency of A.V.D.*, 62 Wn. App. 562, 568, 815 P.2d 277 (1991). The following elements are necessary to terminate parental rights:

- (a) That the child has been found to be a dependent child under RCW 13.34.030(4); and
- (b) That the court has entered a dispositional order pursuant to RCW 13.34.130; and
- (c) That the child has been removed or will, at the time of the hearing, have been removed from the custody of the parent for a period of at least six months pursuant to a finding of dependency;
- (d) That the services ordered under RCW 13.34.136 have been expressly and understandably offered or provided and all necessary services, reasonably available, capable of correcting the parental deficiencies within the foreseeable future have been expressly and understandably offered or provided;
- (e) That there is little likelihood that conditions will be remedied so that the child can be returned to the parent in the near future. A parent’s failure to substantially improve parental deficiencies within twelve months following entry of the dispositional order shall give rise to a rebuttable presumption that there is little likelihood that conditions will be remedied so that the child can be returned to the parent in the near future. The presumption shall not arise unless the petitioner makes a showing that all necessary services reasonably capable of correcting the parental deficiencies within the foreseeable future have been clearly offered or provided.
- (f) That continuation of the parent and child relationship clearly diminishes the child’s prospects for early integration into a stable and permanent home.

RCW 13.34.180(1)(a)-(f).

Once these elements are proved, RCW 13.34.190(2) requires that termination must be shown to be in the child's best interests. The burden of proof for the best interest element is a preponderance of the evidence. *In re A.V.D.*, 62 Wn. App. at 571.

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 the Dependency of A.M.*, 106 Wn. App. 123, 131, 22 P.3d 828 (2001) (citing *In re Aschauer's Dependency*, 93 Wn.2d 689, 695, 611 P.2d 1245 (1980)).

**A. The Trial Court's Order Terminating Parental Rights Should Not Be Disturbed As Substantial Evidence Supports The Finding That Each Element Necessary For Termination Of Ms. Roberts' Parental Rights Has Been Established.**

**1. Elements (a), (b), And (c) Are Not Challenged And Become Verities On Appeal.**

Ms. Roberts does not dispute, and did not assign any error, to the trial court's findings that the Department proved by clear, cogent, and convincing evidence elements (a), (b), (c) of RCW 13.34.180(1). Specifically, the court found that: 1) the child was dependent; 2) a dispositional order had been entered; and 3) the child had been out of her mother's care since January of 2004. Because Ms. Roberts has not

challenged those findings on appeal, they are verities on appeal. *In re J.F.*, 109 Wn. App. 718, 722, 37 P.3d 1227 (2001).

**B. The Department Proved That They Offered or Provided All Necessary Services, Capable Of Correcting Ms. Roberts Deficiencies.**

RCW 13.34.180(1)(d) requires the Department to affirmatively offer or provide necessary services. *In re Hall*, 99 Wn.2d 842, 850, 664 P.2d 1245 (1983). The Department is not required to provide services that will not correct parental deficiencies in the near future. *In re P.D.*, 58 Wn. App. 18, 26-27, 792 P.2d 159 (1990), *review denied*, 115 Wn.2d 1019 (1990).

In addition, a parent who makes a claim of insufficient services must point to evidence demonstrating how the service, if offered, would have corrected parental deficiencies. *In re T.R.*, 108 Wn. App. at 163. In other words, “even if the State inexcusably fails to offer a service to a willing parent, termination is appropriate if the service would not have remedied the parent’s deficiencies in the foreseeable future[.]” *Id.* at 164.

A parent’s unwillingness or inability to make use of the provided services excuses the Department from offering extra services that might have been helpful. *In re Ramquist*, 52 Wn. App. 854, 861, 765 P.2d 30 (1988). Where the record indicates that the offer of services would be futile because the parent has little hope of establishing a relationship with

the child despite the services, the trial court may find that the Department has offered all reasonable services. *In re Ferguson*, 32 Wn. App. 865, 869-70, 650 P.2d 1118 (1982), *reversed on other grounds*, 98 Wn.2d 589, 656 P.2d 503 (1983).

The Department met the requirement of RCW 13.34.180(d) because it offered or provided all necessary services. RP 103-104. Ms. Roberts was offered services after she voluntarily placed her children including a parenting and bonding assessment, a psychological evaluation, a drug and alcohol evaluation, individual counseling and parenting classes. RP 29. After dependency was established, additional services were ordered by the trial court and offered by the Department. These services included a chemical dependency assessment and recommended treatment, random urinalysis testing, a psychological evaluation, a mental health assessment, counseling, a parenting assessment, parenting classes, and home visits. RP 84-85.

Ms. Roberts claims that the Department failed to offer her all available services because the Department did not offer her particular classes that were available to train foster parents. However, her argument must fail because these services were not capable of correcting the mother's deficiencies in the near future. *See P.D.*, 58 Wn. App. at 26-27.

First, at the time Ms. Roberts watched online foster parent training videos, and completed questionnaires on March 26, 2008, the dependencies of D.R. and A.R. had been going on for almost a four year period. RP 652. In fact, Ms. Roberts completed these online training sessions after the trial regarding the Department's petition to terminate her parental rights had already begun, on March 20, 2008. RP 4. Further, social worker Monica Accord testified that in order to receive foster parent training, she would have to go through the licensing process to become a foster parent, and that these courses are done through the Department of Licensing. RP 599-600. In order for Ms. Roberts to complete this process, additional time would have been required. Finally, even if Ms. Roberts were able to attend foster parent training sessions, it is very unlikely that she would have been able to parent the children in the near future given the children's extremely high needs requiring institutionalization of A.R., and placement of D.R. in a very experienced therapeutic foster home. Indeed, the children's therapists testified that the children need caregivers with special training and substantial successful experience caring for children with similarly high needs.

Substantial evidence exists in the record to show that all necessary services, capable of correcting Ms. Roberts' deficiencies in the near future were offered or provided. No evidence exists to suggest that any service

existed that could have been offered to correct parental deficiencies in the near future. Based on the timeline of the dependencies of D.R. and A.R., even with additional services, Ms. Roberts would not have been able to correct her parental deficiencies in the near future. The finding was supported by clear, cogent, and convincing evidence.

**C. The Department Proved That There Is Little Likelihood That Conditions Will Be Remedied So That The Children Can Be Returned To The Parent In The Near Future.**

Ms. Roberts argues that there is insufficient evidence to support the courts finding that there is little likelihood that conditions will be remedied so that the children can be returned to her in the near future. Her claim is unsupported by the record.

RCW 13.34.180(1)(e) requires the Department to prove that there is little likelihood that conditions will be remedied so that the children can be returned to the parent in the near future. The focus of this element is whether parental deficiencies can be corrected in the near future of the child. *In re Dependency of K.R.*, 128 Wn.2d 129, 144, 904 P.2d 1132 (1995); *In re Hall*, 99 Wn.2d at 644; *In re T.R.*, 108 Wn. App. 149 at 166. Although the near future is not explicitly defined by statute, permanency should be established at the earliest possible date. RCW 13.34.145(1)(c). “A determination of what constitutes the near future depends on the age of

the child and the circumstances of the placement.” *In Re Dependency of T.L.G.*, 126 Wn. App. 181, 204, 108 P.3d 156, 168 (2005).

When terminating parental rights, the “dominant consideration is the moral intellectual and material welfare of the child...what is perhaps eventually possible for the parent must yield to the child’s present need for stability and permanence.” *In re T.R.*, 108 Wn. App. 149 at 166. Stated another way, even if a parent may eventually be capable of correcting parental deficiencies, termination is still appropriate where such deficiencies will not be corrected within the “foreseeable future” as viewed from the child’s point of view. *See, In re Dependency of A.W.*, 53 Wn. App. 22, 32, 765 P.2d 307 (1988).

Here, substantial evidence exists to prove that Ms. Roberts does not possess the ability to remedy her deficiencies in the children’s near future. As previously mentioned, at the time of trial on the termination of Ms. Roberts parental rights, the dependencies of D.R. and A.R. had been going on for almost a four-year period. Additionally, in order for Ms. Roberts to remedy conditions so that the children can be returned to her in the near future, she would need to be a sufficient caretaker for both D.R. and A.R.

Dr. Lisa Estelle testified that D.R. would need caregivers who are able to establish and maintain positive relationships with her, are not

emotionally reactive in a negative manner, are able to provide constant supervision, and would have some level of education and training about how D.R.'s learning issues impact her as well as her developmental history and limitations. RP 205-206. Dr. Estelle also stated that D.R. would need a caretaker who is able to provide structure and a patient response to her frequent need for redirection, and who has proven experience dealing with high needs youth. RP 205-206.

Susan Elg, who observed Ms. Roberts with D.R. and A.R. for evaluation of the parent-child relationship, testified that D.R. needs "highly skilled, extremely therapeutic care." RP 263, 276.

Dr. Jeremiah Norris testified A.R. needs a placement that emphasizes ongoing sexually aggressive youth therapy, and a very structured, scheduled, predictable, and safe institutionalized living environment. RP 349-350. Dr. Norris went on to say that the "very minimum standard" for A.R.'s caregivers are people like those that work at the CSTC who have bachelors' degrees in psychology with a minimum of two years experience working with troubled youth. RP 350. These qualifications would take the mother several years to achieve.

Given the testimony of the children's therapists, there is substantial evidence supporting the trial court's conclusion that Ms. Roberts will not

be able to remedy her parental deficiencies in order to become the kind of caretaker that D.R. and A.R. are in need of in the foreseeable future.

**D. The Department Proved That Continuation Of The Parent Child Relationship Clearly Diminishes The Child's Prospects For Early Integration Into A Stable And Permanent Home.**

RCW 13.34.180(1)(f) requires the Department to prove that the continuation of the parent child relationship clearly diminishes the child's prospects for early integration into a stable and permanent home. RCW 13.34.180(1)(f) emphasizes a limited time frame for establishing permanency for a child by use of the phrase "early integration" into a stable and permanent home. This element focuses on "the parent/child relationship and whether it impedes the child's prospects for integration, not what constitutes a stable and permanent home." *In re Dependency of K.S.C.*, 137 Wn.2d 918, 927, 976 P.2d 113 (1999).

A finding that continuation of the parent-child relationship diminishes the child's prospects for early integration into a stable and permanent home necessarily follows from an adequate showing that there is little likelihood that conditions will be remedied so that the child can be returned home in the near future. *In re Dependency of J.C.*, 130 Wn.2d 418, 427, 924 P.2d (1996).

In this case, the Department proved that continuation of the parent-child relationship between Ms. Roberts and D.R. and A.R. clearly diminished D.R. and A.R.'s prospects for early integration.

First as set forth above, the Department established that there is little likelihood that conditions will be remedied in the near future. Thus it necessarily follows that continuation of the parent-child relationship diminishes the child's prospects for early integration into a stable and permanent home. *See J.C.*, 130 Wn.2d at 427.

In addition, Cheryl Grimm testified that for D.R. and A.R. "to be able to try and establish a...stable relationship...they would need to know that the story with their mom is done, that the time is done." RP 108. She also noted that termination of Ms. Roberts' parental rights would "allow the children to move into environments that will offer them the support and the structure...without wondering whether they're going to go back." RP 109.

Dr. Lisa Estelle testified that "if termination provides the opportunity for [D.R.] to have an increased chance of permanency in her placement, I believe...it would be a good thing for [D.R.]. She needs a sense of permanence...I wish that [D.R.] would have had permanence to her situation years ago. The longer she has to deal with impermanence and a sense of anxiety about whether she belongs where she belongs or is

going to stay where she's at, I think that can be harmful to D.R." RP 212-213. Additionally, Susan Elg also testified that that "it would not be a good idea to reunify [Ms. Roberts, D.R. and A.R.]." RP 286.

The guardian ad litem, Lu Haynes testified that continuation of the parent-child relationship between Ms. Roberts and D.R. and A.R. would stand in the way of the children being able to obtain a stable and permanent home as termination would help A.R. to "know that the relationship is gone...[and] it would help him get mentally healthy." RP 475. As to D.R., Lu Haynes testified that the continuation of the parent-child relationship between Ms. Roberts and D.R. would get in the way of D.R. obtaining a stable and permanent home because D.R. would "hold out hope that they were going back to the Mother...I think they'd be able to move on better and...be healthier in a new foster home knowing they would have to rely on that foster parent exclusively." RP 476.

While it is clear that both D.R. and A.R. have substantial issues as a result of the trauma that they both suffered throughout their childhood, and that placement in a adoptive home was not likely at the time of the termination trial, the focus is not on whether they are or will be in a stable and permanent home, but rather on the child's prospects for integration. *See K.S.C.*, 137 Wn. 2d at 927. While D.R. was not in an adoptive

placement, social worker Monica Accord testified that that D.R.'s placement was "willing to keep her as long as possible." RP 590.

**E. The Department Proved That Termination Of Ms. Roberts' Parental Rights Was In The Best Interest Of D.R. And A.R.**

Once the trial court finds that each element of RCW 13.34.180 has been proven by clear, cogent and convincing evidence, it must then decide whether, by a preponderance of the evidence, termination is in the best interests of the child under RCW 13.34.190(2). *In re Welfare of A.J.R.*, 78 Wn. App. 222, 228, 896 P.2d 1298 (1995)

In parental termination proceedings, the paramount consideration is the welfare of the child. *In re Russell*, 70 Wn. 2d 451, 423 P.2d 640 (1967); *In re K.S.C.*, 137 Wn. 2d at 925. When a parent has been unable to progress over a lengthy period of time, a court is "fully justified" in finding termination is in the best interests of the child rather than "leaving [the child] in limbo of foster care for an indefinite period while [the parent] sought to rehabilitate himself." *In re T.R.*, 108 Wn. App. at 167, (quoting *In re A.W.*, 53 Wn. App. at 23).

Having established that the elements of RCW 13.34.180 were proven by clear, cogent, and convincing evidence, the court properly concluded preponderance of the evidence that termination of Ms. Roberts' parental rights was in the child's best interests. The paramount

consideration in this case is the welfare of D.R. and A.R. The social worker Cheryl Grimm, Dr. Lisa Estelle, Sue Elg, the guardian ad litem, Lu Haynes, and Monica Accord all testified that it was in the best interest of the children for Ms. Roberts' parental rights to be terminated and not be reunified with the children. RP 109, 212-213, 286, 475-476, 581.

The court properly concluded on this evidence that termination was in the child's best interests, and that conclusion should not be disturbed.

**F. The Court Did Not Abuse Its Discretion In Suspending Visitation**

This argument for reversal of the termination of parental rights fails because (1) the challenge is untimely since the visits were terminated more than three (3) years before the termination trial began; (2) even if suspension of visits was error, it does not impact the court's findings supporting termination; and (3) suspension of visits was appropriate.

Visitation in the context of a dependency is governed by RCW 13.34.136(b)(ii). Visitation is "the right of the family...in cases in which visitation is in the best interest of the child." RCW 13.34.136(b)(ii). However, visitation can be limited or denied if "the court determines that such limitation or denial is necessary to protect the child's health, safety or welfare." *In Re Dependency of T.L.G.*, 126 Wn. App. 181, 204, 108 P.3d

156, 168 (2005) infers that continued contact with a parent is contrary to a child's welfare without a specific finding from the trial court. *Dependency of J.W.*, 90 Wn. App. 417, 429, 953 P.2d 104 (1998).

Thus, suspension of visits is appropriate if the visits posed a concrete risk of harm to the children's health, safety or welfare.

As to D.R. and A.R., the Department attempted to mitigate some of the issues that were taking place in visitation sessions earlier on in the dependency. At visitations A.R. was in constant demand of Ms. Roberts' attention so much that D.R. would get angry and become withdrawn. RP 97. Eventually D.R. and A.R.'s visitation sessions were separated. RP 97. However this did not resolve all of issues that were taking place.

The Department discontinued visitation between Ms. Roberts and the children by motion because there were serious concerns regarding the mental health and welfare of the children as a result of visits. RP 94. The social worker at the time, Cheryl Grimm, testified that she was concerned about A.R.'s sexualized behavior at visits which were exhibited by his laying directly on top of his mother. RP 95. She also noted concern over D.R.'s responses to her mother which included eating a fly then kissing her mother. RP 96.

Visitation also increased the children's troubling behaviors suggesting the visits were harmful to their emotional well being. The

children acted out both before and after visits. RP 94, 100, 108. Directly after visitation sessions, the children would be uncontrollable, refuse to follow rules, refuse to listen, and be generally defiant. RP 96-97. Visitation made the children "very rocky," and "tumultuous." RP 100. This was a significant disruption, and it was affecting the stability of their placements. RP 100, 108. Regarding suspension of visitation, Ms. Grimm consulted with Sue Elg (who completed Ms. Roberts' parent-child evaluation), Jim Allen (A.R.'s counselor), and the guardian ad litem. RP 100.

Here, visitation sessions were discontinued by the trial court as a result of the negative effect that they had on D.R. and A.R.'s mental health, welfare, and best interests. The court's concern is substantiated by the record, and the court did not abuse its discretion in ordering that visitation be suspended. *Dependency of J.W.*, 90 Wn. App. 417, 429, 953 P.2d 104 (1998).

Also, the suspension of visits, even if error, does not justify reversal of termination of parental rights because the suspension was not a basis of the trial court's order terminating parental rights. Rather, the trial court's termination was based upon the children's high needs and the mother's inability to gain the skills and experience necessary to provide the minimum level of care they need.

**G. The Court Did Not Abuse Its Discretion By Not Appointing Counsel for D.R.**

Ms. Roberts asserts that the trial court abused its discretion when it denied her motion to appoint counsel for D.R. “The granting or denying of a motion ... rests within the sound discretion of the trial court and the trial court’s ruling will not be disturbed unless an abuse of discretion is shown. *State v. Sutherland*, 3 Wn. App. 20, 21, 472 P.2d 584, 585 (1970). “Discretion is abused only where no reasonable man would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken by the trial court, it cannot be said that the trial court abused its discretion.” *Id.* at 21, 22.

Here, regarding appointment of counsel for a child in a dependency proceeding, RCW 13.34.100(6) provides, “[i]f the child requests legal counsel and is age twelve or older, or if the guardian ad litem or the court determines that the child needs to be independently represented by counsel, the court **may** (emphasis added) appoint an attorney to represent the child’s position.” RCW 13.34.100(6).

Thus, the trial court may, but is not required to, appoint independent counsel for a child under RCW 13.34.100(6) if either (1) the child is 12 years or older and requests counsel, or (2) the guardian ad litem or trial court determine the child needs to be independently represented by counsel.

In the case at hand, the child D.R. did not request legal counsel. Likewise, neither the guardian ad litem nor the court determined that the child needed to be independently represented. To the contrary, the guardian ad litem and trial court determined that the child did not need counsel based on the child's therapist's and guardian ad litem's opinions that appointment of counsel would unnecessarily confuse D.R. and cause her emotional trauma. Accordingly, the statutory prerequisites to the court being allowed to exercise its discretion were not satisfied. Even if they were, the court did not abuse its discretion.

The guardian ad litem stated that, after discussion with her program manager, and D.R.'s foster parent, she came to the conclusion that she did not want to discuss appointment of independent counsel with D.R. The guardian ad litem explained that this was due to her belief that D.R. would not understand the ramifications of having an attorney due to her cognitive disabilities. RP 418-419.

The guardian ad litem's reasoning was corroborated by D.R.'s therapist, Dr. Lisa Estelle. RP 419. Dr. Estelle stated in an email to the GAL,

I am concerned that a lawyer for [D.R.]...would only add to her anxiety and contribute to her getting her hopes up and later being disappointed again. I am not informed about how an attorney for her would benefit her currently and do not know the legal requirements for representation of a 12-

year-old who is significantly limited in cognitive skills, language, comprehension, and insight. I am confident that Judge Baker would have these answers and be the best one to decide if [D.R.] needs her own attorney.

RP 419.

Based on the above, the trial court was concerned that appointing counsel for the child may “throw[ing] [D.R.] into a tailspin,” and stated that as a result of her anxiety disorder, that it would not be right for the guardian ad litem to approach her directly. RP 426. In addition, the trial court noted that the “overriding issue is that [appointment of independent counsel] will not be of any real assistance to [D.R.]...or to the court...” RP 427. As a result, the court denied Ms. Roberts’ and Mr. Roberts’ motion to appoint independent counsel for D.R. RP 427.

Here, given both the factual circumstances and the law, the trial court did not abuse its discretion. Discretion is abused where “no reasonable man would take the view adopted by the trial court.” It cannot be said that no reasonable person would have denied the motion for appointment of independent counsel. The people with close relationships to D.R., including the foster mother and her therapist, agreed that it would be futile and disruptive to D.R. to appoint counsel. The trial court’s decision to not appoint counsel for D.R. was a proper exercise of judicial discretion and should be upheld by this court.

#### IV. CONCLUSION

The Department established by clear, cogent, and convincing evidence all elements necessary under RCW 13.34.180(1) to terminate Ms. Roberts' parental rights. The Department has also proven by a preponderance of the evidence that termination of Ms. Roberts' parental rights is in the best interests of the children D.R. and A.R., as required by RCW 13.34.190(2). D.R. and A.R.'s best interests were served by termination of Ms. Roberts' parental rights and the trial court's decision should be affirmed.

RESPECTFULLY SUBMITTED this 30th day of April, 2009.



KELLY E. KONKRIGHT, WSBA #33544  
Assistant Attorney General  
Attorney for Washington State  
Department of Social Health Services,  
Respondent

FILED

APR 30 2009

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

NO. 273946-III

**COURT OF APPEALS FOR DIVISION III  
STATE OF WASHINGTON**

In re:

D.R. and A.R.

DECLARATION OF  
MAILING

I, Danielle Hunter, state that on April 30, 2009, I deposited in the United States mails by first class mail, proper postage affixed, the following documents: Respondent's Brief regarding the above-referenced matter to:

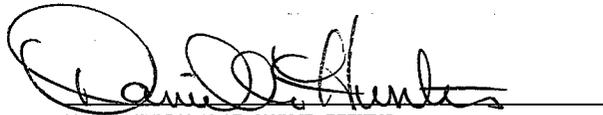
David L. Donnan  
Washington Appellant Project  
1511 Third Avenue, Suite 701  
Seattle, Washington 98101

Bonne W. Beavers  
Attorney at Law  
35 W. Main Avenue, Suite 300  
Spokane, WA 99201

Casey Trupin  
Columbia Legal Services  
101 Yesler Way Ste 300  
Seattle, WA 98104-2528

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 30<sup>th</sup> day of April, 2009 at Spokane, Washington.

A handwritten signature in black ink, appearing to read "Danielle Hunter", written over a horizontal line.

DANIELLE HUNTER  
Office of the Attorney General