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SUPREME COURT
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CLERK

NO. 84458-5

SUPREME COURT OF THE STATE OF WASHINGTON

IN RE DEPENDENCY OF P.P.T., J.J.I.,
O.L.T.,

Minor Children,

PETER TSIMBALYUK ,

Petitioner,

STATE OF WASHINGTON, DSHS, and
COURT APPOINTED SPECIAL
ADVOCATE FOR CHILDREN
("CASA"),

Respondents.

JOINT
RESPONSE BY DSHS AND
CASA TO COURT'S REQUEST
FOR INFORMATION RE:
SECOND TERMINATION
TRIAL

1. IDENTITY OF MOVING PARTY:

The respondents, the Department of Social and Health Services of the State of Washington, and the children's Court Appointed Special Advocate ("CASA") offer this joint response to the Court's letter dated September 9, 2010 requesting additional information regarding the second

ORIGINAL

FILED AS
ATTACHMENT TO EMAIL

termination proceeding, which occurred while this case was being considered for review.¹

2. STATEMENT OF RELIEF SOUGHT:

The Department and the CASA request that this Court deny Tsimbalyuk's Petition for Discretionary Review.

3. FACTS RELEVANT TO THE DEPARTMENT'S RESPONSE:

This appeal concerns three young children who have spent much of their life in state custody waiting for the father to correct his parental deficiencies.

On March 25, 2009, following the trial which is the subject of this appeal, Judge Ronald Kessler denied termination of the father's parental rights to these three children, who were then ages two, four, and eight. The court found that all services capable of correcting the father's parental deficiencies had been provided; and found there was little likelihood the father's deficiencies could be remedied in the near future; and found that custody should remain with the relatives but denied termination concluding that some alternative to termination, such as dependency

¹ The second termination proceeding was an entirely new proceeding, separate from the case that is currently on appeal and was filed under King County Cause No. 09-7-04166-9 SEA, 09-7-04167-7 SEA, and 09-7-04168-5 SEA. Following trial on the new petition, the court terminated the father's parental rights, and those orders are currently on appeal in Division One, Court of Appeals, No. 65293-1-I.

guardianship or third party custody would better serve the children's interest. The court made this conclusion even though there was no alternative action pending before the court, and no alternatives advocated for by any of the parties, and no evidence presented that any alternatives were viable or would provide the children the kind of stability and permanence they need.

Following trial, the Department and CASA moved the court pursuant to CR 60(b) to vacate the order denying termination and to reopen the case for presentation of additional evidence, which would have shown that the court's ruling was based on erroneous assumptions and mistakes of fact. The Department and CASA requested this relief as preferable to that which could be obtained through either an appeal or a second termination trial because both were concerned about the lengthy delays that would inevitably ensue and the danger these delays presented for the children's stability. CP 319-352.

Judge Kessler refused to grant a hearing on the motion to vacate and summarily denied it without explanation. CP 354-355, 358-359. Both the Department and the CASA sought discretionary review of both orders. However, because of delays occasioned by the late appointment of appellate counsel for the father, his requests for continuances in the

appeal, and because of factual developments in the case demonstrating the children's stability was now at risk, the Department additionally filed a second termination petition on October 15, 2009, concluding that these children could not wait for the appellate process to run its course. *See* Appendix A. Trial on the new termination petition was scheduled to begin on March 8, 2010, but on the eve of trial the father moved to stay or continue the trial. Appendix B.

Both the Department and the CASA objected to the father's motion, noting the lateness of his request, the changes in circumstances since the first trial, and the fact that the father's argument opposing a second termination trial was completely inconsistent with the argument he advanced throughout this appeal that filing a second termination action is the proper course of action for the state to take when it loses a termination trial. Appendix C and D.

Additionally, the father's decision to seek Supreme Court review of the decision by the Court of Appeals, Division One to reverse Judge Kessler's denial of termination in the first trial (which is the subject of this appeal) rather than permit the case to be remanded as directed by the Court of Appeals meant that any ultimate resolution of the first termination trial would be further delayed. Appendix C. Even the father acknowledged

that it would be at least six months before the Supreme Court would decide whether to accept review.² Appendix B.

Factually, the situation was additionally becoming dire for these young children. In the year since Judge Kessler denied termination in the first trial, the relationship between the father, the children, and the relatives had significantly deteriorated. Although the father had the option to pursue the alternatives Judge Kessler found preferable to termination, the father never pursued the filing of a guardianship or 3rd party custody petition, nor did he made any serious attempt at having his children returned to him. His behaviors toward the relative caretakers and the children became abusive. *See* Declaration of Social worker Sandy Street, CASA report to court, and text message from the father to the relative caretakers attached to Appendix C, and *see* Appendix D.

Among other things, the father threatened to move the youngest children to different relatives in another state and to undermine any alternative action ordered by the court; he moved in and then destroyed the relative's rental home leaving holes in the walls, broken windows, piles of garbage and drug paraphernalia, resulting in the relatives losing the property; he threatened and defamed the relatives so significantly that the

² As of the date of this brief it has been over seven months since the Court of Appeals issued its decision.

relatives sought a protection order against him and they refused to supervise his visits; he shaved his children's heads in contravention of the children's desires and specific admonitions by the court commissioner; he failed to appear for court ordered urinalysis; he did not participate in any of the services ordered of him in the dependency since termination was denied the year prior; he did not consistently visit the children; he refused to follow the court order requiring him to sign a release of information for immigration records; and he was fired from his job. Appendix C and D.³

Moreover, Dr. Richard Borton, the psychologist who testified at the first termination trial, and whom Judge Kessler relied upon for his decision to deny termination, completed a records review of the events from the past year and concluded that termination was indeed appropriate and that any adoption should be "closed" so as to give the children a clean break and to reduce the possibility of the father manipulating the children during visits. See copy of Dr. Borton's February 22, 2010 letter attached to Appendix C.

³ Evidence substantiating these assertions of fact are in Appendix C and can be seen throughout the dependency files involving these children. See CASA's Certification of Emergency Hearing filed on 1/21/10 under Cause Numbers 06-7-04269-5 SEA; 05-7-00142-7 SEA; 06-7-04270-9 SEA; See CASA Motion re: Visitation and Services for Father filed 1/27/10 under same Cause Numbers; See DSHS Response to CASA's Motion Regarding Father's Visitation filed 2/3/10 under same Cause Numbers; See CASA Strict Reply dated 2/8/10 filed under same Cause Numbers; See Department's Response to Father's Motion for Revision filed on 2/11/10 under same Cause Numbers.

The Department argued that in addition to the historical events of the case, these recent events would be the focus of the second termination trial, and because the second trial would necessarily consider these new facts, there was no risk of inconsistent decisions on appeal. Appendix A and C.

The Superior court denied the father's motion to stay or continue the new termination trial and the father never sought appellate review of that decision. Appendix E. Following a second six day trial that considered these new developments, the Honorable Michal J. Fox ordered termination of the father's parental rights. See Copy of that decision attached as Appendix A to the State's Answer to Petition for Discretionary Review. The father has appealed the order terminating his parental rights and that order is before Division One of the Court of Appeals.⁴

4. ARGUMENT:

A. Clearly established law permits the Department to file a second termination petition, when it loses the first.

The Department's right to file a second termination petition, when it loses the first, is a matter of clearly settled law. In re Dependency of A.G., 127 Wn. App. 801, 112 P. 3d 588 (2005) *review denied*, 156 Wn. 2d 1013 (2006). In A.G. the trial court denied termination of parental rights

⁴ Cause No. 65293-1-I.

and the state appealed. In concluding that the order denying termination of parental rights was not appealable as a matter of right, the court stated:

“We emphasize that the State may file an additional petition for termination. The dismissal here is akin to a dismissal of an action without prejudice. In fact, the court acknowledged the likelihood that further action regarding Green’s parental rights may occur, probably to Green’s detriment in the long-term.”

112 P. 3d at 591

The court went on to state that the denial of the initial termination petition creates “no bar to a subsequent petition by the State” and that the practical effect of denying the initial termination petition is to “temporarily discontinue or postpone the action” until the parent is “given another opportunity to “get it together.” *Id.* Indeed, throughout this appeal, the father consistently argued that the state could file a second termination petition. *See* Exhibit 1 attached to Appendix C for excerpts of the father’s arguments on this appeal. It was not until the state filed a second termination petition and the trial was about to begin that the father suddenly complained. Appendix B.

In appeals where placement or custody of children is involved, courts have repeatedly recognized that circumstances change and that issues on appeal do not remain static. *See e.g. In re Guardianship of Inez B. Way*, 79 Wn. App. 184, 901 P. 2d 349 (1995)(situations such as those involving

dependent children or incapacitated persons are fluid and ever changing); In re Dependency of M.A., 66 Wn. App. 614, 834 P. 2d 627 (1992)(noting that the appellate court's knowledge of the case is frozen at the time the appeal was filed, and that circumstances may well have changed in the intervening time). The decision in A.G. that recognizes the Department's right to file another petition when it loses the first acknowledges that where circumstances of children change, the state must have the tools necessary to address those changes. If the Department were precluded from proceeding to trial on a second termination petition, then the remedy articulated in A.G. would be an illusory remedy, and the state should have an absolute right to appeal orders that deny termination.

In its letter of September 9, 2010, this Court requested the factual and procedural basis and authority, consistent with RAP 7.2, for the court to have entered termination orders, and the A.G. decision provides that authority. RAP 7.2 is inapplicable because that rule addresses the authority of the trial court to act *in the same proceeding* which is the subject of the appeal, and it only limits the court's authority to act after review is accepted. See RAP 7.1 and RAP 7.2. The second termination petition filed in this case was an entirely new action, filed under new cause numbers, and was based on facts that had arisen since the first termination

petition was denied. Appendix A, C, and D. It was not brought pursuant to the proceeding that is the subject of this appeal, and at the time it was filed in October of 2009, the Court of Appeals had not yet accepted discretionary review of the order resulting from the first termination trial. Because it was a separate action, permitted to be filed by the decision in A.G., and because it was based on new facts, the trial court was clearly within its authority to proceed.⁵

B. The factual circumstances had changed and new facts developed necessitating that the second termination petition be filed.

As indicated *supra* at 5-6, the second termination petition was filed because the factual circumstances of these children had deteriorated so significantly, they could not wait any longer to have the appeal of the first termination trial resolved. They needed stability and permanency after having been bounced from multiple placements. Although they finally had stable homes with their current relative caretakers when the first trial occurred, that was no longer certain just a few months following the first trial, and the potential for disruption in their placement created too great a risk of harm. Appendix C and D.

The law guarantees every child the right to a “safe, stable, and *permanent* home and a *speedy* resolution of proceedings” under ch. 13.34

⁵ And to the extent any errors occurred during the second trial, they will be remedied

RCW. *See also* In re the Dependency of J.S., 111 Wn. App. 796, 46 P.3d 273 (2002)(statute mandates *speedy* resolution in order to allow the child to have a safe, stable and permanent home). To require these children, who had already been denied these basic rights to wait another indefinite period of time for this first appeal to run its course would sentence them to a lifetime of uncertainty; it would violate their statutory and constitutional right to stability and early permanency; and it would ignore their best interest. *See* In re Dependency of J.B.S., 123 Wn.2d 1, 863 P.2d 1344 (2008); In re P.A.D., 58 Wn. App. 18, 26, 792 P.2d 159 (1990); In re Dependency of C.T., 59 Wn. App. 490, 498, 798 P.2d 1170 (1990) *review denied*, 116 Wn.2d 1015 (1991); *see also*, In re Russell, 70 Wn.2d 451, 423 P.2d 640 (1976); In re Ramquist, 52 Wn. App. 854, 861, 765 P.2d 30 (1988).

The law grants the Department the authority to file a second termination petition, and in this case it was absolutely necessary to prevent a catastrophic result for these children.

DATED this 17th day of September, 2010.

ROBERT M. MCKENNA
Attorney General

through the appeal currently pending in the Court of Appeals.

By Trisha L. Mcardle
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And By:

Amanda Beane - by Jm
AMANDA J. BEANE and *e-mail*
KAREN BRUNTON *approval*
Attorneys for CASA *9-17-10*

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SUPREME COURT OF THE STATE OF WASHINGTON

In re the Welfare of P.P.T., J.J.I., O.L.T,
Minor Children

STATE OF WASHINGTON,
Department of Social and Health
Services,

Respondent,

v.

PETER TSIMBALYUK,

Petitioner.

DECLARATION OF
SERVICE

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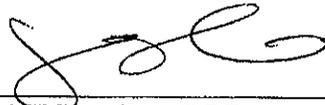
I, Vanessa Valdez, declare as follows:

I am a Legal Assistant employed by the Washington State Attorney General's Office. On April 23, 2010, I sent a copy of: **DSHS Answer to Petition for Discretionary Review, and Declaration of Service** via first class, US mail, to:

1. **Lila J. Silverstein**, Washington Appellate Project, 1511 Third Avenue, Ste. 701, Seattle, WA 98101
2. **Amanda J. Beane**, Perkins Coie, L.L.P., 1201 3rd Avenue, Ste. 4800, Seattle, WA 98101

I declare under penalty of perjury, under the law of the State of Washington that the foregoing is true and correct.

DATED this 23rd day of April, 2010 at Seattle, Washington.



VANESSA VALDEZ
Legal Assistant

FILED AS
ATTACHMENT TO EMAIL

ORIGINAL

OFFICE RECEPTIONIST, CLERK

To: Valdez, Vanessa (ATG)
Subject: RE: 84458-5 Filing

Rec. 9-17-10

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From: Valdez, Vanessa (ATG) [mailto:VanessaV1@ATG.WA.GOV]
Sent: Friday, September 17, 2010 3:27 PM
To: OFFICE RECEPTIONIST, CLERK
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Case Name: In re the Welfare of P.P.T., J.J.I., O.L.T., Minor Children

State of Washington, DSHS v. Peter Tsimbalyuk

Case Number: 84458-5

Filing: Joint Response by DSHS and CASA to Court's Request for Information re: Second Termination Trial, and Declaration of Service

****Attachments are over 25 pages in length and will be mailed to the Supreme Court.**

Filed by:

Trisha McArdle, Senior Counsel

WSBA # 16371

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<<84458 Joint Response.pdf>> <<84458-5 Dec of Svc.pdf>>

VANESSA VALDEZ

Washington State Attorney General's Office

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Appendix A

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY
JUVENILE DEPARTMENT

IN RE DEPENDENCY OF:

TSIMBALYUK, PETER PETROVICH,
dob: 9/12/2000
IRBY, JAYCOB JAMES,
dob: 2/21/2005
TSIMBALYUK, OSCAR LEONID,
dob: 8/17/2006

Minor Children.

NO. ~~06-7-04270-9 SEA~~ 09-7-04166-9 SEA
[Dependency No. 06-7-04270-9 SEA] 06-7-04269-5 SEA
NO. 09-7-04167-7 SEA
[Dependency No. 05-7-00142-7 SEA]
NO. 09-7-04168-5 SEA
[Dependency No. 06-7-04269-5 SEA] 06-7-04270-9 SEA

PETITION FOR TERMINATION OF
PARENT-CHILD RELATIONSHIP
[Clerk's Action Required]

The State of Washington's Department of Social and Health Services (DSHS) through the undersigned caseworker petitions the court for entry of an order terminating the parent-child relationship between the above-named minor children and their father, Peter Leonidovich Tsimbalyuk, AKA Petro Leonidovich Tsimbalyuk, date of birth 4/3/1978, pursuant to RCW 13.34.180 et seq. The petition is based on the following allegations:

I. JURISDICTION

This court has jurisdiction over this proceeding pursuant to RCW 13.34.180 and JuCR 4.1.

II. PARTIES

2.1. Petitioner. The Department of Social and Health Services, through Sandra L. Street, Division of Children and Family Services. DSHS is represented by Robert

1 M. McKenna, Attorney General, through an Assistant Attorney General.

2 2.2 Children. Jaycob J. Irby, Peter P. Tsimbalyuk, and Oscar L. Tsimbalyuk are
3 dependent children pursuant to previously entered orders of dependency.

4 2.3 Mother. The parental rights of the children's mothers have been terminated
5 pursuant to orders of the court previously entered on November 3, 2008, with regard to Peter
6 P. Tsimbalyuk and on February 13, 2009, with regard to Jaycob J. Irby and Oscar L.
7 Tsimbalyuk.

8 2.4 Father. Paternity of the children has been established. The father of the
9 children is Peter Leonodovich Tsimbalyuk, AKA Petro Leonidovich Tsimbalyuk. The father
10 currently resides at 4709 176th Street SW Apt. C12, Lynnwood, WA 98037.

11 2.5 Children's CASA. Lori Reynolds is the children's court-appointed special
12 advocate.

13 2.6 The father is not married to the biological mother of Peter P. Tsimbalyuk,
14 Veronica Haupt. The father is married to the biological mother of Jaycob J. Irby and Oscar
15 L. Tsimbalyuk, Toby Irby.

16 2.7 The children are not members of or eligible for membership in an Indian
17 tribe and the Indian Child Welfare Act, 25 U.S.C. § 1901 *et seq.* does not apply to the
18 proceedings.

19 2.8 To the best of DSHS' knowledge, the father is not a service member and the
20 Servicemembers Civil Relief Act does not apply to these proceedings.

21 III. ALLEGATIONS IN SUPPORT OF TERMINATION

22 3.1 Dependency. The children were declared dependent under RCW
23 13.34.030(5) by agreed orders entered on May 17, 2005, as to Jaycob and on May 18, 2007
24 as to Peter and Oscar.

25 3.2 Disposition. Dispositional orders were entered pursuant to RCW 13.34.130

1 on May 17, 2005 and May 18, 2007.

2 3.3 Removal From Parents. The children have been removed from the custody
3 of the father for a period of at least six months pursuant to a finding of dependency. Jaycob
4 J. Irby was initially removed from his parents on March 2, 2005. He was returned to their
5 care on March 10, 2006, and removed for the final time on January 16, 2007. Peter P.
6 Tsimbalyuk was removed from his father's home on November 21, 2006, and has remained
7 with paternal relatives since that time. Oscar L. Tsimbalyuk was removed from his parents
8 on January 16, 2007.

9 3.4 Services to Correct Parental Deficiencies. Services ordered under RCW
10 13.34.130 have been expressly and understandably offered or provided and all necessary
11 services, reasonably available, capable of correcting the parental deficiencies within the
12 foreseeable future have been expressly and understandably offered or provided.

13 3.5 The father agreed to court-ordered disposition orders which required him to
14 participate in the following: a drug/alcohol evaluation; random urinalysis testing two times
15 per week; age-appropriate parenting classes, a psychological evaluation and recommended
16 treatment; domestic violence perpetrator's treatment and Family Preservation Services if the
17 children were returned to him. The father was also ordered to comply with the restraining
18 order regarding Ms. Irby.

19 3.6 Mr. Tsimbalyuk participated in UA testing, completed an approved course of
20 parenting, submitted to a psychological evaluation and participated in but did not complete
21 counseling with 2 different counselors. He enrolled in two difference domestic violence
22 perpetrator's programs but did not complete either of them.

23 3.7 Mr. Tsimbalyuk participated in domestic violence perpetrators' treatment
24 with Doug Bartholomew and Associates from May 2007 through August 2007. The father
25 selected Mr. Bartholomew's program, and the Department approved the father's enrollment

1 in the program. The father made no progress in treatment. He continued to believe that his
2 behavior was justified, he did not want to change his behavior, he showed no regard for the
3 feelings of others, and he showed no emotional reaction that would inhibit future bad
4 behavior. The treatment provider determined that, without domestic violence treatment the
5 father posed a high risk of re-offending. Mr. Tsimbalyuk withdrew from the program
6 because he did not want to participate in a program that required polygraphs.

7 3.8 The father engaged in domestic violence perpetrators' treatment with Coastal
8 Treatment and Associates from October 2007 through February 2008. The father selected
9 the program, and the Department approved the father's enrollment in the program. The
10 father was suspended from the program in February 2008 after he refused to complete a
11 responsibility letter to his victim, Ms. Irby. The father never re-initiated domestic violence
12 perpetrators' treatment following his discharge from Coastal Treatment.

13 3.9 The father engaged in individual mental health counseling with Jay
14 Williamson, a licensed mental health provider with a domestic violence treatment
15 background. The father engaged in counseling with Mr. Williamson to address his
16 provisional diagnosis of Anti-social personality disorder. The father made some progress,
17 but would require at least two more years of intensive counseling with external monitoring
18 in order to make progress towards establishing a healthy, self-disciplined life-style.

19 3.10 Little Likelihood of Return Home. There is little likelihood that conditions
20 will be remedied so that the children can be returned to the father in the near future.
21 Throughout the dependency, the father has demonstrated an unwillingness to participate in
22 and/or successfully complete services offered to correct parental deficiencies. The father
23 has failed to substantially improve his parental deficiencies in the years following the entry
24 of the disposition orders. It has been over four years since disposition orders were entered
25 for Jaycob, and over two years for Peter and Oscar.

1 3.11 Ms. Irby, the mother of Peter and Oscar, had chronic mental health and
2 substance abuse issues. She was involved with the Department for over fifteen years. Her
3 parental rights as to one child were terminated in 1994, and two other children were
4 removed from her care in Snohomish County, Washington. The mother was offered
5 continuous services over a fifteen-year period, including drug/alcohol evaluations, inpatient
6 and outpatient substance abuse treatment, random urinalysis, family preservation services,
7 domestic violence victim's counseling, psychological evaluations, mental health counseling,
8 parenting classes, and housing assistance. None of these services successfully addressed the
9 mother's long-standing parental deficiencies. The mother was voluntarily and involuntarily
10 committed to psychiatric hospitals on multiple occasions. The mother ceased all court-
11 ordered services around January 2008. The mother stopped visiting with her children in
12 January 2008, re-commenced visitation around November 2008, visited only three more
13 times, and ceased visitation again in December 2008. The mother only visited her children
14 Jaycob and Oscar approximately five times in 2008. Ms. Irby is incapable of caring for
15 children, even in conjunction with Mr. Tsimbalyuk as the primary caregiver.

16 3.12 The father assaulted Ms. Irby, punching her in the face, back, neck, and
17 abdomen where she had recently had a Caesarean section. The assault caused bruising and
18 caused Ms. Irby to black out, throw up blood, and bleed from the rectum. Ms. Irby asked
19 for the father's help, which he refused. The father also refused to permit Ms. Irby to go to
20 the hospital for medical attention. This assault occurred within the hearing of Peter Jr., who
21 was then six years old.

22 3.13 The father assaulted Ms. Irby on at least one other occasion, hitting her with
23 a belt for at least five or six minutes in order to punish her for relapsing.

24 3.14 While the father was incarcerated for these assaults, he contacted Ms. Irby
25 on seven different occasions in violation of a no-contact order. It is clear from jail

1 recordings that Mr. Tsimbalyuk was aware of the no-contact order. During the
2 conversations from the jail, Mr. Tsimbalyuk told Ms. Irby to lie to the court and the
3 Department about the assault. Mr. Tsimbalyuk threatened to tell the Department about
4 Ms. Irby's substance use if she told the truth about the assault.

5 3.15 The father continued to violate the no-contact order between himself and
6 Ms. Irby when he was released from jail.

7 3.16 Mr. Tsimbalyuk married Ms. Irby in September 2008. In March 2009, Mr.
8 Tsimbalyuk testified that he planned to continue his relationship with Ms. Irby, whom he
9 believed is a good mother.

10 3.17 The father engaged in a psychological evaluation with Dr. Richard Borton in
11 October 2007. Dr. Borton noted significant deceptiveness during the interview. Dr. Borton
12 expressed concerns regarding the father's judgment with regards to the risks posed by Ms.
13 Irby, the father's lack of remorse regarding the domestic violence, and the father's inability
14 to recognize the domestic violence on his children. Dr. Borton made a provisional diagnosis
15 of anti-social personality disorder. Dr. Borton found that there were no services which, over
16 a reasonable period of time, would remedy Mr. Tsimbalyuk's parenting deficiencies such
17 that he could resume full custody of his children. Dr. Borton did recommend that Mr.
18 Tsimbalyuk engage in counseling and indicated that Mr. Tsimbalyuk would likely need
19 intensive, long-term psychotherapy with external monitoring in order to make progress
20 towards addressing his mental health disorder.

21 3.18 Although Dr. Borton observed positive interactions between the father and
22 Jaycob and Oscar, he noted that the father lacked insight into Jaycob's delays. Dr. Borton
23 recommended that someone other than the father be the children's primary parent.

24 3.19 Continuation of the Parent-Child Relationship. Continuation of the parent-
25 child relationship clearly diminishes the children's prospects for early integration into a

1 | stable and permanent home. The father has not provided the children with a stable home.
2 | The father has not demonstrated the ability or the commitment to provide the children with a
3 | stable home, and will not do so in the near future. The children reside with paternal relatives
4 | who are fully committed to adopting them. Although the children are placed in stable
5 | homes, these homes can not be permanent unless parental rights are terminated.

6 | 3.20 Jaycob and Oscar have resided out of parental care for most of their lives.
7 | Jaycob had developmental delays when first placed but has since made monumental
8 | progress. Peter, who is currently nine years old, has resided out of parental care for nearly
9 | one-third of his live. He is extremely bonded to his paternal grandmother, whom he
10 | looks to as his primary caregiver.

11 | 3.21 A previous termination petition was filed and trial was held in March 2009.
12 | The trial court found that the requirements of RCW 13.34.180(1)(a) through (e) were proven
13 | by clear, cogent and convincing evidence.

14 | 3.22 The March 2009 court further found that all three children are in need of a
15 | permanent home, given the instability they have faced in their biological home and the
16 | length of time they have spent in out-of-home care. All three children are adoptable and
17 | have prospects for adoption.

18 | 3.23 Following the March 2009 trial, the court found that RCW 13.34.180(1)(f)
19 | had not been established by clear, cogent, and convincing evidence because the Department
20 | had not proven that the children's current homes are not stable and permanent short of
21 | termination and adoption. Since that time, there has been a change of circumstances.

22 | 3.24 Following the court's rulings, DSHS attempted to work with the father and
23 | family members to investigate alternative permanent plans for the children. The father has
24 | refused to work with DSHS and has alienated the relatives caring for the boys. The father
25 | has interfered with the stability of the permanent placements of Jaycob and Oscar by

1 indicating his intent to "undo" any permanency arrangement short of termination of parental
2 rights.

3 3.25 The father has indicated his intent to request placement of Jaycob and Oscar
4 with a relative in Tennessee. This would remove the children from their current stable
5 relative placement and abruptly end contact between Jaycob and Oscar and their brother,
6 Peter Jr.

7 3.26 The relatives providing care for the children are potential adoptive
8 placements. They are willing to adopt the children and are not willing to implement any
9 other permanent plan or continue caring for the children in an ongoing dependency.

10 3.27 The father has behaved inappropriately at visitation with the children. He
11 has frequently cancelled visitation. At a recent visit, he shaved Jaycob's head, despite the
12 fact that Jaycob cried, struggled, and begged him to stop. The father threatened to do the
13 same to his then two-year-old son, Oscar, and had to be told by the Department, CASA, and
14 finally by the court that such behavior was not appropriate.

15 3.28 Best Interests. Termination of parental rights is in the best interest of
16 these young children. The court has already found that returning these children to their
17 father is not an option. It is in the best interest of the children for parental rights to be
18 terminated so that they can be made legally free for adoption, which is the only feasible
19 permanent plan for these children.

20 IV. RIGHTS OF THE CHILDREN

21 4.1 Jaycob J. Irby, Peter P. Tsimbalyuk and Oscar L. Tsimbalyuk have the right
22 to be raised in a permanent, stable home environment under the care and custody of
23 emotionally stable, nurturing parents where the children will be provided with adequate
24 food, clothing, shelter, medical care, education, and a secure place in the community, all of
25 which have not and will not be provided by the father.

1 DATED this 28th day of September, 2009 in Seattle, Washington.

2

3

~~Sandra A. Street~~
SANDRA A. STREET
DSHS Social Worker

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Appendix B

FILED

10 FEB 22 AM 8:30

KING COUNTY
SUPERIOR COURT CLERK
E-FILED
CASE NUMBER: 09-7-04166-9 SEA

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THE COUNTY OF KING

IN RE THE DEPENDENCY OF:

PETER TSIMBALYUK
JAYCOB IRBY
OSCAR TSIMBALYUK

NO. 09-7-04166-9 SEA
09-7-04167-7 SEA
09-7-04168-6 SEA
NOTICE FOR HEARING
SEATTLE COURTHOUSE ONLY
(Clerk's Action Required) (NTHG)

TO: THE CLERK OF THE COURT and to all other parties listed on Page 2:
PLEASE TAKE NOTICE that an issue of law in this case will be heard on the date below and the Clerk is directed to note this issue on the calendar checked below.

Calendar Date: 3-5-10 Day of Week: Friday

Nature of Motion: MOTION TO STAY TERMINATION TRIAL PROCEEDINGS

CASES ASSIGNED TO INDIVIDUAL JUDGES – Seattle	
If oral argument on the motion is allowed (LR 7(b)(2)), contact staff of assigned judge to schedule date and time before filing this notice. Working Papers: The <u>judge's name</u> , date and time of hearing <u>must</u> be noted in the upper right corner of the Judge's copy. Deliver Judge's copies to Judges' Mailroom at C203.	
<input type="checkbox"/> Without oral argument (Mon - Fri)	<input checked="" type="checkbox"/> With oral argument Hearing
Date/Time: March 5, 2010	
Judge's Name: JUVENILE PRESIDING – no judge assigned (J. Clark affidavit)	

CHIEF CRIMINAL DEPARTMENT - Seattle in E1201	
<input type="checkbox"/> Bond Forfeiture 3:15 pm, 2 nd Thur of each month	
<input type="checkbox"/> Certificates of Rehabilitation- Weapon Possession (Convictions from Limited Jurisdiction Courts) 3:30 First Tues of each month	

CHIEF CIVIL DEPARTMENT – Seattle – (Please report to E713 for assignment)	
Deliver working copies to Judges' Mailroom, Room C203. In upper right corner of papers write "Chief Civil Department" or judge's name and date of hearing	
<input type="checkbox"/> Extraordinary Writs (Show Cause Hearing) (LR 98.40) 1:30 p.m. Tues/Wed -report to Room E713	
<input type="checkbox"/> Supplemental Proceedings (1:30 pm Tues/Wed)(LR 69)	Non-Assigned Cases:
<input type="checkbox"/> DOL Stays 1:30 pm Tues/Wed	<input type="checkbox"/> Non-Dispositive Motions M-F (without oral argument).
<input type="checkbox"/> Motions to Consolidate with multiple judges assigned (without oral argument) (LR 40(a)(4))	<input type="checkbox"/> Dispositive Motions and Revisions (1:30 pm Tues/Wed)
	<input type="checkbox"/> Certificates of Rehabilitation (Employment) 1:30 pm Tues/Wed (LR 40(2)(B))

You may list an address that is not your residential address where you agree to accept legal documents.
Sign: [Signature] Print/Type Name: Alison Warden
WSBA # 33199 (if attorney) Attorney for: Peter Tsimbalyuk, father
Address: 1401 E. Jefferson St, Suite 200 City, State, Zip Seattle, WA 98122
Telephone: 206-322-8400 ext. 3125 Date: _____

DO NOT USE THIS FORM FOR FAMILY LAW, EX PARTE OR RALJ MOTIONS.

LIST NAMES AND SERVICE ADDRESSES FOR ALL NECESSARY PARTIES REQUIRING NOTICE

Sandy Street- SW

Heidi Nagle, and/or Lori Irwin
Dependency CASA Program
1401 E. Jefferson, Suite 500
Seattle, WA 98122
206-296-1120
WSBA # 24160/13523; Atty/Supervisor for: CASA

Marci Comeau
Assistant Attorney General
800 5th Avenue, Suite 2000
Seattle, WA 98164
WSBA#29600 Atty For:DCFS
206-464-7045

IMPORTANT NOTICE REGARDING CASES

Party requesting hearing must file motion & affidavits separately along with this notice. List names, addresses and telephone numbers of all parties requiring notice (including GAL) on this page. Serve a copy of this notice, with motion documents, on all parties.

The original must be filed at the Clerk's Office not less than six court days prior to requested hearing date, except for Summary Judgment Motions (to be filed with Clerk 28 days in advance).

THIS IS ONLY A PARTIAL SUMMARY OF THE LOCAL RULES AND ALL PARTIES ARE ADVISED TO CONSULT WITH AN ATTORNEY.

The SEATTLE COURTHOUSE is in Seattle, Washington at 516 Third Avenue. The Clerk's Office is on the sixth floor, room E609. The Judges' Mailroom is Room C203.

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March 5, 2010 @ 8:30 a.m.

Motion Hearing

Juvenile Presiding or Assigned Judge

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY
JUVENILE DIVISION

IN RE THE DEPENDENCY OF:
PETER TSIMBALYUK, dob 9/12/00
JAYCOB IRBY, dob 2/21/05
OSCAR TSIMBALYUK, dob 8/17/06

NO. 09-7-04166-9 SEA
09-7-04167-7 SEA
09-7-04168-5 SEA

MOTION TO STAY PROCEEDINGS TO
AVOID CONFLICTING RULINGS
BETWEEN APPELLATE AND SUPERIOR
COURT

COMES NOW, father Peter Tsimbalyuk, by and through his attorney Alison Warden of Society of Counsel Representing Accused Persons, and hereby moves this Court to stay or continue proceedings in the above-captioned termination trial. The purpose of the motion is to avoid the potential for conflicting rulings on common issues of law and fact between this Court and proceedings mandated by Washington Court of Appeals, Division One under Cause Number 63551-4-I. Exhibit A.

PROCEDURAL BACKGROUND

A. First Termination Trial: March 2009

In July 2008, the Department initiated its first termination proceedings against Mr. Tsimbalyuk in relation to the same three children who are the subjects of the above-captioned

MOTION TO STAY.
Page 1 of 4
SA

**SOCIETY OF COUNSEL
REPRESENTING ACCUSED PERSONS
1401 East Jefferson Street
Suite 200
Seattle, Washington 98122
(206) 322-8400**

1 matter. On March 25, 2009, Judge Ronald Kessler ruled that termination was not in the best
2 interest of the children, finding instead that it was in the children's interests to continue the
3 parent-child relationship with their father through visitation. Judge Kessler further found that
4 the State failed to prove that continuation of the parent-child relationship clearly diminished
5 prospects for early integration into a stable and permanent home, because the children all lived
6 with relatives in stable and permanent placements. The State and CASA moved to reopen the
7 case to offer testimony from the relatives, presumably in support of the Department's position
8 that the placement with relatives was in fact not stable. Judge Kessler denied the motion to
9 reopen the case.
10

11
12 **B. Department's Appeal of Judge Kessler's Ruling**

13 The Department and CASA chose to appeal Judge Kessler's dismissal of the termination
14 petition and Judge Kessler's refusal to reopen the case to allow additional testimony from the
15 relatives. The appeal was assigned cause number 63551-4-I in Division One of the Washington
16 Court of Appeals. The Department asked Division One to overturn Judge Kessler's ruling and
17 hold that he abused his discretion in determining that termination was not in the children's best
18 interests. Additionally, the Department argued that Judge Kessler erred in finding that the State
19 failed to prove the necessary element found in RCW 13.34.180(1)(f): that continuation of the
20 parent-child relationship clearly diminished prospects for early integration into a stable and
21 permanent home (hereinafter referred to as "Element 6").
22

23 Oral arguments were heard on January 5, 2010. On February 16, 2010, the Court of
24 Appeals reversed Judge Kessler's ruling in part and remanded for further proceedings. See
25 Exhibit A, Division One's ruling. Division One held that the State had indeed proved the element
26
27

28 MOTION TO STAY

Page 2 of 4

SA

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1 found in 13.34.180(1)(f) (Element 6) because Element 6 necessarily flows from proof of Element
2 5 (13.34.180(1)(e)). Division One found that Judge Kessler committed obvious error by
3 interpreting that statute in favor of Mr. Tsimbalyuk.
4

5 Notably, Division One did not rule that termination was appropriate, but instead
6 remanded the case back to Judge Kessler to determine whether termination is in the best interest
7 of the children in light of the finding that Element 6 had been proven by the state.

8 **C. Current Procedural Posture of Appeal**

9 According to Mr. Tsimbalyuk's appellate attorney, she will file a motion for discretionary
10 review with the Washington State Supreme Court within the next 30 days. See Exhibit 2,
11 declaration of Lila Silverstein. It may be six months before the Court decides whether to accept
12 review of the case. If the Court declines to accept review, the case will be mandatorily remanded
13 to Judge Kessler to make the above-described determination about whether termination is in the
14 best interests of the children.
15

16 **D. Potential for Conflicting Rulings**

17 The Department chose to file a second termination petition before the appeal of the first
18 termination petition was resolved. This was an unusual decision that created a situation not
19 contemplated in the caselaw. The same questions of law and fact are set to be in front of at least
20 two sets of judicial officers – the Washington Supreme Court and the King County Superior
21 Court, at some time in the future. It makes sense that the appeal from the first case should be
22 resolved before the trial court handles the same questions of law and fact.
23

24 Here, the "law of the case" is not settled and will not be settled until the Washington Supreme
25 Court declines review or makes a ruling in the case. Direction should be taken from the higher
26 Court declines review or makes a ruling in the case. Direction should be taken from the higher
27

28 MOTION TO STAY
Page 3 of 4

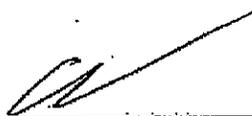
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1 courts before moving forward in the lower courts on a second petition involving the same parties
2 and facts.

3 For the reasons above, Mr. Tsimbalyuk respectfully requests that this Court stay the
4 proceedings in the above-captioned matter to allow the appellate courts to resolve the common
5 questions of law and fact as applied to these proceedings.
6

7 DATED this 19th day of February, 2010.
8

9 
10 _____
11 Alison Warden

12 Attorney for Peter Tsimbalyuk
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28 MOTION TO STAY
Page 4 of 4

SA

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DO NOT CITE. SEE RAP GR 14.1(a).

Court of Appeals Division I
State of Washington

Opinion Information Sheet

Docket Number: 63551-4

Title of Case: Dependency Of P.p.t. Peter Tsimbalyuk, Respondent V. Dshs, Appellant

File Date: 02/16/2010

SOURCE OF APPEAL

Appeal from King County Superior Court

Docket No: 08-7-01086-2

Judgment or order under review

Date filed: 03/25/2009

Judge signing: Honorable Ronald Kessler

JUDGES

Authored by J. Robert Leach

Concurring: Marilyn Appelwick

Ronald Cox

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Exhibit A

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View the Opinion in PDF Format

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Dependency of)
)
P.P.T., d.o.b. 9/12/2000;) NO. 63551-4-I
) (Consolidated with
J.J.I., d.o.b. 2/21/2005;) 63393-7-I, 63394-5-I, 63552-2-I,
O.L.T., d.o.b. 8/17/2006.) 63553-1-I, 63395-3-I)
)
) UNPUBLISHED OPINION
)
) FILED: February 16, 2010
)

Leach, J. The Department of Social and Health Services (DSHS), joined by the Court Appointed Special Advocate (CASA), appeals from the superior court's orders dismissing its petitions to terminate Peter Tsimbalyuk's parental rights to his three children.¹ Appellants argue the court erred in applying RCW 13.34.180(1)(f), the sixth element of the parental rights termination statute. We grant discretionary review of this issue because we agree that the court committed obvious error in applying RCW 13.34.180(1)(f). We reverse and remand for further proceedings consistent with this opinion.

FACTS

This case concerns three children: P.P.T., J.J.I., and O.L.T.

Mr.

1 Because resolution of this issue is dispositive, we need not address appellants' assignments of error regarding the court's orders denying a show cause hearing on the motions to vacate, the court's orders denying the motions to vacate, and the sufficiency of the evidence.

No. 63551-4-I (consol. with Nos. 63393-7-I, 63394-5-I, 63552-2-I, 63553-1-I, 63395-3-I) / 2

Tsimbalyuk is the father of all three children. Veronica Haupt is the mother of P.P.T., and Toby Irby is the mother of J.J.I. and O.L.T.² The parental rights of the mothers were terminated and are not at issue here.³

1. P.P.T.

P.P.T. was born on September 12, 2000. Three months later, Ms. Haupt left the family, so P.P.T. was raised by Mr. Tsimbalyuk. While under his father's care, P.P.T. spent a significant amount of time with his paternal grandmother and two aunts.

P.P.T. was removed from his father's care and found dependent in May 2007. The removal was triggered by a domestic violence incident in November 2006, during which Mr. Tsimbalyuk struck Ms. Irby in the face, neck, back, and abdomen, causing her to black out, throw up blood, and bleed from the rectum. The assault, which occurred within the hearing of P.P.T., led to Mr. Tsimbalyuk's arrest and incarceration. Mr. Tsimbalyuk was ordered to participate in domestic violence (DV) perpetrators' treatment, submit to random urinalysis tests (UAs), take parenting classes, and obtain a psychological evaluation. He provided the UAs, completed an approved parenting course, and submitted to a psychological

2 Ms. Irby married Mr. Tsimbalyuk in September 2008, but we refer to her as Ms. Irby for clarity.

3 Ms. Haupt's parental rights were terminated in November 2008. Ms. Irby relinquished her parental rights, and her parental rights were terminated in February 2009.

-2-

No. 63551-4-I (consol. with Nos.

63393-7-I, 63394-5-I, 63552-2-I,
63553-1-I, 63395-3-I) / 3

evaluation by Dr. Richard Borton. Following Dr. Borton's recommendation, Mr. Tsimbalyuk participated in counseling. He also enrolled in two DV programs. But Mr. Tsimbalyuk never completed the counseling sessions or DV programs.

After the assault, P.P.T. was placed with his paternal aunts and then with his paternal grandmother. At the time of the termination trial in February 2009, P.P.T. was eight years old and had lived with his grandmother for the past two years. According to the CASA, P.P.T. was extremely bonded to his grandmother and looked to her as his primary care giver. The CASA and DSHS social worker also testified that the grandmother wanted to adopt him.

2. J.J.I.

J.J.I. was born on February 21, 2005. At the time of J.J.I.'s birth, Ms. Irby was under observation by Child Protective Services (CPS) because she had displayed erratic behavior at the hospital. CPS was also aware that Ms. Irby had a long history of substance abuse and had been involved with the Department of Child and Family Welfare Services regarding three other children from other relationships. In 1994, Ms. Irby's parental rights to one child were terminated, and in 2003, the two other children were removed from her care.

J.J.I. was removed from his parents' care in March 2005 and found dependent in May 2005. Ms. Irby was ordered to continue substance abuse treatment, to submit to random UAs twice a week, and to engage in counseling

-3-

No. 63551-4-I (consol. with Nos.
63393-7-I, 63394-5-I, 63552-2-I,
63553-1-I, 63395-3-I) / 4

and a psychological evaluation. Mr. Tsimbalyuk was ordered to submit to UAs twice a week and undergo a drug/alcohol evaluation.

In March 2006, J.J.I. was returned to his parents' care. Following the domestic violence incident in November 2006, J.J.I. remained with Ms. Irby. When she was charged with driving while intoxicated and tested positive for cocaine use, the court ordered removal, and J.J.I. was placed in foster care. At the time of the termination trial, J.J.I. was four years old and had resided out of parental care for three years. The CASA testified that J.J.I. lived with a paternal aunt, who wanted to adopt him and was initially reluctant to take J.J.I. until the termination process was complete.

3. O.L.T.

O.L.T. was born on August 17, 2006. He lived with both parents until the November 2006 assault of Ms. Irby. O.L.T. stayed with Ms. Irby, but was removed from her care at the same time as J.J.I. Eventually, O.L.T. was placed with the paternal aunt caring for J.J.I. In May 2007, O.L.T. was found dependent. At the time of the termination trial, O.L.T. had resided all but five of 31 months of his life out of parental care. The CASA testified that the aunt wanted to adopt O.L.T. and, as with J.J.I., had been initially hesitant to take O.L.T. before the termination process was complete.

4. Termination Proceedings

-4-

No. 63551-4-I (consol. with Nos. 63393-7-I, 63394-5-I, 63552-2-I, 63553-1-I, 63395-3-I) / 5

In August 2008, DSHS filed petitions to terminate Mr. Tsimbalyuk's parental rights to P.P.T, J.J.I., and O.L.T. Mr. Tsimbalyuk opposed termination of his rights to all three children and asked the court to return the children to him. He testified that he planned to take care of the children with Ms. Irby, whom he had married in September 2008. He also stated that he would separate from Ms. Irby if that was required to have the children returned to him.

To obtain orders terminating Mr. Tsimbalyuk's parental rights, DSHS was required to prove the six elements of the parental rights termination statute, RCW 13.34.180(1). The superior court held that DSHS had proved the first five elements. Notably, the court found that, in spite of the services offered to help Mr. Tsimbalyuk address his parental deficiencies, his problems with domestic violence remained uncorrected and would not be corrected in the near future. The court further stated that it did not believe that Mr. Tsimbalyuk would separate from Ms. Irby and that there was little likelihood that conditions could be remedied so that the children could be returned to him in the near future. The court also entered findings that all three children were in need of a permanent home given the instability they faced in their parents' home and the length of time they had spent out of parental care, that all three children had prospects for adoption, and that the aunt and grandmother preferred to live without oversight by DSHS and the court.

-5-

No. 63551-4-I (consol. with Nos. 63393-7-I, 63394-5-I, 63552-2-I, 63553-1-I, 63395-3-I) / 6

But the court refused to order termination of Mr. Tsimbalyuk's parental

rights, holding that DSHS had failed to prove the sixth element, RCW 13.34.180(1)(f), whether continuation of Mr. Tsimbalyuk's relationship with the children diminished their prospects for integration into a permanent home. The court noted Dr. Borton's recommendation that Mr. Tsimbalyuk continue to have an ancillary role in the children's lives and the lack of any recommendation for termination of parental rights in his report. The court found that it was "only speculation" whether the paternal relatives would permit Mr. Tsimbalyuk to visit the children following adoption. The court opined that ongoing dependency and ongoing relative care was "sufficiently stable and permanent without adoption" and that it was not convinced that the paternal relatives would end their relationship with the children if they could not adopt. Acknowledging that there were no guardianship petitions before it, the court stated that either a dependency guardianship or long-term relative care would be in the best interests of the children because it would allow Mr. Tsimbalyuk to see them. The court encouraged the parties to file dependency guardianship petitions.

When the parties appeared before the court for entry of written findings, the CASA asked the court to delay entry so the family could meet and discuss the court's ruling. The court denied the request and dismissed the termination petitions.

-6-

No. 63551-4-I (consol. with Nos. 63393-7-I, 63394-5-I, 63552-2-I, 63553-1-I, 63395-3-I) / 7

DSHS moved to vacate the superior court's judgment. It also filed notices of discretionary review as to each child of the court's orders dismissing the termination petitions. The CASA joined DSHS in seeking review of these orders.

When the court denied the motions to vacate, DSHS filed notices of appeal as to each child of the court's orders denying a show cause hearing on the motions to vacate and the court's orders denying the motions to vacate. The CASA joined DSHS in appealing these orders.

DSHS filed a motion to consolidate all of the proceedings. Stating that "[i]t appears that the rulings by the trial court are appealable as a matter of right under RAP 2.2(a)," a commissioner of this court ordered consolidation.

Analysis

DSHS and the CASA argue the superior court applied RCW 13.34.180(1)(f) incorrectly. In response, Mr. Tsimbalyuk contends that DSHS is

not entitled to appeal from the orders dismissing the termination petitions as a matter of right under RAP 2.2(a) and this court's decision in *In re Dependency of A.G.4*. Mr. Tsimbalyuk further contends that no basis exists to grant discretionary review under RAP 2.3. While the dismissal of the termination petitions is not appealable as a matter of right by DSHS, discretionary review is warranted because we agree that the court committed obvious error in applying RCW 4 127 Wn. App. 801, 112 P.3d 588 (2005).

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No. 63551-4-I (consol. with Nos. 63393-7-I, 63394-5-I, 63552-2-I, 63553-1-I, 63395-3-I) / 8

13.34.180(1)(f).

RAP 2.2(a) lists the superior court decisions from which a party may appeal as a matter of right. It states, in relevant part,

(a) Generally. Unless otherwise prohibited by statute or court rule and except as provided in sections (b) and (c), a party may appeal from only the following superior court decisions:

(1) Final Judgment. The final judgment entered in any action or proceeding, regardless of whether the judgment reserves for future determination an award of attorney fees or costs.

(3) Decision Determining Action. Any written decision affecting a substantial right in a civil case that in effect determines the action and prevents a final judgment or discontinues the action.

(5) Juvenile Court Disposition. The disposition decision following a finding of dependency by a juvenile court, or a disposition decision following a finding of guilt in a juvenile offense proceeding.

(6) Termination of All Parental Rights. A decision terminating all of a person's parental rights with respect to a child.

(13) Final Order After Judgment. Any final order made after judgment that affects a substantial right.

In *A.G.*, the State sought to appeal the dismissal of its petition for termination of the mother's parental rights. In rejecting the State's argument that the dismissal was appealable as a matter of right under subsections (5) and (6)

-8-

No. 63551-4-I (consol. with Nos. 63393-7-I, 63394-5-I, 63552-2-I, 63553-1-I, 63395-3-I) / 9

of RAP 2.2(a), the A.G. court drew upon this court's decision in *In re Welfare of Watson*; 5

The *Watson* decision holds that the State has no right of appeal

from the . . . dismissal of a petition for the permanent deprivation of parental rights. Watson indicates that subsections (5) and (6) of RAP 2.2(a) explicitly recognize the stages of juvenile proceedings where an appeal as a matter of right will lie and that a reading of the rule makes it clear that the State is not entitled to an appeal from the dismissal of a petition for permanent deprivation. [6]

The A.G. court also rejected the State's argument that the dismissal of its petition was independently appealable as a final judgment under subsections (1), (3), and (13) of RAP 2.2(a). The court pointed out that the dismissal did not end the overall action since the underlying dependency remained in place and the State could file an additional termination petition.⁷ The court also looked to the practical effect of the dismissal order, stating that the order only temporarily discontinued or postponed termination proceedings.⁸

Accordingly, DSHS may not appeal the dismissal of the termination petitions under RAP 2.2(a)(5) or (6). Nor may DSHS appeal the dismissal under RAP 2.2(a)(1), (3), or (13) because the court's orders are not final. As in A.G., dismissal of DSHS's petitions did not end the overall actions because the underlying dependencies remain in place and the State may file additional

5 23 Wn. App. 21, 594 P.2d 947 (1979).

6 A.G., 127 Wn. App. at 806.

7 A.G., 127 Wn. App. at 807.

8 A.G., 127 Wn. App. at 807.

-9-

No. 63551-4-I (consol. with Nos.
63393-7-I, 63394-5-I, 63552-2-I,
63553-1-I, 63395-3-I) / 10

termination petitions. Furthermore, the practical effect of the orders is the postponement of termination proceedings.

But, as noted in A.G. and Watson, we may treat the appeal as a motion for discretionary review and grant discretionary review under RAP 2.3.9. This rule sets forth the acts of a superior court that are not appealable as a matter of right but may be considered on a motion for discretionary review. Subsection (b) provides that discretionary review may be accepted only in certain circumstances, such as when (1) the superior court committed obvious error rendering further proceedings useless, (2) it committed probable error and the decision alters the status quo or limits the freedom of a party to act, or (3) it has so far departed from the accepted and usual course of judicial proceedings as to call for review by the appellate court.

Here, appellants contend that the superior court committed obvious error when it applied RCW 13.34.180(1)(f). This is an error of law reviewed de

nov.10

Two statutory provisions describe the standards for terminating the parent-

9 In granting discretionary review of this issue, we consider the briefs submitted by the CASA but do not address whether it is entitled to appeal from the dismissal of the termination petitions as a matter of right.

10 Spokane County ex rel. County Commissioners v. State, 136 Wn.2d 644, 649, 966 P.2d 305 (1998) ("An error of law is 'an error in applying the law to the facts as pleaded and established.'" (internal quotation marks omitted) (quoting Westerman v. Cary, 125 Wn.2d 277, 302, 892 P.2d 1067 (1994))); see also City of Seattle v. May, 151 Wn. App. 694, 697, 213 P.3d 945 (2009).

-10-

No. 63551-4-I (consol. with Nos. 63393-7-I, 63394-5-I, 63552-2-I, 63553-1-I, 63395-3-I) / 11

child relationship. RCW 13.34.180(1) sets forth six statutory elements that the State must prove by clear, cogent, and convincing evidence. If these elements are established, RCW 13.34.190 then requires that the State prove by a preponderance of the evidence that termination of the parent-child relationship is in the child's best interests.

This case turns on the application of the sixth element of RCW 13.34.180(1), subsection (f). The six statutory elements are:

- (a) That the child has been found to be a dependent child;
- (b) That the court has entered a dispositional order pursuant to RCW 13.34.130;
- (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 . . . ; and
- (f) That continuation of the parent and child relationship clearly diminishes the child's prospects for early integration into a stable and permanent home.

In applying RCW 13.34.180(1)(f), our Supreme Court has held that "the main focus . . . is the parent-child relationship and whether it impedes the child's

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No. 63551-4-I (consol. with Nos. 63393-7-I, 63394-5-I, 63552-2-I, 63553-1-I, 63395-3-I) / 12

prospects for integration, not what constitutes a stable and permanent home."11 This court has further clarified that "[w]hile a detrimental personal relationship would not be irrelevant, this factor is mainly concerned with the continued effect

of the legal relationship between parent and child, as an obstacle to adoption; it is especially a concern where children have potential adoption resources.¹² In addition, our Supreme Court has declared that a finding under RCW 13.34.180(1)(f) "necessarily follows from an adequate showing" that there is little likelihood that conditions will be remedied so that children can be returned to the parent in the near future, which is the fifth statutory element, RCW 13.34.180(1)(e).¹³

In light of this precedent, the superior court erred in two respects. First, it mistakenly focused on what it believed constituted a stable and permanent home for P.P.T., J.J.I., and O.L.T., rather than on the continued effect of Mr. Tsimbalyuk's legal relationship with the children on their prospects for adoption. Specifically, the court found that the children were in need of a permanent home given the instability of residential care and the length of time spent in out-of-home care, that there were prospects for adoption for all three children with paternal relatives, and that the families preferred to live without oversight by

¹¹ In re Dependency of K.S.C., 137 Wn.2d 918, 927, 976 P.2d 113 (1999).

¹² In re Dependency of A.C., 123 Wn. App. 244, 250, '98 P.3d 89 (2004).

¹³ In re Dependency of J.C., 130 Wn.2d 418, 427, 924 P.2d 21 (1996).

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No. 63551-4-I (consol. with Nos. 63393-7-I, 63394-5-I, 63552-2-I, 63553-1-I, 63395-3-I) / 13

DSHS and the court. Although these findings established that Mr. Tsimbalyuk's legal relationship posed an obstacle to the children's adoption prospects, the court then directed its attention to what it believed constituted a desirable permanent home for the children. It reasoned that either a dependency guardianship or long-term relative care would be in the best interests of the children because it would allow Mr. Tsimbalyuk to see them. The court further stated that it was not convinced that the paternal relatives would end their relationship with the children if they could not adopt. Thus, it held that "RCW 13.34.180(1)(f) has not been established by clear, cogent, and convincing evidence because the Department has not proved by clear, cogent, and convincing evidence that the current homes are not stable and permanent short of termination and adoption." These findings and conclusions show that the superior court was aware that Mr. Tsimbalyuk's legal relationship with the children posed an obstacle to their adoption prospects but improperly focused on what it believed constituted an appropriate permanent home for the children.

Second, the superior court erred by failing to find that the State had

proved RCW 13.34.180(1)(f), given its finding under the fifth statutory element, RCW 13.34.180(1)(e), that there was little likelihood that conditions would be remedied. Noting Mr. Tsimbalyuk's failure to complete counseling and DV treatment, the court found that Mr. Tsimbalyuk's domestic violence issues had

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No. 63551-4-I (consol. with Nos. 63393-7-I, 63394-5-I, 63552-2-I, 63553-1-I, 63395-3-I) / 14

not been corrected and would not be corrected in the near future. The court also found there was little likelihood that conditions would be remedied so that the children could be returned to Mr. Tsimbalyuk because it did not believe that Mr. Tsimbalyuk would separate from Ms. Irby. Given these findings, there was more than adequate evidence supporting its finding under RCW 13.34.180(1)(e). Therefore, a finding under RCW 13.34.180(1)(f) necessarily followed.

Mr. Tsimbalyuk suggests that this result "read[s] both RCW 13.34.180(1)(f) and RCW 13.34.190 out of existence." He insists that "[i]n addition to proving subsections (a) -- (e) [of RCW 13.34.180(1)], the State must also prove RCW 13.34.180(1)(f) by clear, cogent and convincing evidence, and must prove that termination serves the children's best interests. RCW 13.34.190." This argument ignores Supreme Court precedent establishing that a finding under RCW 13.34.180(1)(f) necessarily follows from an adequate showing under RCW 13.34.180(1)(e). Mr. Tsimbalyuk, however, is correct in stating that after determining that the six statutory elements under RCW 13.34.180(1) have been satisfied, the court must consider whether appellants have proved that termination is in the children's best interests under RCW 13.34.190. We remand to the superior court to make this determination.

CONCLUSION

The superior court committed obvious error in applying RCW

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No. 63551-4-I (consol. with Nos. 63393-7-I, 63394-5-I, 63552-2-I, 63553-1-I, 63395-3-I) / 15

13.34.180(1)(f). It failed to focus on the effect of the legal relationship between Mr. Tsimbalyuk and the children on the children's adoption prospects and failed to enter a finding under RCW 13.34.180(1)(f) consistent with its finding under RCW 13.34.180(1)(e). We therefore grant discretionary review and reverse and remand for further proceedings consistent with this opinion.

WE CONCUR:

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY
JUVENILE DIVISION

IN RE THE DEPENDENCY OF:
TSIMBALYUK, PETER P.d.o.b. 9/12/00
IRBY, JAYCOB J. d.o.b. 2/21/05
TSIMBALYUK, OSCAR d.o.b. 8/17/06
Minor Children

NO. 09-7-04166-9 SEA
09-7-04167-7 SEA
09-7-04168-5 SEA

DECLARATION OF
APPELLATE COUNSEL

TO: Clerk of the Court
Assistant Attorney General – Marci Comeau
DSHS caseworker – Sandra street
CASA – Lori Reynolds

I, Lila Silverstein, am over the age of 18 and am competent to testify. I

declare as follows:

1. I am an appellate attorney at the Washington Appellate Project in Seattle, Washington. I represent Peter Tsimbalyuk, father, in Court of Appeals Cause No. 63551-4-1.

2. The appellate case involves the trial court's refusal to terminate Mr. Tsimbalyuk's parental rights to Oscar Tsimbalyuk, Peter Tsimbalyuk, Jr. and Jaycob Irby. The appellate case involves the same parties and subject matter that are involved in the above-captioned matter.

Declaration of Appellate Counsel
Page 1

Exhibit B

SOCIETY OF COUNSEL
REPRESENTING ACCUSED PERSONS
1401 East Jefferson Street, Suite 200
Seattle, Washington 98122
(206)322-8400

1 3. On July 22, 2008, the Department petitioned for termination of Mr.
2 Tsimbalyuk's parental rights based on alleged parental deficiencies. Judge
3 Ronald Kessler ruled on March 25, 2009 that termination was not in the best
4 interest of the children, finding instead that it was in the children's interest to
5 continue the relationship with their father through visitation. Judge Kessler
6 further found that the State failed to prove that continuation of the parent-child
7 relationship clearly diminished prospects for early integration into a stable and
8 permanent home, because the children were in stable and permanent homes
9 with their relatives.
10

11 3. The Department appealed Judge Kessler's ruling. The appeal was
12 assigned cause number 63551-4-1 in Division One. I represent Mr. Tsimbalyuk in
13 the appeal.
14

15 4. In its briefing, the Department asked Division One to overturn
16 Judge Kessler's ruling and hold that he abused his discretion in determining that
17 termination was not in the children's best interests. Additionally, the Department
18 argued Judge Kessler erred in finding the State failed to prove RCW
19 13.34.180(1)(f) on the basis that the relatives did not testify that they would
20 abandon the children if they could not adopt them.
21

22 5. Oral arguments were heard before a three-judge panel on January
23 5, 2010. The Court of Appeals reversed the juvenile court's ruling on February
24 16, 2010. The Court held that Judge Kessler's analysis as to subsection (f) was

25 Declaration of Appellate Counsel
26 Page 2

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Appendix C

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Judge Leroy McCullough
March 5, 2010
@ 8:30 a.m.

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY
JUVENILE DEPARTMENT

IN RE DEPENDENCY OF:
TSIMBALYUK, PETER P.
DOB: 8/17/2006
IRBY, JAYCOB
DOB: 2/21/2005
TSIMBALYUK, OSCAR
DOB: 8/17/2006

NO. 09-7-04166-9 SEA
NO. 09-7-04167-7 SEA
NO. 09-7-04168-5 SEA
AMENDED
RESPONSE OF DCFS IN OPPOSITION TO
FATHER'S MOTION TO CONTINUE OR
STAY THE TERMINATION TRIAL

Minor Child(ren).

COMES NOW the Department of Social and Health Services, State of Washington, by Marci Comeau, Assistant Attorney General, and responds in opposition to the father's motion to "stay" or "continue" the termination trial.

I. RELIEF REQUESTED

DCFS requests that the court deny the father's motion to continue or stay the termination trial because there is no legal basis for continuing the trial; there is no risk of conflicting rulings since the second termination trial is based on new facts; the law clearly provides the Department the authority to file a second termination petition; and these children cannot wait for a remand that may or may not occur for yet another year or more.

RESPONSE TO MOTION FOR CONTESTED
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II. STATEMENT OF FACTS

On March 25, 2009, almost one year ago, Judge Ronald Kessler denied termination of the father's parental rights to these three children, who were then ages two, four, and eight. The court found that all services capable of correcting the father's parental deficiencies had been provided; and found there was little likelihood the father's deficiencies could be remedied in the near future; and found that custody should remain with the relatives but denied termination concluding that some alternative to termination, such as dependency guardianship or third party custody would better serve the children's interest.

The court made this conclusion even though there was no alternative action pending before the court, and no alternatives were advocated for by any of the parties, and no evidence presented that any alternatives were viable or would provide the children the kind of stability and permanence they need. In fact, the only alternative to termination advocated for by the father was a full return of the children to his custody, and he argued that he was prepared to do whatever was necessary to make that happen.

Following trial, the Department and CASA moved the court pursuant to CR 60(b) to vacate the order denying termination and to reopen the case for presentation of additional evidence which would show that the court's ruling was based on erroneous assumptions and mistakes of fact since there were no viable alternatives to termination. The Department and CASA requested this relief as preferable to that which could be obtained through either an appeal or a second termination trial because both were concerned about the lengthy delays that would inevitably ensue and the danger these

1 delays presented for the children's stability. *See* Motion to Vacate filed in Cause No. 08-
2 7-01084-6 SEA, 08-7-01085-4 SEA, 08-7-01086-2 SEA.

3 Judge Kessler refused to grant a hearing on the motion to vacate and summarily
4 denied it without explanation. Both the Department and the CASA sought discretionary
5 review of both orders. However, because of delays occasioned by the late appointment of
6 appellate counsel for the father and his requests for continuances in the appeal, the
7 Department filed a second termination petition on October 15, 2009, concluding that
8 these children could not wait any longer for the appellate process to run its course. *See*
9 attached declaration of Trisha L. McArdle. The preliminary hearing and the pretrial
10 conference on the second termination petition occurred long ago, and trial on the second
11 termination petition is scheduled to begin on March 8, 2010.

12 Throughout the time that this second termination petition has been pending, the
13 father never requested a continuance of the second trial, despite the pending appeal, and
14 in fact he consistently argued on appeal that the proper remedy is a second trial. *See*
15 attached declaration of Trisha L. McArdle and attached relevant sections of father's
16 appellate brief.

17 On February 16, 2010, the Court of Appeals, Division One reversed Judge
18 Kessler's denial of termination, finding "obvious error" in the court's application of
19 RCW 13.34.180(1)(f). *See* Copy of the Court's decision attached to father's motion.
20 The case was remanded for further hearings. However, instead of allowing the case to be
21 remanded to Judge Kessler, the father has decided to seek review from the Supreme
22 Court.

1 Court and his appellate attorney acknowledges that it will be at least six months before
2 the Court even decides whether to accept review.¹ See Declaration from Lila Silverstein
3 attached to father's motion.

4 Since Judge Kessler denied termination a year ago, the situation with the father,
5 children and relatives has significantly deteriorated. Although the father had the option
6 to pursue the alternatives Judge Kessler found preferable to termination, he never pursued
7 the filing of a guardianship or 3rd party custody petition, nor has he made any serious
8 attempt at having his children returned to him. His behaviors toward the relative
9 caretakers and the children since the last trial have been nothing short of abominable. See
10 Declaration of Social worker Sandy Street, CASA report to court, and text message from
11 the father to the relative caretakers attached to the Declaration of Trisha McArdle.
12 Among other things, the father has threatened to move the youngest children to different
13 relatives in another state and to undermine any alternative action ordered by the court; he
14 moved in and then trashed the relative's rental home leaving holes in the walls, broken
15 windows, piles of garbage and drug paraphernalia, resulting in the relatives losing the
16 property; he threatened and defamed the relatives so significantly that the relatives have
17 sought a protection order against him and they now refuse to supervise his visits; he
18 shaved his children's heads in contravention of the children's desires and specific
19 admonitions by Commissioner Castilleja; he failed to appear for court ordered urinalysis;
20 he has not participated in any of the services ordered of him in the dependency since the
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25 ¹ As the attached declaration from Trisha L. McArdle indicates, that estimate of time is
26 conservative, and could easily take a year or more for the case to proceed through the Supreme Court.
RESPONSE TO MOTION FOR CONTESTED 4 ATTORNEY GENERAL OF WASHINGTON
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1 last termination trial a year ago; he has not consistently visited the children; he has
2 refused to follow the court order requiring him to sign a release of information for
3 immigration records; and he was recently fired from his job.² Moreover, Dr. Richard
4 Borton, the psychologist who testified at the first termination trial, and whom Judge
5 Kessler relied upon for his decision to deny termination, recently reviewed records from
6 the past year and Dr. Borton makes it clear that he supports termination and recommends
7 that any adoption be "closed" so as to give the children a clean break and to reduce the
8 possibility of the father manipulating the children during visits. See copy of Dr. Borton's
9 February 22, 2010 letter attached to the Declaration of Trisha McArdle. These events
10 will be the subject of the second termination trial.
11

12 III. ARGUMENT

13
14 In his motion, the father requests a "continuance" or a "stay" but he fails to cite a
15 single source of authority for his request. His entire argument rests on a speculative
16 assertion that allowing the second trial to go forward might result in conflicting rulings
17 because the two cases are based on similar facts. This is a false premise because the facts
18 of this case have substantially changed, the second trial will be based on new evidence, and
19 the children's need to obtain permanency has gone from necessary to critical. In short, these
20 children simply cannot wait any longer.
21

22
23 ² Evidence substantiating these assertions of fact can be seen throughout the dependency files
24 involving these children. See CASA's Certification of Emergency Hearing filed on 1/21/10 under Cause
25 Numbers 06-7-04269-5 SEA; 05-7-00142-7 SEA; 06-7-04270-9 SEA; See CASA Motion re: Visitation and
26 SERVICES for Father filed 1/27/10 under same Cause Numbers; See DSHS Response to CASA's Motion
REGARDING Father's Visitation filed 2/3/10 under same Cause Numbers; See CASA Strict Reply dated
RESPONSE TO MOTION FOR CONTESTED 5

1 **A. The request to continue the termination trial is not timely and the father has**
2 **failed to demonstrate that extraordinary circumstances exist such that there**
3 **are no alternative means of preventing a substantial injustice.**

4 LJuCR 4.5(2) provides that where a motion to change a termination trial date is
5 made after the pretrial conference, "the motion will not be granted except under
6 extraordinary circumstances where there is no alternative means of preventing a substantial
7 injustice..." (emphasis added). The party requesting the continuance clearly has the
8 burden of demonstrating extraordinary circumstances, which the father in this case cannot
9 show, since the appeal was pending when the Department filed its second termination
10 petition last October, and he argued throughout the appeal that a second trial was the proper
11 remedy for the Department to pursue. See supra at 6-7. The local rule also requires that
12 conditions should be imposed on any continuance to preserve justice, but there are no
13 conditions that can be imposed that will protect these children from the harmful effects of an
14 indefinite delay. Particularly since any delay in this case might very well result in a
15 complete disruption of the children's current placements.
16

17 **B. The law clearly provides the Department the right to proceed on a second**
18 **termination petition, when the first one is denied.**

19 The father argues that the Department's decision to file a second termination
20 petition was an "unusual decision that created a situation not contemplated in the
21 caselaw." Father's motion at 3. However, there was nothing unusual about the
22 Department's decision in this case. In 2005, the court of appeals made clear that the
23 Rules on Appeal do not allow the Department the right to appeal an order denying
24

25 2/8/10 filed under same Cause Numbers; See Department's Response to Father's Motion for Revision filed
26 RESPONSE TO MOTION FOR CONTESTED 6 ATTORNEY GENERAL OF WASHINGTON
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1 termination because the state can always file a second termination petition. In re
2 Dependency of A.G., 127 Wn. App. 801, 807, 112 P. 3d 588 (2005), *review denied*, 156
3 Wn. 2d 1013 (2006). On appeal of Judge Kessler's order in the first termination, the
4 father used this same rationale in attempting to dissuade the court of appeals from
5 accepting review. He argued: "The Department's proper course of action – if it was
6 determined not to proceed with a guardianship or third-party custody – was to file a
7 second termination petition." See P. 17 of Father's brf. on appeal attached to Declaration
8 of Trisha McArdle. When it served his purpose on appeal, he argued that the law
9 provides the Department the opportunity to "simply try again" if it loses the first
10 termination trial. See p. 24 of Father's brf. on appeal attached to Declaration of Trisha
11 McArdle. He argued that Judge Kessler's denial of termination did not alter the status
12 quo or limit the freedom of any party to act because the state has the option to pursue a
13 variety of alternatives, "and still file a termination petition." See p. 28 of Father's
14 appellate brf. Having conceded on appeal that the state has the option of filing a second
15 termination petition when it loses the first, the father is hardly well positioned to argue
16 the second termination trial should not go forward. Additionally, if the Department is
17 precluded from proceeding to trial on a second termination petition, then the court of
18 appeals articulated remedy in In re A.G. of filing a second petition is in fact an illusory
19 remedy, and the state should have an absolute right to appeal orders that deny
20 termination.
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25 on 2/11/10 under same Cause Numbers.
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1 C. The second termination trial will not be based on the same facts, so there is
2 no danger of conflicting decisions.

3 All of the events that have transpired over the past year, plus the father's prior
4 history of domestic violence and failed treatment attempts, his anti-social personality
5 disorder and his ongoing lack of concern over his children's wellbeing will be the subject
6 of the second termination trial. Because the second trial is based on new evidence,
7 resolution of the case will not be based on the same facts, so there is no risk of
8 'inconsistent' rulings. In fact, the results of the second trial will essentially moot out any
9 remand of the original case. West v. Thurston County, 144 Wn. App. 573, 183 P. 3d 346
10 (2008)(an issue is moot if its resolution is purely academic and cannot provide the party
11 with effective relief.) The unfortunate reality is that the appeal of Judge Kessler's order
12 took too long for these children, and with an additional appeal to the Supreme Court,
13 there is no end in sight for these children. Although it hoped that an appeal would
14 resolve this case sooner, that is not to be. DCFS is prepared to start from scratch and, if
15 necessary, prove each and every element required for termination again.
16

17
18 D. These children cannot wait any longer to have these proceedings resolved.

19 At the first termination trial both the CASA and the social worker testified to
20 these children's pressing need for stability and permanency. Over the years that these
21 children have been in care, they have had multiple placements and have bounced from
22 placement to placement. They finally had stable homes with their current relative
23 caretakers when the first trial was had, but that is no longer certain, and a change in
24 placement will be devastating to these children. The law guarantees every child the right
25

1 to a "safe, stable, and *permanent* home and a *speedy* resolution of proceedings" under ch.
2 13.34 RCW. *See also* In re the Dependency of J.S., 111 Wn. App. 796, 46 P.3d 273
3 (2002)(statute mandates *speedy* resolution in order to allow the child to have a safe,
4 stable and permanent home). These children have already been denied these basic rights.
5 To grant an indefinite stay of this termination trial sentences these children to a lifetime
6 of uncertainty. It violates their statutory and constitutional right to stability and early
7 permanency and it ignores their best interest. *See In re Dependency of J.B.S.*, 123 Wn.2d
8 1, 863 P.2d 1344 (2008); In re P.A.D., 58 Wn. App. 18, 26, 792 P.2d 159 (1990); In re
9 Dependency of C.T., 59 Wn. App. 490, 498, 798 P.2d 1170 (1990) *review denied*, 116
10 Wn.2d 1015 (1991); *see also*, In re Russell, 70 Wn.2d 451, 423 P.2d 640 (1976); In re
11 Ramquist, 52 Wn. App. 854, 861, 765 P.2d 30 (1988). If the relative caretakers decide
12 they can no longer tolerate the uncertainty and discord caused by these incessant delays,
13 the results for these children could be catastrophic. The request to stay or continue this
14 termination trial should be denied.

15
16
17 DATED this 26th day of February, 2010.

18
19
20 By: S/MARCI D. COMEAU
21 Assistant Attorney General
22 WSPA # 38027
23 Washington State Attorney General's Office
24 800 Fifth Avenue, Suite 2000
25 Seattle, Washington 98104
26 Phone: (206) 464-7045
FAX: (206) 464-6338
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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY
JUVENILE DEPARTMENT

IN RE DEPENDENCY OF:
TSIMBALYUK, PETER P.
DOB: 8/17/2006
IRBY, JAYCOB
DOB: 2/21/2005
TSIMBALYUK, OSCAR
DOB: 8/17/2006

Minor Child(ren).

NO. 09-7-04166-9 SEA
NO. 09-7-04167-7 SEA
NO. 09-7-04168-5 SEA

DECLARATION OF TRISHA L.
MCARDLE

I, Trisha L. McArdle, hereby declare as follows:

I am the Assistant Attorney General assigned to the appeal of Judge Kessler's denial of termination in the first termination trial. I am over the age of eighteen and competent to testify herein.

1. I am familiar with the record in this case, including the appeal and have read the Department's response in opposition to stay. The response accurately reflects the Department's arguments on appeal and the father's arguments in response. Attached hereto as Exhibit 1 are true and correct copies of relevant arguments made by the father's appellate counsel on the right of the Department to pursue a second termination action.

DECLARATION OF TRISHA L. MCARDLE
Rev. 03/01 pp

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- 1 2. In handling this appeal, there were numerous delays in the processing of the
2 appeal that were no fault of the Department or the CASA. The father's trial
3 counsel did not seek an order of indigency for the father until May 26, 2009,
4 which was several months after the Department filed its notice of appeal.
5 Counsel did not transmit that order to the court of appeals for appointment of
6 appellate counsel until September of 2009, which was a month after the
7 Department filed and served its opening brief. This required appellate counsel to
8 request a continuance for her brief, so that she could become familiar with the
9 record. It was because of these ongoing delays with the processing of the appeal
10 and the instability of the children's placement that the Department decided to file
11 a second termination petition.
- 12 3. I have worked for the Office of the Attorney General for over 23 years, and have
13 handled hundreds of appeals involving termination and dependency cases. In
14 my experience, it is very unusual for a petition for review to the Washington
15 Supreme Court to be resolved in less than a year. Particularly if the parents
16 pursue a number of technical challenges to preliminary rulings by the clerk. In
17 my estimation, this case will likely not be remanded, if remand is ordered for a
18 year or more.
- 19 4. In addition to Exhibit 1, I am attaching to this declaration as Exhibit 2 an
20 updated report from psychologist Dr. Borton, who was the psychologist whom
21 Judge Kessler relied upon to conclude in the first termination trial that
22 termination should not occur. This updated report is far more definitive on the
23 need for termination than Dr. Borton originally reported. Attached as Exhibit 3
24 is a true and correct copy of an e-mail that was forwarded to me, and purports to
25 be a message sent by the father to the relative caretakers.

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 26th day of February, 2010.


TRISHA L. MCARDLE
SENIOR COUNSEL
WSBN 16371

Exhibit 1

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OFFICE OF THE ATTORNEY GENERAL
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

In Re the Dependency of Peter T. (dob 9/12/2000), Jaycob I. (dob
2/21/2005), and Oscar T. (dob 8/17/2006)

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

The Honorable Ronald Kessler, Judge

BRIEF OF RESPONDENT

LILA J. SILVERSTEIN
Attorney for Respondent Peter Tsimbalyuk

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

motion to consolidate it with the notice of discretionary review as to the denial of the termination petition. This Court consolidated the cases and appointed appellate counsel for Mr. Tsimbalyuk.

D. ARGUMENT

1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING THE STATE'S MOTION TO VACATE JUDGMENT UNDER CR 60(B).

The State contends the trial court abused its discretion in denying its motion to vacate judgment, essentially arguing that the trial court was required to reopen the case to hear new evidence because DSHS failed to prove its case the first time around. The State is wrong. CR 60(b) is not designed to give the losing party a second bite at the apple. The Department's proper course of action – if it was determined not to proceed with a guardianship or third-party custody – was to file a second termination petition.

"A motion to vacate a judgment is to be considered and decided by the trial court in the exercise of its discretion, and its decision should not be overturned on appeal unless it plainly appears that this discretion has been abused." In re the Guardianship of Adamec, 100 Wn.2d 166, 173, 667 P.2d 1085 (1983). Discretion is abused where it is exercised on untenable

in adoption did not testify at the termination trial, and the court found that there was no evidence she would not be willing to care for the child under a more inclusive arrangement. Id. at 805.

The State appealed, and this Court held that RAP 2.2(a) did not provide a right to appeal the denial of a termination petition.³

Id. This Court noted that subsection (6) of RAP 2.2(a) allows appeals as of right for aggrieved parents, but that no counterpart existed for cases the Department lost – presumably because the Department, unlike parents, could simply try again. Id. at 806.

Indeed, the Court concluded that the denial of a termination petition is not appealable under RAP 2.2(a)(1), (3), or (13) for that very reason: It is not a final judgment because it does not “end the overall action.” Id. at 807. Rather, the dependency is still in place, and the State is free to file another termination petition.⁴ Id.

The appellants here act as if the denial of the termination petition is appealable as of right simply by virtue of the fact that the denial of a CR 60(b) motion is appealable. Endorsing this practice

³ This Court further held that discretionary review was not warranted. Id. at 808-09.

⁴ In this case the State claims it did not file another termination petition because of “inherent delays” in the process. DSHS Brief at 37 n.7. But if the State really cared about employing the most expeditious solution, it would have filed a second termination petition and been finished with a second termination trial by now. The fact that it instead filed a frivolous CR 60(b) motion and appeal belies any claim of urgency.

cases where it appears that the superior court has committed probable error which substantially alters the status quo").

However, the State cannot prevail because the decision of the superior court did not substantially alter the status quo and did not substantially limit the freedom of a party to act. To the contrary, the decision maintained the status quo: the children remained dependent children in the care of relatives. Nor did the ruling substantially limit the freedom of a party to act. Mr. Tsimbalyuk can still see his children, and the State can still provide services to the family, still pursue a variety of alternative permanent plans, and still file a termination petition. Thus, RAP 2.3(b) is not satisfied, and the Court need not reach the argument below.

c. Even if the trial court's decision had altered the status quo, discretionary review would be unwarranted because the trial court did not commit probable error; rather, the trial court credited the State's own witnesses who testified that continued contact with the father served the children's best interests. Even if the second clause of RAP 2.3(b)(2) were satisfied, the first is not. The juvenile court did not commit probable error in concluding that the State

Exhibit 2

RICHARD W. BORTON, Ph.D.
Infant, Child, Family Therapy and Evaluations
Licensed Psychologist (#838)

19105 36th Ave. W. #206
Alderwood Business Campus
Lynnwood, WA 98036-5760

(425) 478-2280

2/22/10

Marci Comeau, Attorney
AAG Office
800 Fifth Ave. Suite 2000
Seattle, WA 98104

Re: Peter Tsimbalyuk

Dear Ms Comeau,

This is a formal summary of my review of the documents you sent me last week regarding Mr. Tsimbalyuk. You asked that this review ultimately address three questions:

(1) Whether based on the documents I reviewed, my opinion remains that Mr. Tsimbalyuk should not have primary parenting responsibility for his three children (Peter, Jr; Oscar; Jaycob), and whether my opinion would change knowing that Mr. Tsimbalyuk is separated from Ms Irby.

(2) Whether I would maintain the opinion that termination is not in the children's best interests.

And (3): If termination is in the best interests of the children, what has changed since 3/09 to change my opinion, and whether that opinion would be the same for all three children.

Based on my reading of the documents presented for this review, and on the information made available to me at the initial termination trial in 3/09, along with my evaluation of Mr. Tsimbalyuk in 12/07, I would offer the following in response to these questions. I would note that I have had no contact with Mr. Tsimbalyuk or his attorney in this review, and base my opinions solely on the information described above.

As to (1), my opinion has not changed. There is nothing in the current materials to suggest that Mr. Tsimbalyuk has made changes in the factors initially disposing me to the

opinion that he should not have custody of his children. Indeed, while he has made two brief attempts at counseling, as discussed in the initial evaluation, therapy would need to be consistent, frequent, occur over a long period of time, and he would need to be motivated to change. None of these factors have been true.

In the initial evaluation, I proposed that Mr. Tsimbalyuk's Antisocial Personality Disorder primarily made him unable to be a fit parent for his three children. The diagnosis of Antisocial Personality Disorder was based upon Mr. Tsimbalyuk's history and then-current symptoms of deceitfulness, irresponsibility, and lack of remorse. In terms of parenting, these resulted in his being primarily self-focused in his day-to-day decision making and judgment, opportunistic (without regard to the effect his behavior had on others), manipulative, and disregarding of authority. Since then, the materials reviewed provide continued, multiple examples of these symptoms. For example, he has openly stated to the CASA his intention to disregard the rules of any parenting arrangement except return of the children to his care. He has said that he wanted to move two of his children to his sister's home in Tennessee, his sister having 9 children already. He claims that he had spoken with her and obtained her approval of this plan, but later, I am told, he retracted his suggestion that the children be moved there. It is unclear if his reported contact with his sister was ever made. In this process, he had no plans for how he would visit these children (were they to be moved to Tennessee), and/or maintain contact with his oldest child (Peter, Jr) who is placed with Mr. Tsimbalyuk's mother locally. His irresponsibility is evident in comments he has reportedly made to a DV counselor that he is happy to have the state support his children, and that he had no need to work full time. He described himself at the time being "voluntarily underemployed", working 20-30 hours a week and stating that he only had about \$100-\$200 a month left for paying bills. At the same time, he has somehow paid for an attorney and another psychological evaluation in the process of his deportation hearing. I believe his family is supporting those efforts. Somehow he believes he could support his children. His disregard of authority is also evident in a recent visit in which he had to be told twice to put his cell phone away, and in another visit in which he brought a "cousin" who, himself, disregarded the supervisor's authority and took pictures on his cell phone after being told not to. This event is troubling also because it suggests that Mr. Tsimbalyuk is befriending people whose disdain for authority mimics his own, rather than associating with people who could be more appropriate models. Finally, his continued disregard of authority is evident in the haircutting incidents discussed in supervised visitation notes. In the initial incident (6/09) he claimed that the caseworker had given him such permission a year prior, and that therefore he felt that he currently was permitted to cut his child's hair in the visit, despite the visitation supervisor's protestations. It is reported that he was subsequently given guidance in this matter by the court, and yet later once again cut his children's hair when they were at his mother's home in 1/10. He claimed then that the visit was not an official "visit" and that therefore he had the right, and was free, to cut their hair. In neither incident did he consult with the foster parent for the children, his own sister.

His continued deceptiveness is evident as well. He cancelled visits, for example, on three occasions in the fall, 2009, claiming illness. Possibly this is the real reason for these

cancellations. He claimed that he knew nothing of the well-established visitation rule that three missed visits would result in suspension of visits. It is very difficult to believe that in the course of these three cancellations over a two-month period, that he would not have been reminded of the rules, and/or that these rules would not have been well-explained at the outset of the supervised visitation. Mr. Tsimbalyuk's dissimulation was clearly evident in the initial evaluation with me. In no uncertain terms, I talked to Mr. Tsimbalyuk about the risks to his children were he to re-engage with Ms Irby. I also made it clear that the state would likely take a dim view of him ever obtaining custody of the children were he to become involved again with Ms Irby. He assured me that he was not involved with her and would not be re-involving himself with her. I learned in the initial termination trial that not three months after the evaluation with me was completed, he married Ms Irby. Despite his protestations to the contrary, he was in fact quite involved with Ms Irby during my initial evaluation. As I stated in the termination trial, this was quite dismaying to me, as it not only was evidence of his continued deceptiveness, but also potentially elevated the risks for any children returned to his care, and clearly indicated his priority of his own self interests over those of his children.

Finally, his antisocial personality is evident in his management of his housing situation over the past year. His sister and brother in law rented Mr. Tsimbalyuk a house, which later became foreclosed apparently due to the brother in law's failure to keep up with the mortgage. Papers indicate that this occurred in 8/09. The house was to be vacated thereafter, as would be appropriate, and sometime that Fall eviction notices were sent to the rental home in which Mr. Tsimbalyuk and Ms Irby were living. The sister and brother in law state that they never received these notifications because Mr. Tsimbalyuk did not forward them. This resulted in something of a surprise notification to the sister and brother in law, which in turn resulted in their visit to the house to be sure no one was living there. They were under the impression that their prior requests that the couple move out were fulfilled. They report that they found Mr. Tsimbalyuk and Ms Irby living in the home and claim that the home was trashed. The brother in law was understandably angry, and probably made inappropriate threats to Mr. Tsimbalyuk. Mr. Tsimbalyuk responded to these threats with voice-mailed threats of his own, including one message including sounds of gunshots and glass breaking. It is Mr. Tsimbalyuk's response to his brother in law that is of importance here, as it suggests that rather than being remorseful about continuing to live in a home that was no longer rented to him (and for which he had paid no rent for months), and moving out when requested to do so, Mr. Tsimbalyuk remained in the home and then responded to his brother in law's anger with vindictive anger of his own. This indicates the level of entitlement and irresponsibility Mr. Tsimbalyuk has.

All of the above is to say that his Antisocial Personality Disorder is alive and well and continues to be a major impediment to safe care and nurturance of children. I continue to argue that placement of any of his children with him is not appropriate. He would, as I indicated in the initial evaluation, present an poor model for his children in terms of helping them learn the values of adherence to societal rules and respecting authority; he would be apt to expose the children to unsafe people; he would not be likely to consider his children's best interests ahead of his own; he would not be likely to be able to a

consistently nurturing and supportive adult for the children. His choice to marry the children's mother, knowing that her presence would be unsafe to the children, indicates extremely poor judgment. His attempts to have two of his children move to Tennessee, and/or to have them in a guardianship here, all appear to be aimed at reducing court structure (or manipulating the court) to the point that he could resume custody immediately after court structure was removed. I maintain that he should not be the custodial parent for any his children.

As I indicated in my prior evaluation, I did think at the time that his positive relationship with his children, and theirs with him, merited some consideration. I felt at the time that there were relatives who would be willing to provide the lion's share of care and nurturance for the children, and that Mr. Tsimbalyuk could act as a "favored uncle" to the children, much as he has done in most of the visits he has had until recently. My caveat at the time was that a guardianship could be considered if the placement resources were willing to consider this, and if the relationships between the placement resources and Mr. Tsimbalyuk could be maintained positively. While these caveats were minor issues at the time of the evaluation (based on my conversations with one of Mr. Tsimbalyuk's sisters), since then there have been considerable, adverse changes, to be discussed below.

(2) Based on the reasoning discussed in (3), I believe at this point that termination of parental rights would be appropriate. I recognize that this is a deviation from my prior recommendations to the court, and believe that this change in opinion is valid for the reasons discussed below.

(3) A number of changes have occurred since my initial evaluation in 12/07 and since the initial termination trial in 3/09. These changes have led me reluctantly to conclude that Mr. Tsimbalyuk does not have the capacity to be a viable parent for these children.

First, as indicated above, Mr. Tsimbalyuk chose to marry the children's mother, who demonstrably was neglectful of the children and has since relinquished her parental rights. This clearly indicates Mr. Tsimbalyuk's priorities are skewed toward his own interests over those of his children.

Second, the caveats I discussed in the initial evaluation have been far more problematic than initially expected. Mr. Tsimbalyuk has taken advantage of his sister and brother in law renting him their home, by not paying rent for months, and by not leaving when told to do so. This, as well as the family's insistence that they cannot continue to care for the children under anything other than an adoption, has led to very severe conflicts between Mr. Tsimbalyuk and the potential guardians of his children. There is a no contact order restricting Mr. Tsimbalyuk from contact with his sister and brother in law. The relationships do not appear repairable in the foreseeable future, and no one should expect differently. So, the relative placements are no longer in agreement with guardianship as an option, and the relationships between the families involved have disintegrated. Guardianship would no longer be viable, from my point of view.

Third, the only reason that termination was not recommended in the prior evaluation, was that Mr. Tsimbalyuk's relatively positive involvement with his children in visits indicated an abiding attachment of the children to him. What was not clear at the time was the degree to which conflicts between Mr. Tsimbalyuk and the children's caretakers and between Mr. Tsimbalyuk and the state would interfere with his conduct with his children. Visitation notes from 6/09 to the present indicate that when Mr. Tsimbalyuk has been frustrated with either caretakers or the state, he has not been able to suppress this frustration in front of his children. Thus, we have the CASA reporting that he made disparaging comments to the children about the CASA and caseworker during a recent visit. He has disregarded his child's protestations as well as those of the visit supervisor in cutting the children's hair. It is clear that when he is under stress in other areas of his life, his visitation with his children is adversely affected. Clearly, he has had stress in the past and managed to maintain appropriate conduct in visits. More recently, though, his conduct during visits has been less appropriate. He has brought a person to the visit who modeled disregard for authority and has required two reminders in one visit to stop using his cell phone. I am told that he has missed two visits recently. Finally, there are several visits at the end of 2009 in which the children refer to their father as "Peter". This could suggest some distancing on their part. Overall, I am concerned that his previously positive relationships with his children during visits may be compromised currently.

I am also concerned that his previously positive relationship with his own mother (the relative placement for his oldest son, Peter, Jr.) was, and perhaps continues to be, based on her willingness to accept Mr. Tsimbalyuk's dissimulations at face value. I am struck, for example, by her willingness to allow Mr. Tsimbalyuk to cut the children's hair in her presence, apparently being swayed by the argument that the visit was in some way not an official visit and that therefore he could violate court orders, or that somehow he persuaded her that he should have the right to cut their hair, as the children's father. Or, who knows what argument, if any, he used? She must have known about the prior haircutting issue and should have admonished him (and perhaps did so) not to cut the children's hair. I worry that she may be duped by him on other issues and/or have simply wanted to believe him as her son. In any case, I believe that she may not be able to exert control over his actions, or to too easily succumb to his manipulations, and that were guardianship to occur with Peter, she may be too quick to allow excessive and inappropriate contact between father and son. She has been reported to have been pleased to hear that Mr. Tsimbalyuk was remanded for drug testing, apparently recognizing a recent negative change in his behavior possibly associated with drug use. This would suggest that she does not have the capability to confront him on her own.

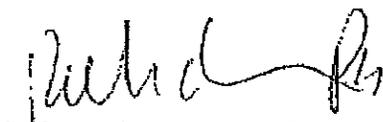
Finally as mentioned in the initial evaluation, Mr. Tsimbalyuk's deportation status is an issue, though the court and DCFS at this point do not have a clear understanding of this due apparently to confidentiality issues. Mr. Tsimbalyuk is under court order to release this information, but has refused to comply. The last information available is that he has been deported, and that he is awaiting appeal of that order. It is a very reasonable possibility that he would be deported at some point in the near future. Dependency court should consider (a) the possibility that Mr. Tsimbalyuk's desire to obtain custody of his children is in part motivated by his agenda not to be deported, and (b) what would happen

to the children were he to be deported. I am concerned that this would have an adverse impact on the children were parental rights not terminated.

I cannot speak as to the "best interests of the children" in this matter. My evaluation was to address Mr. Tsimbalyuk's capacity to be a viable parent to his three children. I think that his Antisocial Personality Disorder raises considerable risks to the safety of children in his care, not so much because he would be actively abusive, but rather that he would not be proactively protective of his children, sensitive to their feelings, and act on their behalf ahead of his own. This led to the initial removal of the children from his care, due to his failure to protect the children from neglect from their mother. Marrying her after she relinquished parental rights is a blatant statement of his priorities. I believe that his actions over the last year have continued to provide clear evidence that his focus is quite clearly on his own interests. Those interests have been to have his children back into his care, regardless of the impact on the children. This represents both a parental deficit, in the sense of acting in a manner that is dismissive of the children's attachments to their aunt and uncle and grandmother, and a lack of sensitivity to the children's best interests.

I have one further caveat in all of this. Aside from the one DV incident with his wife, Mr. Tsimbalyuk does not have a history of chronic, violent behavior. But based on his conduct over the past year, I am concerned about other retaliative actions he could take against his sister and brother in law in particular, were the court to determine that parental rights should be terminated. It is clear that he would not abide by guardianship strictures, and he has said as much to the CASA. However, he has also indicated that he would "go to court" to get the changes he wanted. He has not said that he would take matters into his own hands. Were court relief not to be an option (were parental rights to be terminated), it is not clear to what ends he would go to get what he wants. While I do not see him suddenly becoming assaultive, it is not out of the question that he could act to kidnap the children, perhaps in association with his deportation. It would not be out of the question that he could continue to harass his sister and brother in law, and/or violate the no contact orders. If the court determines that termination is appropriate, it would probably be best to make a subsequent adoption closed, to effect "a clean break" and reduce the possibility of Mr. Tsimbalyuk engaging in manipulative behaviors with the children during visits.

I hope that I have responded to all of your questions. Feel free to call if you have further issues to address.



Richard W. Borton, Ph.D.

Exhibit 3

McArdle, Trisha (ATG)

From: Comeau, Marci (ATG)
Sent: Thursday, February 25, 2010 7:48 PM
To: McArdle, Trisha (ATG)
Subject: FW: Discovery on the Tsimbalyuk case

-----Original Message-----

From: Comeau, Marci (ATG)
Sent: Thursday, February 25, 2010 7:48 PM
To: 'Warden, Alison'; Freeman, Roger; 'Nagel, Heidi'; 'casa.group@kingcounty.gov'
Cc: 'Lori Reynolds'; Street, Sandra (DSHS/CA)
Subject: Discovery on the Tsimbalyuk case

Below is an email received by me from the relative caregiver for Jaycob Irby and Oscar Tsimbalyuk containing the text messages sent by Peter Tsimbalyuk to Lena and Sergey Budnik on January 16 and January 17, 2010.

-----Original Message-----

From: 4255011061@ms.att.net [mailto:4255011061@ms.att.net]
Sent: Thursday, February 25, 2010 6:30 PM
To: Comeau, Marci (ATG)
Subject: Multimedia message

SUKERS SUKERS GO HOME AND EAT SHIT
LIKE I SAID. EAT STINKY SHIT BLUDNIK

Ya I think not. I know a bludnik when I hear one. And I'm going to my real house which is u know where. I can take him easy, just didn't because of the kids. BLUDNIK. MAYBE YOUR FRIENDS MALUTA COULD USE A COPY OF YOUR FAMOUS SPEACH. U. ARE FASHISTU. I WISH U LUCK WITH TOMOROW WITH YOUR FAKE SEREMONY. HOW CAN U LOOK PEOPLE IN THE EYES AND SAY "LOVE ONE ANOTHER". O YA BY THE WAY ILL BE COLLECTING FROM YOUR ASSES ON BEHALF OF SNIJANA ALEX LUBA VIKA MOM AND ANYBODY ELSE THAT ASKS FOR MY HELP. So open your mattres and start forking out money that u stole from honest people. U ain't nothing but a thief and raketeer and a big fat liar (it wouldn't hurt to lose a few hundred pounds). Overall u are a baaaaad person=u really chouse a wrong career for yourself. I think u were a better driver for that politician than u could ever be a "bastor"

Its my fuck. GET A FUCKING JOB. U LOOOOSER And u be mean or a scratch on any(u know what I mean),thaaaaan I might get upset with uu. U don't want that trust me and how many people do u want to rec ive the message (the one about the money)give me a number O yeah, lil sisy almost forgat about u I am reaaalllly disapointed in U for folowing in the footsteps of the mindless,GREEDY,LYING,PIEcE OF SHIT. U shou ld know better. And no there is no threat u dumb fuk. -I'm just telling u to be nice to people and animals around u. Otherwise u will no longer be a ba stor-get it. "Pastor". I said it ain't. What the shit are u talking about and stop taking so many steroids sergey I think u owe (both of u) owe an appology to GOD for missusing HIS house of worship I didn't realize that a little bit of money can make people act like the BIGGEST ASSHOOLEES in the universe. ps sergey I could give u a few driving lesso ns for free if u can't afford it Hey look I'm sorry about what I said, I didn't mean it. Ok. Have o good night and sweet dreams everybody. I ll see u guys tomorow and if u want we could Lena "fuk your husband he is the biggest and the fattest looser of all time"

Yeah, thats all true

I don't lie

What a bunch of crap. When I moved there I had a \$1100 condo that I was paying\$500 for .I just gave it up and was doing u a favor by staying at that shi thole that u cared nothing

about untill somebody actually had started to enjoy themselves overthere u had to stop that at any price..loosers that's what I think of u sergey and sisy. Following me around like a couple of dumb asses with your noses up eachothers ASSHOLES. "Brownosing". Get a life. Find so mething usefull to do with your time. Stop doing the stupid shit u be doing. And shouldn't u be in "church" right about now. GET THE FUCK LOST"
U ASSHOLES .

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY
JUVENILE DEPARTMENT

IN RE DEPENDENCY OF:
TSIMBALYUK, PETER P.
DOB: 8/17/2006
IRBY, JAYCOB
DOB: 2/21/2005
TSIMBALYUK, OSCAR
DOB: 8/17/2006
Minor Children.

NO. 09-7-04166-9 SEA
NO. 09-7-04167-7 SEA
NO. 09-7-04168-5 SEA

DECLARATION OF DSHS SOCIAL
WORKER SANDRA STREET

I, Sandra A. Street, hereby declare as follows:

I am employed by the Department of Social and Health Services as a social worker and make this declaration as such. I am over the age of eighteen and competent to testify herein.

JAYCOB IRBY AND OSCAR TSIMBALYUK

I have supervised these two children since on or about 01/08/2007. During this time, these children have resided in approximately five different non-relative placements. The children were placed with their paternal relative aunt and her husband on 06/14/2008. During the past year, the relationship between the father Peter Tsimablyuk and the relative caretakers has deteriorated so extensively that the paternal aunt (the father's sister) recently

DECLARATION OF DSHS SOCIAL
WORKER SANDRA STREET
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ATTORNEY GENERAL OF WASHINGTON
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7744

1 filed a protection order against Mr. Tsimbalyuk due to harassing text messages and
2 extensive damage and vandalism to the paternal aunt's rental home. There have also two
3 separate head-shaving incidents while the children were on supervised visits with their
4 father. Per my communication with the relatives, they have experienced concerning stress
5 in their inability to make caretaking decisions for the children that conflict with the father.
6 This recently resulted in a DCFS/CASA intervention in an effort to salvage this placement
7 and prevent the children from being returned to the foster care system. The children have
8 developed a strong bond with their paternal family caretakers. The children view the
9 paternal aunt's husband as a father figure and refer to their father by his first name during
10 visits.

11 The relative caretaker and her husband have indicated they want to adopt Jaycob and
12 Oscar, and any other permanency option will not be acceptable.

13 Jaycob Irby has been a dependent child for almost five years now and has bounced
14 from a disrupted parental placement and moved from foster home to foster home, affecting
15 his emotional and developmental status and his inability to form long-lasting attachments.
16 Oscar Tsimbalyuk has been a dependent child for almost three years now and has had the
17 same history of bouncing from foster home to foster home, affecting his ability to grow and
18 develop emotional bonds and attachments. These children have stabilized in their current
19 placements, and to move them for a sixth time could potentially affect their psychological
20 status on a permanent basis. Delaying the termination trial will jeopardize the stability of
21 their placement, because the relatives have indicated that dragging out these proceedings is
22 putting incredible stress on their family and is making it harder and harder for them to keep
23 these children in their care. The Department is incredibly concerned that making these
24 children and this family wait for six more months will result in the children losing this
25 placement that has proved necessary to their health, safety, and welfare.

26 DECLARATION OF DSHS SOCIAL
WORKER SANDRA STREET
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2

ATTORNEY GENERAL OF WASHINGTON
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7744

1 PETER P. TSIMBALYUK JR.

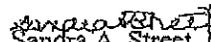
2 This case was assigned to this social worker on 06/04/2007. Since that time, Peter Jr.
3 was moved to the home of his second relative caretaker, his paternal grandmother. This
4 caretaker has expressed her desire to adopt her grandson, as she has been the predominant
5 hands-on caretaker of this child for most of his life, and the child is very bonded to her. She
6 has indicated she does not want to pursue any other permanent plan for Peter Jr.

7 The relative caretaker spends several months a year living in the Ukraine and has
8 been given approval to take the child with her by the court for the past three years. On a
9 recent home visit, the relative caretaker indicated how stressful it had become to both her
10 and her grandchild with the unresolved legal issues and having a number of government
11 officials that intervene in her life on a regular basis. These meetings have, on occasion, been
12 tearful for the grandmother.

13 In my over twenty years of working with the Department, I have never supervised a
14 case that has resulted in the inability to achieve a permanent plan for three young children.
15 These children deserve permanency now and not in six months. They are unable to return to
16 their father Peter Tsimbalyuk and the parental rights for the biological mother's of these
17 children have been terminated over a year ago.

18 I declare under penalty of perjury under the laws of the State of Washington that the
19 foregoing is true and correct.

20 Dated this 25th day of February, 2010, at Seattle, Washington.

21
22 
23 Sandra A. Street, MSSW
24 DSHS Social Worker

25
26 DECLARATION OF DSHS SOCIAL
WORKER SANDRA STREET
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ATTORNEY GENERAL OF WASHINGTON
800 Fifth Avenue, Suite 2000
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Appendix D

FILED

10 FEB 25 PM 2:26



REPORT TO COURT

THIS REPORT IS OF A CONFIDENTIAL NATURE FOR THE BENEFIT OF THE COURT AND MAY BE DISTRIBUTED ONLY TO PARTIES TO THE PROCEEDINGS.

NAME:	Peter Tsimbalyuk	AGE:	9-1/2 years	L.N.:	09-7-04166-9 SEA
	Oscar Tsimbalyuk		3-1/2 years		09-7-04168-5 SEA
	Jaycob Irby		5 years		09-7-04167-7 SEA
TYPE OF HEARING:	Motion Set by father	DATE:	3/5/2010	CASA NOS.:	9750 9750-1
			8:30 a.m.		
			JUDGE MCCULLOUGH		

The children are not of Native American heritage.

Peter -- Dependency was established on May 25, 2007 as to the mother and May 18, 2007 as to the father; the mother's parental rights were terminated on November 3, 2008. Peter has been in three placements.

Oscar -- Dependency was established on May 18, 2007 as to the mother and father; the mother's parental rights were terminated on February 13, 2009. Oscar has been in five placements.

Jaycob -- Dependency was established on May 10, 2005 as to the mother and May 17, 2005 as to the father; the mother's parental rights were terminated on February 13, 2009. Jaycob has been in six placements.

ISSUE

Should the March termination trial be stayed while the father seeks discretionary review in the Supreme Court of Washington and/or the matter is remanded from the Court of Appeals to Judge Kessler?

RECOMMENDATION

No, the termination trial should go forward without delay.

COMMENTARY

Children. The road to permanency for these three boys has been unusually long and difficult and is getting increasingly hard on the boys. Despite the Legislature's dedication to keeping children in limbo for no more than 15 months, Jaycob has been a ward of the court for five years. More than four of those years have been in out-of-home placement, with too many moves and too many strangers; he has been in six placements. Oscar's situation is equally

alarming; he has been in five placements in his three years under Court supervision; he's only 3 ½ years old. Peter Jr. has been more fortunate because his paternal grandmother, Valentina Timoshchuk, has been his primary caregiver for all but six months of his life. However, Peter Jr. has also been dependent for nearly three years.

Father. The stress of the prolonged legal case is clearly taking a toll on Mr. Tsimbalyuk. His behavior and actions since the last trial have steadily eroded and he is increasingly unpredictable, uncooperative, agitated and combative. For the first few years of this dependency, the father displayed some interest and acted toward reunification with his children. As the years have gone by that resolve has declined to the point that the father quit complying with anything over a year ago. After winning the 2009 termination trial, he did not take the opportunity to turn around his efforts toward reunification; instead that point marks a turn for the worse. A few months ago Mr. Tsimbalyuk lost his long-time employment. Over the last month the father has quit answering his phone, ignored multiple messages, blocked voicemail for a week, and refused to accept written correspondence from the social worker. All of this has interfered with dependable visits, creating more uncertainty for the boys (and the caretakers). The father's behavior and actions created sufficient concern that on January 22, 2010 the court ordered random UA testing and increased visitation restrictions. No UA reports have been received, indicating the father is out of compliance and raising this CASA's concerns that the father is using drugs. In an earlier phase of this dependency, the father complied with random UA testing.

Visits have become problematic this past year with issues relating to dad's bad choices. Since May 2009, the father has had chronic problems making the regularly scheduled visits with Jaycob and Oscar and there are several reports showing Jaycob being upset or acting out around the visits. The father failed to show at his last two visits, one of which caused Jaycob and Oscar to be unnecessarily transported and disappointed. The same situation happened with Peter two weeks ago. There are other problems with visits: the father brought an unauthorized person to a visit to take pictures of the boys against direction of the visitation supervisor; he forcefully shaved Jaycob's head against the repeated direction of the visitation supervisor, was told to stop by Commissioner Castilleja and did it again with all three boys in early January; and he had unauthorized contact with the boys in early January. Since the January 2010 order to change the location of visits to a secure DCFS location for all of the boys, the father is difficult, next to impossible, to contact.

Placements. Of enormous concern to this CASA is the growing conflict between Mr. Tsimbalyuk and the three relative caretakers. If these placements are lost, the boys will lose out on the tremendous benefits of this stability and the warmth of the strong extended biological family. The two younger boys, Jaycob and Oscar, are placed with the Budniks, a paternal aunt and uncle. They have been with the Budniks since June 2008 and thrive there, calling the Budniks Momma and Poppa. To this CASA, it appears that both Jaycob and Oscar have regained lost developmental ground since being placed in this loving home. Peter Jr. is placed with his paternal grandmother and is also loved and doing well.

All three relatives are clear that they want and need an end to this placement limbo; it is getting too difficult to have the Court, the father and the State in their lives and parenting decisions for so long. Since trial, the father has continued to talk about alternative permanent plans – guardianship, third-party legal custody, even long-term foster care – but no plan or petition has been brought to the Court during all the years of these dependencies. The father seems to

know reunification is highly unlikely yet continues to thwart all efforts toward true permanency -- even when it involves permanent plans within his own family for all three boys.

The Budniks were the only relatives who expressed a willingness to take in Jaycob and Oscar and raise them, but due to concerns about Mr. Tsimbalyuk's choices and behaviors, wanted only adoption. The boys were placed there with Mr. Tsimbalyuk's consent, after multiple foster care placements. The Budniks took in the boys after much deliberation because it appeared the boys would be legally free either by relinquishment or trial within a year. Almost two years later, the boys are not legally free, the father will no longer relinquish, court supervision continues, their relationship with the father has eroded to conflict, and there is no end in sight. The father has publicly stated his intention of undoing any permanent plan short of adoption as soon as court involvement ends.

Relations between the Budniks and the father have eroded this past year as a result of the events in this case, their enforcement of rules and court orders, and a series of events related to the Budniks' rental property and the father. (For details on this issue, please see my two declarations filed in support of my Motion Regarding Visitation and Services, attached to this Report.) Over the last several months, the father has been displaying increasingly unpredictable, inappropriate and agitated behavior to family members, myself, the social worker, and particularly the Budniks such that they got an order of protection against the father. This behavior also led the dependency court to order that visitation occur in DSHS secure facilities and that the father undergo UA testing. The father has provided no UAs, in defiance of the January 22, 2010 court order. (Mr. Tsimbalyuk is also in defiance of another Court order requiring him to sign a release of information so that DSHS can have access to his immigration records and status.)

Even the grandmother sees the changes in her son's appearance and behavior and is concerned, as are two other paternal aunts. The grandmother has always been very supportive of the father but even she is now openly frustrated and unhappy with the father for preventing her from adopting Peter Jr. Mr. Tsimbalyuk has a minor role Peter Jr.'s day-to-day care but the grandmother has felt compelled to let the father have an often significant role in parenting decisions because she felt her unofficial status prevented her from doing otherwise. She badly wants that to change, and be the official parent of Peter.

Conclusion. The father's wish for a Stay of these proceedings will further delay permanency for these boys, minimally by a year, but potentially for many, many years. This is clearly detrimental for the boys, bad news for the three caretakers, and could well disrupt even these strong relative placements.

All parties have known since October 2009 that the appeal was underway and that a second termination petition was moving forward. We have already been through the preliminary hearing and the pretrial conference, and only now, when trial is just a week away, does the father raise this issue. These boys have waited far too long. They are adoptable and the relative caretakers all have approved adoptive home studies. These prolonged dependencies with no hope of reunification are clearly taking a toll on everyone -- the three caretakers, the father, the children. There is nothing to be gained for these three boys, in fact much to lose, by prolonging the temporary nature of these placements for another year or longer.

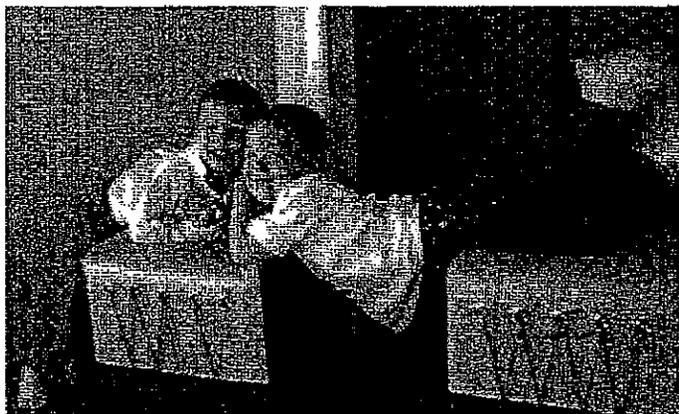
On behalf of all three children, I urge the court to deny the father's motion and allow the trial to go immediately forward.

PERSONS CONTACTED REGARDING THE CURRENT SITUATION:

Oscar Tsimbalyuk	child
Jaycob Irby	child
Peter Tsimbalyuk (Jr.)	child
Peter Tsimbalyuk	father
Valentina Timoshchuk	paternal grandmother, caretaker of Peter Jr.
Vasily Gumenny	paternal grandfather
Lena, Sergey Budnik	paternal aunt and husband, caretakers of Jaycob and Oscar
Jane Timoshchuk	paternal aunt
Sandra Street	social worker
Sandy Greenup	adoption social worker
Julie Young, Selena Taylor, Paul Fashaw,	visitation supervisors
Marci Comeau	AAG
Alison Warden	father's attorney
Don Miner	CASA supervisor
Heidi Nagel	CASA attorney



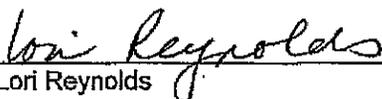
Peter



Oscar and Jaycob

Under penalty of perjury of the laws of the State of Washington, I declare that the foregoing is true and correct to the best of my knowledge.

Signed this 15TH day of February, 2010 at Seattle, Washington.


Lori Reynolds

cc:

Court coordinator/Judges Chambers	Via email -- Judge McCullough
Social worker	Sandra Street
Attorney for father	Alison Warden/Roger Freeman, SCRAP
AAG	Via email - Marci Comeau
CASA	Lori Reynolds
CASA attorney	Heidi Nagel/Lori Irwin
Office file	9750lr
CASA supervisor	Don Miner

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SEATTLE, WA

SUPERIOR COURT OF WASHINGTON, COUNTY OF KING
JUVENILE DIVISION

IN RE THE WELFARE OF
Peter Tsimbalyuk, Jr
Oscar Tsimbalyuk
Jaycob Frby

09-7-04166-9 SEA
NO 09-7-04167-7 SEA
09-7-04168-5 SEA
MOTION & ORDER

STATEMENT OF FACTS

~~Respondent's Counsel~~ Alison Warden represents to the court under penalty of perjury that the following facts alleged in support of the motion, are true and correct

In light of recent appellate court ruling involving termination of Father's parental visits as to the above-captioned children, Father's counsel has filed a motion to STAY the above-captioned proceedings, to currently, trial motion is scheduled for 3-5-10. Parties are in agreement to continue FF to 3-8-10.

ORDER
The undersigned, having read and considered the above recited motion and statement of facts in support thereof and having found said motion to be necessary for the welfare and in the best interest of the above named child or children NOW THEREFORE
IT IS HEREBY ORDERED

Good cause is found to continue.
Fact-finding is now set for 3-8-10*, pending court's decision on motion to stay. * Brokerage set for 3/4/10

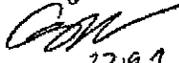
DATED this 25 day of February 2010


Judge/Commissioner

Presented by Alison Warden #33199
Attorney for Father

Mari Corneau #38097 AAG
Marc Corneau, Assistant Attorney General

Ms Nagel gives email permission
Hendi Nagel, EABA Program Attorney Design


33199

MotionOrder.doc

Page ORIGINAL

Appendix E

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SUPERIOR COURT OF WASHINGTON FOR THE COUNTY OF KING
JUVENILE DEPARTMENT

IN RE DEPENDENCY OF
TSIMBALYUK, PETER PETROVICH
DOB DOB 9/12/00
IRBY, JAYCOB JAMES
DOB 2/21/2005
TSIMBALYUK, OSCAR LEONID
DOB 8/17/2006
Minor Children

NO 09-7-04166-9 SEA ✓
NO 09-7-04167-7 SEA
NO 09-7-04168-5 SEA

ORDER ON FATHER'S MOTION TO
STRIKE TESTIMONY OR CONTINUE
TRIAL AND ON DSHS MOTION FOR
TERMS

THIS MATTER, having come on before the court on the father's motion to strike testimony or continue the termination fact-finding trial and on the Department's motion for terms, and the court having reviewed the foregoing Motions, considered responsive pleadings, heard argument, being familiar with the records and files herein, the court makes the following

I FINDINGS

1 The Department committed a technical violation of LCR 26(b)(3) by not disclosing a summary of Dr Borton's opinion by the February 24, 2010 deadline, and therefore the Department's motion for CR 11 sanctions is denied

ORDER ON FATHER'S MOTION TO
STRIKE TESTIMONY OR CONTINUE
TRIAL AND ON DSHS MOTION FOR
TERMS

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1 2 However, a continuance of the termination trial is not warranted because Dr
2 Borton's updated opinion is not substantially different than it was previously, and
3 any change in his opinion are the fair subject of cross examination
4 3 Pursuant to LCR 26(b)(3), the court finds good cause to permit Dr Borton's
5 testimony because of the one-week continuance of the trial already granted on the
6 father's motion, the fact that a summary of Dr Borton's updated opinion was
7 submitted to all parties on February 25, 2010, only one day after the February 24,
8 2010 deadline, and the ability of the father to cross-examine Dr Borton about his
9 updated opinion at trial

10 **II ORDER**

11 **IT IS ORDERED, ADJUDGED, AND DECREED THAT**

- 12 1 The father's motion to strike Dr Richard Borton's testimony is DENIED
13 2 The father's motion to continue the termination trial is DENIED
14 3 The Department's CR 11 motion for terms is DENIED

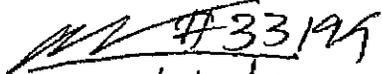
15 Dated this 5th day of March, 2010

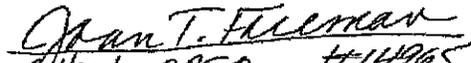
16 
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18 JUDGE LEROY MCCULLOUGH

18 Presented by

19 
20 MARC D. COMEAU
21 Assistant Attorney General
22 WSBA #38027

Approved as to form


23 ALISON WARDEN


24 ALAN T. FREEMAN #14965
25

26 ORDER ON FATHER'S MOTION TO
STRIKE TESTIMONY OR CONTINUE
TRIAL AND ON DSHS MOTION FOR
TERMS