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Supreme Court No. _____
Court of Appeals No. 63551-4-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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

MOTION FOR DISCRETIONARY REVIEW

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A. INTRODUCTION

Peter Tsimbalyuk, petitioner here and respondent in the Court of Appeals, is the father of three boys: Peter T., Jr., Jaycob I., and Oscar T. The boys' mothers have relinquished their rights and have no legal relationship with the children. The boys live with their father's relatives: Peter Jr. lives with his grandmother and Jaycob and Oscar live with their aunt. Mr. Tsimbalyuk and his children have a strong bond, and although he is not their primary caretaker he is actively involved in their lives.

Notwithstanding this bond, the State filed a petition to terminate Mr. Tsimbalyuk's relationship with his boys. At the termination trial, the CASA testified that continued contact with the father would serve the best interests of the children. She said, "I think Peter Jr. especially has a bond with his father, but I think for all boys to have contact with their father is a good thing."

Similarly, the psychologist that the State called as a witness testified that it would not be in the children's best interest to have a legal document that severed the father's ties and provided for no visitation with the children. In his report he wrote, "I would argue against termination of parental rights." He recommended: "I think that the CASA and court may want to consider a guardianship of the boys with one or another of Mr. Tsimbalyuk's sisters or his mother, should they agree and be found

suitable. This would allow Mr. Tsimbalyuk to remain an important part of his children's lives.”

Consistent with the testimony of these witnesses, the trial court found that the State failed to prove termination of the parent-child relationship would serve the children's best interests (RCW 13.34.190), and failed to prove that continuation of the parent-child relationship clearly diminished prospects for early integration into a stable and permanent home (RCW 13.34.180 (1)(f)). The court therefore denied the petition for termination.

The State moved for discretionary review in the Court of Appeals. The Court of Appeals granted review and reversed, holding the trial court committed “obvious error” in finding the State failed to prove RCW 13.34.180(1)(f) by clear and convincing evidence. The court reasoned that because the State proved subsection (e) of RCW 13.34.180(1), it did not have to prove subsection (f). And rather than deferring to the trial court's best-interest determination as required, the Court of Appeals remanded and ordered the trial court to perform the best interest analysis again. But the trial court had already correctly rejected the State's all-or-nothing, terminate-or-return ultimatum, and instead focused on the children's best interests. This Court should grant review.

B. IDENTITY OF PETITIONER AND DECISION BELOW

Pursuant to RAP 13.5A, Peter Tsimbalyuk seeks discretionary review of the Court of Appeals' decision, entered February 16, 2010, reversing the trial court's denial of the State's termination petition. The opinion of the Court of Appeals is attached as Appendix A to this motion. The State has moved for publication of the Court of Appeals' opinion.

C. ISSUES PRESENTED FOR REVIEW

1. Termination of parental rights is unconstitutional unless necessary to prevent harm to the child. Here, at least two of the State's own witnesses testified that not only was termination not necessary to prevent harm to the children, but that it would be harmful to the children to permanently cut off contact with their father. Did the Court of Appeals commit constitutional error in reversing the juvenile court's order denying termination, where the State's own witnesses testified that continued contact with the father served the children's best interests and that guardianship or long-term relative care would be preferable to termination? RAP 13.4(b)(3).

2. On appeal, a reviewing court is "constrained to place very strong reliance on trial court determinations of what course of action will

be in the best interests of the child”¹ and determinations of weight and credibility fall strictly within the purview of the trial court. In this case, after listening to ten witnesses over seven days of trial, the juvenile court found that terminating Peter Tsimbalyuk’s relationship with his children would be contrary to the children’s best interests. Did the Court of Appeals err in reversing the juvenile court’s order denying termination, and ordering the juvenile court to make a new best-interest determination? RAP 13.4(b)(1), (2), (4).

D. STATEMENT OF THE CASE

a. Peter Tsimbalyuk’s Family History. Respondent Peter Tsimbalyuk is the father of three boys: Peter T., Jr., Jaycob I., and Oscar T.² CP 266; 1 RP 52. Peter was born on September 12, 2000, to Mr. Tsimbalyuk and Veronica Haupt. 1 RP 52-53. Ms. Haupt left the family three months after giving birth to the boy, so Mr. Tsimbalyuk raised Peter with the help of his extended family, including his mother and his sisters Jane and Lena. 1 RP 124; 2 RP 202; 7 RP 904.

A few years after Peter’s birth, Mr. Tsimbalyuk met Toby Irby and they began dating. Ms. Irby gave birth to son Jaycob on February 21, 2005. CP 267. However, the Department of Social and Health Services

¹ In re Pawling, 101 Wn.2d 392, 401, 679 P.2d 916 (1984); In re Dependency of Ramquist, 52 Wn. App. 854, 860, 765 P.2d 30 (1988).

² This brief will refer to the children by their first names and to the father as “Mr. Tsimbalyuk.”

removed Jaycob from his parents' care as soon as he was born, because the mother "had a breakdown" at the hospital, and the mother's rights to other children (not by Mr. Tsimbalyuk) had previously been terminated due to drug abuse and mental illness issues. CP 268-69; Ex. 9; 2 RP 186-87.

Both Ms. Irby and Mr. Tsimbalyuk entered agreed orders of dependency as to Jaycob in May of 2005. CP 267; Exs. 9, 10. The mother was ordered to perform many services, but Mr. Tsimbalyuk did not have any identified deficiencies other than possible past drug use. Ex. 10. Indeed, he was still raising his first son, Peter, in his home at the time, and the Department had no concerns about the oldest boy. 2 RP 202, 259, 270. Accordingly, the only services ordered for Mr. Tsimbalyuk were (1) random urinalysis ("UA's") two times per week, and (2) a drug/alcohol evaluation. CP 268; Ex. 11 at 3, 8.

Mr. Tsimbalyuk complied right away. 2 RP 272. He completed the evaluation before the October 21, 2005 permanency planning hearing, and the evaluator determined that Mr. Tsimbalyuk did not have a drug or alcohol problem. 1 RP 62; Ex. 12 at 2-3, 8. All of Mr. Tsimbalyuk's UA's were clean, and he was relieved from further UA testing on January 13, 2006. Ex. 13 at 7. In the meantime, Mr. Tsimbalyuk requested, and was granted, regular visitation with Jaycob. 2 RP 203-04; ex. 11 at 10.

Jaycob was returned to the home of Mr. Tsimbalyuk and Ms. Irby in March, 2006. CP 269; 1 RP 62; 2 RP 261. The social worker visited regularly, and while he had concerns about the mother's bond with Jaycob, he did not have such concerns regarding the father, Mr. Tsimbalyuk. 2 RP 267. While the mother sat on the couch, the social worker "would notice the father on the floor playing with Jaycob, very appropriately." 2 RP 266. Mr. Tsimbalyuk also fed the boy and changed his diapers. 2 RP 271. And the social worker "didn't have any concerns" regarding Mr. Tsimbalyuk's parenting of his older son, Peter. 2 RP 270.

Ms. Irby gave birth to Oscar on August 17, 2006. CP 266. The Department did not file a dependency petition for Oscar, and indicated that it would soon move to dismiss the dependency petition for Jaycob. According to the DSHS social worker, there was never a concern of inadequate food, healthcare, clothing, cleanliness, schooling, or housing for the children when they lived with their parents. 6 RP 764.

But in November of 2006, Ms. Irby relapsed and came home from a party high on drugs. Mr. Tsimbalyuk was angry and worried that her relapse would prevent the dismissal of Jaycob's dependency and legal reunification of the family. 3 RP 388. Unfortunately, he responded to this fear by assaulting Ms. Irby. CP 269; 1 RP 127; 2 RP 238. Although criminal charges were later dropped, Mr. Tsimbalyuk admitted the assault,

and all three children were removed from the home. 1 RP 72; 3 RP 385; ex. 16. Jaycob's dependency order was not dismissed, and dependency orders were entered as to Peter and Oscar on May 18, 2007. CP 267; Ex. 21. Peter was placed with Mr. Tsimbalyuk's relatives, while Jaycob and Oscar initially remained with their mother. 2 RP 283. But Jaycob and Oscar were soon removed from the mother because she used cocaine, drove while under the influence of drugs, and left her children with strangers. 2 RP 284. The two boys were then placed with Mr. Tsimbalyuk's sister, Lena, and her husband, Sergey. 1 RP 70.

The court ordered Mr. Tsimbalyuk to participate in domestic violence ("DV") batterers' treatment, obtain a psychological evaluation, take a parenting class, and again submit to random UA's. CP 268; Ex. 21 at 8. Mr. Tsimbalyuk engaged in all of these services. 7 RP 914; Ex. 23 at 4. He completed another round of clean UA's, submitted to a psychological evaluation, passed an approved 8-week parenting class, and engaged in individual counseling. CP 268; 3 RP 400; ex. 23 at 7; ex. 25 at 8. He attended 26 sessions of DV treatment. 2 RP 306, 309; 4 RP 513; CP 270-71; ex. 42, 44-45. He also engaged in 14 counseling sessions with a mental health provider and made progress. 5 RP 586.

At the February 4, 2008 review hearing, the court found, "Mr. Tsimbalyuk has completed most of his court ordered services except for

the Domestic Violence Batterer's Program." Ex. 28 at 5. The DSHS social worker thought Mr. Tsimbalyuk had "a lot of strengths," but was concerned about his relationship with Ms. Irby. 2 RP 363.

The psychological evaluator, Dr. Borton, concluded that "Mr. Tsimbalyuk presented as a normal parent." 3 RP 414. He reported, "His parenting skills are fine." Ex. 42 at 13.

In the meantime, Mr. Tsimbalyuk participated in regular visitation with his three sons. 1 RP 73; 2 RP 358; ex. 23 at 5, 8. The social worker who supervised the visits said Mr. Tsimbalyuk "would always bring food and, you know, was very attentive to when they needed a diaper change. He was very attentive to the clothing that they wore, the proper clothing, and to their grooming." 2 RP 359. He played with the children, held them while they napped, hugged and kissed them frequently, and calmed them down when they threw tantrums. Ex. 61.

Dr. Borton also observed visits. 3 RP 417. He reported that unlike most parents, Mr. Tsimbalyuk arrived at the visits prepared with diaper changes, toys, and food. Ex. 42 at 8. Mr. Tsimbalyuk played with the boys, fed them, mediated their disputes, and changed both Oscar's and Jaycob's diapers. Ex. 42 at 8. Dr. Borton noticed that:

The boys seemed happy with each other and happy with Mr. Tsimbalyuk. ... They were not reserved in his presence. They did not seem afraid of him at all. Mr.

Tsimbalyuk had food for the kids, I think raisins and a sandwich and stuff, that they were kind of passing back and forth. It was all really pleasant.

3 RP 417. He concluded:

Mr. Tsimbalyuk was attentive to safety issues, aware of his children's needs, able to divide his attention between the children well, affectionate with his children, encouraging the children to interact and attend to each other, and able to handle difficult behavior effectively with distraction and without overt power/control tactics.

Ex. 42 at 9.

Notwithstanding this progress, the court changed the permanency plan "to make return home an alternative plan with primary plan of adoption and/or dependency guardianship with paternal relative." Ex. 25.

The court also directed DSHS to file a termination petition. Ex. 23 at 9.

The Department filed the petition on July 22, 2008, and the termination trial commenced on February 10, 2009.³ CP 1-17; 1 RP.

b. The Termination Trial. Several witnesses testified at the termination trial. The State called the psychologist, Dr. Borton, and asked him for his "overall conclusions about Mr. Tsimbalyuk's ability to parent his children in the long term." 3 RP 423. Dr. Borton testified:

I think on a moment-to-moment basis, he plays well with his children. They appear to care for him. He appears to care for them. I think I mentioned in the report that I did

³ Ms. Irby voluntarily relinquished her parental rights with respect to Jaycob and Oscar. CP 266-67. Veronica Haupt's parental relationship with Peter, Jr., had previously been terminated. CP 266.

not think that termination made sense at the time, because there were other options at the time. I don't know what's happened since, but there were other options at the time, that a relative placement could have occurred, and then I could imagine him being a very good visiting parent.

3 RP 424. Dr. Borton continued, "I think that he needs somebody to be the full-time parent with these children. And that he can play an ancillary role to that." 3 RP 431. The doctor said, "I would have no problem, really, with Mr. Tsimbalyuk participating in that process as a visiting parent, as a favorite uncle. That kind of role, with a guardianship with those other women [the aunt and grandmother]." 3 RP 432.

Dr. Borton supported ongoing contact between Mr. Tsimbalyuk and his children. 3 RP 436. He testified that it would not be in the children's best interest to have a legal document that severed the father's ties and provided for no visitation with the children. 3 RP 466. This testimony was consistent with his report, in which he wrote, "I would argue against termination of parental rights." Ex. 42 at 12. He recommended:

I think that the CASA and court may want to consider a guardianship of the boys with one or another of Mr. Tsimbalyuk's sisters or his mother, should they agree and be found suitable. This would allow Mr. Tsimbalyuk to remain an important part of his children's lives

Ex. 42 at 12. Dr. Borton explained that the arrangement should be “like in a divorce,” where Mr. Tsimbalyuk would not be the primary parent, but would be the “visiting parent.” 3 RP 467.

The CASA concurred that continued contact with the father would serve the best interests of the children. 7 RP 869. She said, “I think Peter, Jr. especially has a bond with his father, but I think for all boys to have contact with their father is a good thing.” 7 RP 869. She noted that she was initially much more concerned about the mother’s parenting ability, but that Mr. Tsimbalyuk “seemed steadier,” was “very good about taking care of business with his services,” and was “very consistent with visitation.” 6 RP 802, 818, 848. According to the CASA, the boys enjoy their weekly visits, and the CASA never had concerns about the father’s visits with the boys. 6 RP 853-55.

The CASA testified that Peter Jr. “definitely” has a positive relationship with his father. 7 RP 867.

He loves his dad and it’s very clear. Everything – I mean, just the way that he speaks, and he has a picture or two of his dad in his room and – but also just in terms of everything that I’ve seen, he loves his dad and enjoys spending time with his father.

7 RP 867-68. The CASA described the extended family as “quite close-knit.” 7 RP 868.

The children are not aware of the legal proceedings regarding their welfare. 6 RP 853. According to the CASA, the current setup is not “creating stress” for the children. 7 RP 877.

c. The Trial Court’s Ruling. The trial court denied the department’s petition to terminate Mr. Tsimbalyuk’s parental relationship with the boys, finding the State had failed to prove termination would serve the children’s best interests and failed to prove that the father’s continued relationship with his sons clearly diminished their prospects for early integration into a stable and permanent home. 7 RP 997-98; CP 273, CP 275-76. The court found, “Dr. Borton recommended that the father continue to have an ancillary role in the children’s life,” and “did not recommend that termination of parental rights occur between Mr. Tsimbalyuk and his children.” CP 272.

The court noted that although it was not obliged to consider alternatives like guardianships, it was not precluded from doing so. 7 RP 997; CP 276. The judge concluded, “I don’t believe it is in the best interest of these children that they have no future contact with Mr. Tsimbalyuk, which is the result of termination.” 7 RP 997-98; CP 273. Rather, “[t]he court is persuaded that a continued relationship with Mr. Tsimbalyuk while in the custody of relatives is in the children’s best interests.” CP 274.

I find that the petitioner has not proved by clear, cogent and convincing evidence that the current homes are not stable and permanent short of termination and adoption. While ... there is evidence that the aunt and grandmother would prefer adoption, I'm not persuaded that they would terminate their relationship with these children if adoption was not the sole option. And if they did, I would have my doubts as to their commitment to the children.

The court concludes that dependency guardianship or long-term relative care is in the best interest of the children because it allows for Mr. Tsimbalyuk to maintain the right to see the children, which is in these three children's best interest.

7 RP 998-99; CP 274-76. The court encouraged the parties to file a dependency guardianship petition as it would serve the children's best interests. 7 RP 999; CP 275.

The department moved for discretionary review of the denial of the termination petition in the Court of Appeals. CP 277, 319-52. The Court of Appeals granted review and reversed, holding the trial court committed "obvious error" in finding the State failed to prove RCW 13.34.180(1)(f) by clear and convincing evidence. The court reasoned that because the State proved subsection (e) of RCW 13.34.180(1), it did not have to prove subsection (f). And rather than deferring to the trial court's best-interest determination, the Court of Appeals remanded and ordered the trial court to perform the best interest analysis again.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

THIS COURT SHOULD GRANT REVIEW BECAUSE THE COURT OF APPEALS COMMITTED CONSTITUTIONAL ERROR IN REVERSING THE TRIAL COURT'S ORDER DENYING THE STATE'S TERMINATION PETITION.

1. Termination of parental rights is unconstitutional unless the State proves, by clear and convincing evidence, that termination is necessary to prevent harm to the child. Under the Due Process Clause, parental rights may not be infringed unless necessary to prevent harm to the child. Custody of Smith, 137 Wn.2d 1, 18, 969 P.2d 21 (1998); U.S. Const. amend. XIV. This constitutional requirement maps to subsection (f) of Washington's termination statute. In re Dependency of K.S.C., 137 Wn.2d 918, 930, 976 P.2d 113 (1999). In other words, the State proves that termination is necessary to prevent harm to the child by proving that continuation of the parent-child relationship clearly diminishes early integration into a stable and permanent home. RCW 13.34.180(1)(f); K.S.C., 137 Wn.2d at 930. Where the State fails to prove subsection (f), termination is unconstitutional.

In this case, the State proved the opposite: that termination of the parent-child relationship would harm the children. Thus, the State failed to prove RCW 13.34.180(1)(f) and failed to prove termination would serve the children's best interests as required under RCW 13.34.190.

Accordingly, the trial court properly denied and dismissed the termination petition, and the Court of Appeals committed constitutional error in reversing.

2. The Court of Appeals erred in substituting its own judgment for that of the trial court and finding that the State proved its case. The Court of Appeals held the juvenile court committed “obvious error” in concluding that the State failed to prove its case. But it is the appellate court that committed the error. The juvenile court properly credited the testimony of the State’s own witnesses who stated that severing the children’s ties to their father would not serve their best interests, and that a guardianship or long-term relative care would be the best solution.

The Court of Appeals erred in substituting its own judgment for that of the trial court. Deference to the trial court is “particularly important in deprivation proceedings.” In re Dependency of K.R., 128 Wn.2d 129, 144, 904 P.2d 1132 (1995). The juvenile court’s findings must be upheld if they are supported by substantial evidence. In re Dependency of C.B., 61 Wn. App. 280, 286, 810 P.2d 518 (1991). Because only the trial court has the opportunity to hear the testimony and observe the witnesses’ demeanor, a reviewing court will not judge the credibility of the witnesses or weigh the evidence. In re Dependency of A.V.D., 62 Wn. App. 562, 568, 815 P.2d 277 (1991). “On appeal, we are

constrained to place very strong reliance on trial court determinations of what course of action will be in the best interests of the child.” In re Pawling, 101 Wn.2d 392, 401, 679 P.2d 916 (1984); In re Dependency of Ramquist, 52 Wn. App. 854, 860, 765 P.2d 30 (1988) (emphasis in original).

a. The psychologist and CASA both testified that continued contact with Mr. Tsimbalyuk served the children's best interests, and the psychologist testified that a guardianship would be better for the children than termination of their father's rights. The Court of Appeals ignored the testimony of the State's own witnesses, who stated that the children were strongly bonded to their father and that continued contact would serve the boys' best interests. The State called the psychologist, Dr. Borton, who testified that it would not be in the children's best interest to have a legal document that severed the father's ties and provided for no visitation with the children. 3 RP 466. This testimony was consistent with Dr. Borton's report, in which he wrote, "I would argue against termination of parental rights." Ex. 42 at 12 (emphasis added). He recommended:

I think that the CASA and court may want to consider a guardianship of the boys with one or another of Mr. Tsimbalyuk's sisters or his mother, should they agree and be found suitable. This would allow Mr. Tsimbalyuk to remain an important part of his children's lives

Ex. 42 at 12.

Dr. Borton further testified that the children appear to care for their father and he appears to care for them. 3 RP 424. He explained that Mr. Tsimbalyuk could “play an ancillary role” while the relatives served as primary caretakers. 3 RP 431. The doctor said, “I would have no problem, really, with Mr. Tsimbalyuk participating in that process as a visiting parent, as a favorite uncle. That kind of role, with a guardianship with those other women.” 3 RP 432.

Consistent with this testimony, the trial court found:

Dr. Borton observed positive interactions between the father and Jaycob and Oscar. ... Dr. Borton recommended that the father continue to have an ancillary role in the children’s life such as a “favorite uncle,” but that someone else should be the children’s primary parent. Dr. Borton did not recommend that termination of parental rights occur between Mr. Tsimbalyuk and his children.

CP 272 (Finding of Fact 1.17). The State did not assign error to this finding, so it is a verity on appellate review. State v. O’Neill, 148 Wn.2d 564, 572, 62 P.3d 489 (2003).

The CASA concurred with Dr. Borton that continued contact with the father would serve the best interests of the children. 7 RP 869. She said, “I think Peter Jr. especially has a bond with his father, but I think for all boys to have contact with their father is a good thing.” 7 RP 869.

Because the appellants' own witnesses testified that the children's best interests would be served by maintaining contact with their father and that a guardianship would be preferable to termination, the trial court operated well within its discretion in denying the termination petition. The Court of Appeals erred in reversing.

b. The Court of Appeals improperly read RCW 13.34.180 (1)(f) out of existence. The Court of Appeals reversed the trial court because "a finding under RCW 13.34.180(1)(f) necessarily follows from an adequate showing under RCW 13.34.180(1)(e)." Slip Op. at 14. In other words, according to the Court of Appeals, termination must occur if the State proves RCW 13.34.180 (1)(a) - (e). That is not the law. "Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous." Whatcom County v. City of Bellingham, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996). In addition to proving subsections (a) – (e), 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.

The Court of Appeals cited this Court's decision in J.C. for the proposition that subsection (f) of the statute no longer exists and that so long as the State proves subsection (e), it does not have to prove subsection (f). Slip Op. at 12, 14 (citing In re Dependency of J.C., 130

Wn.2d 418, 427, 924 P.2d 21 (1996)). But the issue in J.C. was whether subsection (e) was satisfied in that case. See J.C., 130 Wn.2d at 425. This Court could not have intended its dicta on subsection (f) to result in a deletion of that portion of the statute, especially since that subsection of the statute is constitutionally required. See Smith, 137 Wn.2d at 18 (under due process clause parental rights may not be infringed unless necessary to prevent harm to the child); K.S.C., 137 Wn.2d at 930 (proof of RCW 13.34.180 (1)(f) shows termination necessary to prevent harm to the child).

This Court should grant review and clarify that the State must prove RCW 13.34.180(1)(f) in order for termination to occur. The Court of Appeals committed constitutional error in concluding to the contrary.

c. The Court of Appeals failed to defer to the trial court's determination of the children's best interests, as required under RCW 13.34.190. Finally, even if the Court of Appeals' analysis on subsection (f) were correct, it erred in refusing to defer to the trial court's finding that termination would be contrary to the children's best interests. The trial court's finding on this issue was a separate and independent basis for denial of the termination petition. CP 273-74; RCW 13.34.190. Again, "[o]n appeal, we are constrained to place very strong reliance on trial court determinations of what course of action will be in the best interests of the

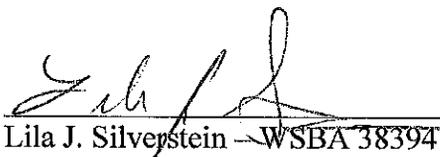
child.” Pawling, 101 Wn.2d at 401. But instead of deferring to the juvenile court, the Court of Appeals deferred to the Department of Social and Health Services. For this reason, too, this Court should grant review.

F. CONCLUSION.

For the reasons set forth above Mr. Tsimbalyuk respectfully requests that this Court grant review.

DATED this 16th day of March, 2010.

Respectfully submitted,



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APPENDIX A

RECEIVED

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Washington Appellate Project

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. 63551-4-1
) (Consolidated with
J.J.I., d.o.b. 2/21/2005;) 63393-7-1, 63394-5-1, 63552-2-1,
O.L.T., d.o.b. 8/17/2006.) 63553-1-1, 63395-3-1)
)
) 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.

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.

FACTS

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

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.

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take parenting classes, and obtain a psychological evaluation. He provided the UAs, completed an approved parenting course, and submitted to a psychological 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 older 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.

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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 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

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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

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.

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.

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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.

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 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.

....

⁴ 127 Wn. App. 801, 112 P.3d 588 (2005).

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(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) 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

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.

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 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.

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.

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 novo.¹⁰

Two statutory provisions describe the standards for terminating the parent-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;

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).

(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 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.

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).

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 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.

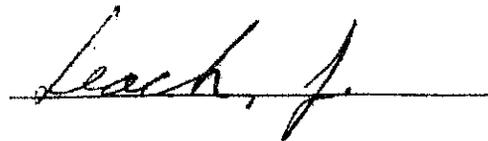
Second, the superior court erred by failing to find that the State had proved RCW 13.34.180(1)(f), given its finding under the fifth statutory element, RCW 13.34.180(1)(e), that there was little likelihood that conditions would be remedied. Noting Mr. Tsimbalyuk's failure to complete counseling and DV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

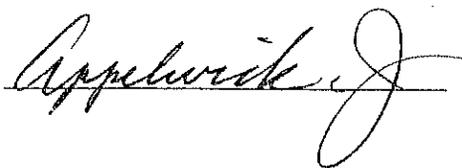
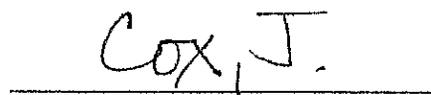
13.34.180(1) have been satisfied, the court must consider whether appellants have proved that termination is in the children's best interests under RCW 13.34.190. We remand to the superior court to make this determination.

CONCLUSION

The superior court committed obvious error in applying RCW 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.

Handwritten signature of Leach, J. in cursive script, written over a horizontal line.

WE CONCUR:

Handwritten signature of Appelwick, J. in cursive script, written over a horizontal line.Handwritten signature of Cox, J. in cursive script, written over a horizontal line.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE P.P.T., ET AL
MINOR CHILDREN

PETER TSIMBALYUK,

RESPONDENT.

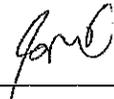
NO. 63551-4-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 16TH DAY OF MARCH, 2010, I CAUSED THE ORIGINAL **MOTION FOR DISCRETIONARY REVIEW TO THE SUPREME COURT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] TRISHA MCARDLE ASSISTANT ATTORNEY GENERAL DSHS DIVISION 800 FIFTH AVENUE, SUITE 2000 SEATTLE, WA 98104-3188	(X) () ()	U.S. MAIL HAND DELIVERY _____
[X] KATHLEEN SULLIVAN KAREN BRUNTON AMANDA BEANE ATTORNEYS FOR CASA/GAL 1201 12 TH AVE STE 4800 SEATTLE, WA 98101	(X) () ()	U.S. MAIL HAND DELIVERY _____
[X] PETER TSIMBALYUK 4709 176 TH ST SW APT C-12 LYNNWOOD, WA 98037	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 16TH DAY OF MARCH, 2010.

X _____


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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;)
J.J.I., d.o.b. 2/21/2005;)
O.L.T., d.o.b. 8/17/2006.)

NO. 63551-4-I
(Consolidated with
63393-7-I, 63394-5-I, 63552-2-I,
63553-1-I, 63395-3-I)

ORDER GRANTING MOTION
TO PUBLISH OPINION

Appellants Department of Social and Health Services and the Court Appointed Special Advocate having filed a joint motion to publish opinion, and the hearing panel having reconsidered its prior determination and finding that the opinion will be of precedential value; now, therefore it is hereby:

ORDERED that the unpublished opinion filed February 16, 2010, shall be published and printed in the Washington Appellate Reports.

Done this 5th day of April, 2010.

FOR THE COURT:

Leach, J.
Judge