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NO. 31514-2-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

In re Dependency of A.W., and M.W., Minors

STATE OF WASHINGTON, DSHS,

Respondent,

v.

T.P.,

Appellant.

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

The Honorable Joseph Schneider, Judge

REPLY BRIEF

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A. ARGUMENT IN REPLY

THE PREPONDERANCE OF THE EVIDENCE STANDARD VIOLATES DUE PROCESS.

Whether a statute passes constitutional muster is a question of law this Court reviews de novo. In re Detention of Savala, 147 Wn. App. 798, 804, 199 P.3d 413 (2008); City of Redmond v. Moore, 151 Wn.2d 664, 668, 91 P.3d 875 (2004). In her opening appellate brief, T.P. challenged the constitutionality of the new guardianship statute, RCW 13.36.040, which requires the court to grant a guardianship petition based on proof of certain factors by a preponderance of the evidence. Brief of Appellant (BOA) at 19-33.

T.P. acknowledged that the appellate court upheld this standard as constitutional under the former dependency guardianship statute, RCW 13.34.231-.233. BOA at 19 (citing In re Dependency of F.S., 81 Wn. App. 264, 913 P.2d 844, review denied, 130 Wn.2d 1002 (1996)). There, the court found sufficient distinctions between guardianship and termination proceedings such that the former did not require the more exacting standard of clear, cogent and convincing evidence. BOA at 28-30; F.S., 81 Wn. App. at 269-70.

But as T.P. pointed out, the new guardianship statute is materially different from the former. Specifically, once the guardianship is established, the dependency is dismissed, there is no continued state involvement and the parent may petition to terminate the guardianship under only a very limited set of circumstances. BOA at 30; RCW 13.36.010, RCW 13.34.050(5), RCW 13.36.070. Accordingly, the new statute no longer provides for an "inherently temporary situation," the main distinction relied upon by the court in F.S. In re F.S., 81 Wn. App. at 269 (guardianship not permanent or irreversible because child remains dependent and the parent may seek to modify or terminate guardianship at any time). Considering the increased private interests at stake, and the greater risk of error created by these changes, T.P. argued that fundamental fairness is no longer satisfied by the preponderance of the evidence standard. BOA at 24-33.

In its response, the state makes two, intermingling arguments. First, the state appears to argue that the new guardianship statute actually gives parents more rights than previously afforded. Second, the state argues there are still sufficient distinctions between guardianship and termination such

that due process is not offended by application of the preponderance of the evidence standard in guardianship proceedings. Brief of Respondent (BOR) at 18-29.

In the first instance, the state is simply incorrect. In the second, what limited distinctions remain no longer justify the weaker standard in light of the increased permanence and irrevocability of today's guardianships.

According to the state, "A guardianship leaves the parent-child relationship intact and, in fact, was specifically enacted by the legislature to create a permanency option for dependent children in foster care, short of termination of parental rights." BOR at 21. As an initial matter, a guardianship – whether under the former or new statute – does not leave the parent-child relationship "intact." While it *may* provide for some limited contact,¹ it removes the care and custody of the child from the parent to the guardian. RCW 13.36.050(2), former RCW 13.34.232(2).

¹ An order of guardianship does not necessarily mean the parent will have continued contact with his or her child. RCW 13.36.050(1)(d) (court shall "Specify an appropriate frequency and type of contact between the parent or parents and the child, if applicable, and between the child and his or her siblings, if applicable[.]"). (Emphasis added).

Under the new guardianship statute, the legislature has declared that once the order is entered: "The guardian shall maintain physical and legal custody of the child and have the following rights and duties under the guardianship" RCW 13.36.050(2). Under the old statute, the court appeared to have some discretion regarding physical and legal custody of the child: "*Unless the court specifies otherwise* in the guardianship order, the dependency guardian shall maintain the physical custody of the child and have the following rights and duties" RCW 13.34.232(2) (emphasis added). Accordingly, the new statute is more restrictive of parental rights, as it forecloses even a remote possibility of shared care or custody.

In support of its position, the state also points to the benign purpose of the statute (BOR at 22), as declared by the legislature in RCW 13.36.010:

The legislature finds that a guardianship is an appropriate permanent plan for a child who has been found to be dependent under chapter 13.34 RCW and who cannot safely be reunified with his or her parents. The legislature is concerned that parents not be pressured by the department into agreeing to the entry of a guardianship when further services would increase the chances that the child could be reunified with his or her parents. The legislature intends to create a separate guardianship chapter to establish permanency for children in foster care through the

appointment of a guardian and dismissal of the dependency.

Emphasis added.

It is unclear, however, how the new statute alleviates pressure on parents to agree to a guardianship. The new and former statutes are no different as to who can petition for a guardianship. Cf. former RCW 13.34.230 to RCW 13.36.030. Moreover, the new statute allows for a guardianship to be established by agreement, whereas the former statute did not. Cf. former RCW 13.34.231 to RCW 13.36.040(2)(b). Consequently, it seems the new statute provides a potential for exerting more pressure on parents. In any event, the stated purpose of the statute is irrelevant as to its impact on the competing interests at stake and the operation of fundamental fairness. Santosky v. Kramer, 455 U.S. 745, 754, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982) (nature of process due determined by balancing the private interests affected by the proceeding (parent/child relationship), the risk of error created by state's chosen procedure, and the countervailing government interest supporting use of challenged procedure).

Next, the state claims that “[u]nder a RCW 13.36 guardianship, many parent’s rights go unaltered.” BOR at 22.

Reportedly citing RCW 13.36.050, the state asserts:

The guardianship statute does not infringe upon a parent’s right to consent to the child’s adoption, the right to consent to the child’s marriage, and the right to provide financial, medical or other support for the child. See 13.36.050. The child’s inheritance rights also remain intact in a RCW 13.36 guardianship. See Id.

BOR at 22.

But apart from leaving open the possibility of continued contact, the statute cited by the state does not address the parent’s rights. Rather, it vests a host of rights in the guardian:

(1) If the court has made the findings required under RCW 13.36.040, the court shall issue an order establishing a guardianship for the child. If the guardian has not previously intervened, the guardian shall be made a party to the guardianship proceeding upon entry of the guardianship order. The order shall:

- (a) Appoint a person to be the guardian for the child;
- (b) Specify the guardian's rights and responsibilities concerning the care, custody, control, and nurturing of the child;
- (c) Specify the guardian's authority, if any, to receive, invest, and expend funds, benefits, or property belonging to the child;
- (d) Specify an appropriate frequency and type of contact between the parent or parents and the child, if

applicable, and between the child and his or her siblings, if applicable; and

(e) Specify the need for and scope of continued oversight by the court, if any.

(2) The guardian shall maintain physical and legal custody of the child and have the following rights and duties under the guardianship:

(a) Duty to protect, nurture, discipline, and educate the child;

(b) Duty to provide food, clothing, shelter, education as required by law, and health care for the child, including but not limited to, medical, dental, mental health, psychological, and psychiatric care and treatment;

(c) Right to consent to health care for the child and sign a release authorizing the sharing of health care information with appropriate authorities, in accordance with state law;

(d) Right to consent to the child's participation in social and school activities; and

(e) Duty to notify the court of a change of address of the guardian and the child. Unless specifically ordered by the court, however, the standards and requirements for relocation in chapter 26.09 RCW do not apply to guardianships established under this chapter.

...

Assuming arguendo there are other statutes that reserve to the parent the right to consent to the child's adoption and marriage and to contribute to the child's finances, such rights hardly compare

to those set forth above and divested from the parent upon entry of the guardianship order.

As addressed in T.P.'s opening brief and the state's response, the new guardianship statute retains provisions whereby a parent may move to terminate and/or modify the guardianship after its establishment. BOA at 30-32; BOR at 23-24. As the state points out, "These are mechanisms that are unavailable to a parent whose parental rights have been terminated." BOR at 23.

Granted, these were factors relied upon by F.S. in finding guardianship inherently temporary. BOA at 28 (citing F.S., 81 Wn. App. at 269). Under the new statute, however, the parent may seek to terminate the guardianship based solely on a substantial change in circumstances *of the child or guardian*. RCW 13.36.070(1). This is a significant departure from the previous statute, which allowed the parent to petition to terminate based on a substantial change in circumstances of any kind. Former RCW 13.34.233(2). Indeed, the former statute contemplated that the change could relate to the *parent's* change of circumstances, i.e. remedying the parental deficiencies that led to the state's involvement. In re Dependency of A.V.D., 62 Wn. App. 562, 815 P.2d 277 (1991) ("If a guardianship were imposed, V's father could

come back many years later and seek to have the guardianship terminated on the ground that he was finally able to care for her.”).

Now, however, a guardianship may not be terminated based on the parent’s subsequent fitness unless by agreement of the guardian, or of the guardian and child, if the child is age 12. RCW 13.36.070(3). Thus, while the right to seek termination remains under the new statute, it has been greatly curtailed. This major change to the statute is one of the reasons fundamental fairness is no longer satisfied by application of the preponderance of the evidence standard. The nature of the private interest – the relationship between parent and child – has increased under the new statute, because the guardianship is more irrevocable. BOA at 32-33. The state’s argument that this remaining right sufficiently distinguishes guardianship from termination therefore should be rejected.

As indicated, the parent also retains the right to seek to modify a guardianship under the new statute. RCW 13.36.060(1). But the state’s argument that this right is greater under the new statute than the former should be rejected. According to the state, “A parent is no longer required to show a ‘substantial change’ by a preponderance of the evidence for modification under the new

statute." BOR at 23 ("*Compare* RCW 13.34.233(2)(2008) to RCW 13.36.060"). At the outset, it should be noted that the statute allows the parent to seek to modify only the visitation provisions. Id.

But more importantly, the statute requires the court to deny the motion to modify "unless it finds that adequate cause for hearing the motion is established by the affidavits[.]" RCW 13.36.060(2) (emphasis added). The statute does not define "adequate cause."

The state alleges the standard set forth in the statute is similar to that in parental custody actions under RCW 26.09.260. However, modification under that statute requires parents to show a "substantial change in circumstances." In re Welfare of BRSH, 141 Wn. App. 39, 46-47, 169 P.3d 40 (2007) (equating "adequate cause" with "substantial change of circumstances" and holding that absent a relocation request, parent must show a substantial change in circumstances to modify parenting plan); RCW 26.09.260(1). Thus, even though the wording is slightly different, it does not appear that the new guardianship statute gives parents any more of an opportunity to modify the guardianship than was previously provided. Cf. former RCW 13.34.233 (2).

Finally, as the state points out, guardianship holds out the possibility the parent will have a continued legal right of contact with his or her child, whereas termination does not. RCW 13.36.050(1)(d) (requiring court to set forth frequency and type of contact, "if applicable"). The question is whether this possibility continues to justify a different standard in guardianships. Under the court's reasoning in F.S., the answer is no. The court's main reason for upholding the lesser standard was not the possibility of continued visitation but the inherently temporary nature of the intrusion on the parent-child relationship. F.S., at 269.

As set forth in T.P.'s opening brief and this reply, the changes to the guardianship statute purposefully weaken the parent's opportunity to come back at a later date and resume custody. Guardianships are inherently more permanent as a result and the private interest at stake is therefore more weighty.

On the other hand, the risk of error has increased under the new statute as there is no continued state involvement and therefore no continued review by the court. Moreover, the nature of the proceeding has become more adversarial. Whereas a parent previously could petition for termination on grounds he or she had remedied his or her parental deficiencies, now he or she

must obtain the guardian's approval. This requirement of permission creates a conflict where none previously existed.

Finally, the state's countervailing interest supported by the less exacting standard – the need for flexibility – to “secure placement of the child while authorizing both visitation between parent and child and continuing involvement by state agencies” – no longer exists, as there is no continued state involvement. See F.S., 81 Wn. App. at 270 (emphasis added). For all these reasons, this Court should find due process is no longer satisfied by proof as flimsy as fifty-one percent. In re Grace, 174 Wn.2d 835, 840, 280 P.3d 1102 (2012) (preponderance means “more likely than not”).

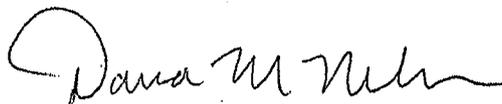
B. CONCLUSION

For the reasons stated in the opening appellate brief and this reply, this Court should reverse the guardianship orders.

Dated this 6th day of December, 2013.

Respectfully submitted,

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