

FILED
Court of Appeals
Division II
State of Washington
6/26/2019 3:27 PM

No. 98043-8

NO. 53152-6-II

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

In re the Welfare of

D.E., 7/05/12
V.E., 6/16/15 &
M.E., 3/06/17,

Minor Children.

MOTION FOR ACCELERATED REVIEW
BY THE MOTHER, J.J.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY
THE HONORABLE ELIZABETH MARTIN, JUDGE

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I. INTRODUCTION

J.J., the mother, appeals the orders terminating her parental rights to her children, D.E., V.E., and M.E. Procedurally, this case was unusual. The parties held two days of trial in November 2018. At the conclusion of evidence, the trial court found that the state had not proved its case by clear, cogent, and convincing evidence. However, the court refused to dismiss the termination petitions, citing the children's best interests. Instead, the court continued the trial about two months and ordered the state to provide additional services to the mother. In January 2019, dissatisfied with the mother's progress, the court took additional evidence and terminated her parental rights.

This Court should reverse for three reasons. First, the procedures used by the trial court violated due process. The court should have dismissed the termination petitions in November 2018 when the state failed to meet its burden. Second, the court erred by concluding that the department met its burden of proof under RCW 13.34.180. The state failed to provide all required services and failed to prove that there was little likelihood the mother can parent in the near future. RCWs 13.34.180(1)(d), (e). Third, the trial court erred by finding the mother unfit. This Court should reverse and remand.

II. STATEMENT OF THE ISSUES

Parents in termination cases are entitled to substantive and procedural due process protections. In order to terminate parental rights, the state must provide parents with all court-ordered and necessary services and must prove that there is little likelihood the parent can care for the child in the near future. Due process also requires the state to prove that a parent is currently unfit. On appeal, the mother raises the following issues:

1. Did the trial court err by refusing to dismiss the termination petitions after the state failed to meet its burden of proof, and by explicitly considering the children's best interests when making this decision?
2. Did the state fail to offer all court-ordered and necessary services when it refused to pay for services, delayed helping the mother submit her health insurance application, and only provided mental health services two months before termination?
3. Did the state fail to prove that there was little likelihood the mother could parent in the near future when the state delayed providing mental health services?
4. Did the trial court err by finding the mother unfit to parent based on her status as a victim of domestic violence, and when the state failed to show a connection between her alleged deficiencies and her ability to parent?

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III. ASSIGNMENTS OF ERROR

The mother assigns error to the following portions of the March 1, 2019 orders terminating her parental rights¹:

1. The trial court erred by finding that the state expressly and understandably offered or provided all court-ordered and necessary services. CP 172-73 at sections 2.9, 2.10, 2.11.
2. The trial court erred by finding that lack of health insurance was not an impediment to the mother accessing services. CP 171 at section 2.9.4.
3. The trial court erred by finding that substance abuse was a parental deficiency for the mother. CP 173 at section 2.14.
4. The trial court erred by finding that domestic violence was a parental deficiency for the mother. CP 173 at section 2.15.
5. The trial court erred by finding that the mother is currently unfit. CP 173 at section 2.16.
6. The trial court erred by finding that the rebuttable presumption under RCW 13.34.180(1)(e) applies in this case. CP 173 at section 2.18.
7. The trial court erred by finding that there is little likelihood the mother will correct her deficiencies and parent in the near future. CP 173 at section 2.18.
8. The trial court erred by finding that terminating the mother's rights is in the children's best interests. CP 174 at sections 2.21, 3.2, 3.4.
9. The trial court erred by concluding that the department met the requirements of RCW 13.34.180 and .190. CP 174 at section 3.3.

¹ The clerk's papers for the three children are substantially the same. This brief cites to the clerk's papers for D.E. The termination orders are located in the clerk's papers at CP 169-76 (D.E.), CP 409-16 (V.E.), and CP 612-19 (M.E.).

10. The trial court erred by granting the termination petitions and severing the parent-child relationship between J.J. and her children. CP 175 at sections 4.2, 4.2.1, 4.2.4.

IV. STATEMENT OF THE CASE

J.J. is the mother of three children: six-year-old D.E., four-year-old V.E., and two-year-old M.E. Ex.s 1, 2, 8. The father of all three children is S.E. *Id.* J.J. loves her children but struggled with poverty, housing insecurity, and transportation issues. RP at 96, 101-02. Her children were found dependent and entered state care. Ex.s 4, 10. In January 2019, the state terminated J.J.'s parental rights. CP 169-76, 409-16, 612-19.

The mother and S.E. had a tumultuous relationship. They met in 2007, when J.J. was 19. RP at 69. J.J. denied that S.E. was violent. RP at 70. However, throughout the case the department received numerous allegations of domestic violence perpetrated by S.E. against J.J. *See, e.g.*, Ex.s 1, 2, 7, 8. In March of 2016, the mother filed a petition for an order of protection against S.E. Ex. 24. The parents reconciled and the mother dropped the petition. RP at 79-81.

During the summer of 2016, the parents, D.E., and V.E. resided together in a trailer on a friend's property. RP at 62. The department received intakes alleging domestic violence, substance abuse, and unsanitary conditions in the home. Ex.s 1, 2; RP at 184-85. The mother

denied these allegations. RP at 62-63, 384. In August 2016, the state removed D.E. and V.E. Ex.s 1, 2.

Over the next several months, the parents struggled with housing and transportation. They resided with S.E.'s parents in Yelm, WA, and then moved to a duplex. RP at 82-83. In December 2016, the father was arrested at the duplex for an alleged domestic violence incident. RP at 86. Reportedly, the father swung an axe at the mother, striking her car. RP at 172. The mother denied this allegation at trial. RP at 70. After S.E. was arrested, the mother moved in with her step-father in Eatonville, WA. RP at 86-87. By April 2017, her step-father asked her to leave. RP at 87. J.J. lived with different friends and relatives in the Yelm area until the termination trial. RP at 90-95.

In March 2017, J.J. gave birth to her youngest child, M.E. Ex. 8. J.J. tested positive for amphetamines when M.E. was born. RP at 119. The mother maintained that this was due to a sinus medication. *Id.* M.E. did not test positive. RP at 144. The state removed M.E. at birth. Ex.s 7, 8.

Throughout the dependency, the department remained concerned about domestic violence by the father against the mother. J.J. denied that the father physically harmed her or the children. RP at 70. However, she acknowledged that he could be violent at times. RP at 78-79. S.E. threatened and attacked the mother's friends and family members. *Id.*

The mother also testified about an incident in June 2018. RP at 72-73. By that point, the mother had broken up with S.E. and briefly dated another person. *Id.* S.E. attacked the mother and her then-boyfriend in their car, breaking windows and tasing the boyfriend. *Id.* According to the mother, S.E. also poured gasoline over the car. RP at 73. Shortly after this incident, S.E. pled guilty to charges of robbery, malicious mischief, and violating a no-contact order with the mother. Ex. 21. In August 2018, he was sentenced to 60 months confinement, and remained incarcerated throughout the remainder of the dependency. *Id.*

By the time of the termination trial, in November 2018, the mother was no longer in a relationship with the father. RP at 74. She had no contact with him and did not intend to resume the relationship. *Id.* Regardless, the father would not be released from prison for several years. Ex. 21.

During the dependency, the mother was court-ordered to complete the following services: random urinalysis testing, a chemical dependency assessment, and a parenting assessment. RP at 112-13. At one point, she was also ordered to engage in parenting coaching, but the parties agreed that she did not need this service. RP at 113. The mother was also ordered to comply with all recommendations of her assessments. *See, e.g.*, Ex. 4 at 7.

The department referred the mother to urinalysis testing, a chemical dependency assessment, and a parenting assessment, but the mother

struggled with transportation to services. RP at 101-02, 106-08. She had difficulty getting from her home in Yelm to an agency for urinalysis testing.² RP at 119. Even when she lived in Eatonville briefly, the mother struggled. RP at 151. She attempted to provide a urinalysis sample at an agency in Morton, WA, but the social worker submitted the referral incorrectly. RP at 151, 196.

Housing and transportation were significant barriers for the mother. Her support system was in Yelm. RP at 139. However, her children and many of her services were in or around Tacoma, WA. RP at 101-02, 120. The mother had a car, but it frequently broke down. RP at 96, 394. The department provided bus passes, but the mother did not reside close to a bus stop. RP at 104, 107, 220-21. Occasionally, the department supplied the mother with gift cards she could use for gas. RP at 110, 221. However, these cards were designated for a different purpose and were not always available. RP at 221. The parties also looked into paratransit, but the mother lived outside of its range. RP at 108.

The department attempted to provide housing resources, but the options were limited. RP at 96. The social worker for most of the

² The mother also refused to provide a urinalysis sample at a meeting with the department in October 2017. RP at 366. J.J. testified that she did not believe she was obligated to provide one by court order and she was concerned that it would test positive for her sinus medication. RP at 382.

dependency, Kyle Wiest, provided the mother with a list of phone numbers to call for various housing resources. RP at 215-16. He did not sit down with her and help her navigate this complicated process. RP at 260-62. The mother and her attorney attempted to call these agencies without success. RP at 377-78. Many of the housing agencies had difficult requirements to qualify. RP at 379. For example, the mother did not qualify for some shelters because she stayed with friends or in her car and thus was not sleeping on the street. *Id.*

The mother got on the waitlist for a housing voucher in May 2017. RP at 212-13. She came up on the list over a year later, in approximately June 2018. RP at 214. The mother attempted to get her application to the social worker but was unsuccessful. RP at 214-15. Even if the mother submitted this application, she likely would not have qualified for a housing voucher because she had no income and the children were not about to return home. RP at 267. The mother asked the social worker about the housing voucher process. RP at 269. According to Mr. Wiest, she did not appear to understand the requirements to qualify for the voucher. *Id.* He did not explain these qualifications to her. RP at 269, 315-16. Instead, he sent the mother a link to the housing website. RP at 269.

The mother also worked on housing with social workers contracted with the Office of Public Defense (OPD). RP at 276. One social worker

found the mother an apartment at a property she owned. RP at 303. The mother called to follow up within a few days, but the apartment was no longer available. RP at 378.

Despite these struggles, the mother did engage in some services. She completed a chemical dependency assessment in March 2017. RP at 117. The parties agree that this assessment recommended no further services. RP at 117, 199. However, at trial the department disputed the results of this assessment because the social worker never provided collateral information to the agency. RP at 119, 243. The department did not keep a copy of the mother's chemical dependency assessment, so this document was not available at trial. RP at 308-09, 351.

The mother also completed a parenting assessment in March 2017. Ex. 27. Josette Parker conducted the mother's assessment. *Id.* It was not favorable. *Id.* According to Ms. Parker, the mother's parental deficiencies included "not being able to create a safe and nurturing environment free from violence" and not being employed. RP at 32.

Ms. Parker repeatedly faulted the mother for not holding the father "accountable" for the abuse he perpetrated against her. RP at 31, 32, 35, 57. She believed this was a deficiency even though S.E. was incarcerated for several years because J.J. could hypothetically be abused by another partner. RP at 57-58. Ms. Parker opined about the detrimental effects to

children from witnessing domestic violence. RP at 35-36. She recommended the mother engage in protective parenting group, a domestic violence support group, and individual counseling. Ex. 27 at 12.

The department referred the mother to protective parenting group, domestic violence support group, and individual counseling at Ms. Parker's agency, in University Place, WA. Ex. 27 at 1; RP at 40. In May 2018, the parties arranged to have all three services on the same day to minimize the mother's travel expenses. RP at 40. Unfortunately, the mother did not participate. RP at 41. In August 2018, these services were re-referred, again all three on the same day. RP at 43-45. The mother again had transportation issues and did not follow through with these services. RP at 43-45, 129-30. She contacted Ms. Parker in September 2018, but by that time the referral was closed. RP at 45.

The department never referred the mother to domestic violence services closer to where she resided. RP at 227. At trial, the social worker, Mr. Wiest, testified that these services were not available in Thurston County. *Id.* The court did not find this testimony credible. CP 172 at section 2.9.7.

During her parenting assessment in March 2017, the mother also disclosed a history of mental illness. Ex. 27 at 5. She reported seeing a psychiatrist, Dr. Sands, since she was 17. *Id.* According to the mother, she

was diagnosed with bipolar disorder, anxiety, depression, obsessive compulsive disorder, attention hyperactivity disorder, and manic depression. *Id.* She was prescribed psychotropic medication, including Prozac, Abilify, and Adderall. *Id.* Ms. Parker recommended that the mother engage in mental health services and medication management. *Id.* at 12.

The department did not follow up on Ms. Parker's recommendations. RP at 205-07. From March 2017 until the termination trial in November 2018, the department did not refer the mother to mental health services. RP at 205-07, 334-35. Mental health services were included in one of the dependency review orders, but Mr. Wiest, the social worker, testified that this was a "clerical error." RP at 207. These services were crossed out in later court orders. RP at 206-07, 334-35. At trial the current social worker, Ashton Dart, listed "mental health" as a parental deficiency for the mother, despite offering no services to address this issue. RP at 352.

In August 2018, the parties held a settlement conference and agreed to a plan for services. RP at 125, 129, 333-34. The department social worker at that time was Ashton Dart. RP at 333. Ms. Dart re-referred the mother to urinalysis testing, as well as the domestic violence services provided by Ms. Parker. RP at 43, 334, 338. The mother participated in two urinalysis tests in August 2018. RP at 338-39, 341. She had notice of

the first test, which was negative. RP at 338-39. The second test was dilute. RP at 339, 341.

Unfortunately, in late August 2018, the mother's car broke down again. RP at 129-30. She promptly informed Ms. Dart. RP at 131-32, 337. However, the social worker did not offer transportation assistance. RP at 358. Lacking transportation, the mother missed urinalysis tests after August 2018. RP at 340. Ms. Dart did not refer her to a chemical dependency evaluation. RP at 359.

Transportation also made it difficult for the mother to attend visits. RP at 120. She missed numerous visits and was late to many of the ones she attended. RP at 228. Near the end of the dependency, the parties moved the visits to Yelm, WA. RP at 122. After visits moved to Yelm, the mother became much more consistent, although she was still late at times. RP at 344-45, 349.

During visits, the mother and her children were loving and clearly bonded. RP at 371. The mother came prepared for visits and met the children's needs. RP at 350. The mother always wanted to visit with her children. RP at 372. She frequently contacted the social workers to follow up on visitation referrals. RP at 211. The Court Appointed Special Advocate (CASA) for the children, Erika Thompson, testified that the

children love their mother and would experience “loss” if they were not able to see her again. RP at 371.

The social worker, Ashton Dart, and the CASA, Ms. Thompson, both recommended termination of the mother’s parental rights. RP at 350, 370. They testified that the mother had not corrected her deficiencies during the dependency. RP at 345-47, 352, 370. They also testified that the children were placed in a pre-adoptive foster home and should be adopted by this placement. RP at 348, 350, 370, 375. In their opinion, the children struggled with uncertainty, especially D.E. RP at 350-52, 373. The social worker and CASA opined that the children needed permanency as soon as possible. RP at 350-52, 373-75.

On November 16, 2018, the trial court issued an oral ruling. RP at 427. The court expressed concern about the services offered to address the mother’s alleged chemical dependency issues. RP at 428-30. The court noted that the mother had difficulty getting transportation to urinalysis testing, but it was unclear why this service was required in the first place. RP at 429. The court was also concerned about the lack of mental health services provided to the mother after her parenting assessment recommended these services. RP at 430.

After weighing these concerns, the trial court judge concluded, “I cannot make a finding at this moment in time by clear, cogent and

convincing evidence that all necessary services have been offered or that there is no reasonable likelihood of her correcting [her deficiencies] within the immediate future.” RP at 431. However, the judge went on to clarify that she was not “willing to dismiss this petition because I think there are a lot of issues.” *Id.* The court ordered “that this matter be continued without findings.” *Id.*

The court ordered a short continuance, to January 2019. RP at 432. The court explicitly connected the length of this continuance to the children’s best interests, stating, “permanency is in these children’s best interest, and that’s why I need to keep this on a relatively short timeline.” RP at 434.

In addition to continuing the termination trial, the court ordered additional services for the mother. RP at 432-33. The court directed the department to investigate services in Thurston County. *Id.* The court also ordered the mother to provide a urinalysis sample that day. RP at 334-35. The court set another hearing for November 29, 2018, to assess the need for additional services. RP at 442, 449.

The mother participated in the urinalysis test ordered by the court. RP at 457. This test was positive for methamphetamines and amphetamines. RP at 457-58. The mother maintained that this resulted

from her sinus medication, but the court did not find this credible. RP at 670; CP 171 at section 2.9.2.

The parties returned to court on November 29, 2018. RP at 456. At that time, the court entered a detailed order outlining services for the mother. CP at 110-11. The court ordered urinalysis testing, a chemical dependency assessment, protective parenting group, a psychological evaluation, individual counseling, and medication management. *Id.* The order listed service providers and contact information for those providers. *Id.* The court also ordered the mother to contact SeaMar in Yelm, an agency providing chemical dependency and mental health services, within 14 days, and to provide the department with up-to-date contact information. *Id.*

At the November 29, 2018 hearing, the parties also discussed funding for services. The department refused to pay for the mother's chemical dependency assessment or mental health services. RP at 458, 473. Instead, the department maintained that the mother needed health insurance in order to access these services. *Id.* The court emphasized that the mother needed to be "diligent" about getting insurance and accessing services because "we have children who are in foster care and in a preadopt home and are stable." RP at 466-67.

On November 29, 2018, the social worker brought a blank application for health insurance to court. RP at 616. Ms. Dart helped the

mother fill out this application. *Id.* They made copies, and the social worker, the mother, and her attorney all left court with a copy of the application. RP at 617, 619. The mother's attorney faxed the insurance application to the health care authority in early December 2018. RP at 501. However, the state may not have received it. RP at 501, 606.

Throughout December, the parties attempted to figure out what happened to application. RP at 605-07. The social worker supervisor checked a state database, which did not have any information. RP at 606. The mother testified that she received a letter stating that the application was incomplete, then checked online and saw she was denied coverage. RP at 645-55. She did not provide verification of this letter or denial. RP at 625. The court did not find her testimony credible. CP 171 at section 2.9.4. Ms. Dart, the social worker, resubmitted the mother's insurance application in January 2019. RP at 626.

The court held a status hearing on January 15, 2019. RP at 494. The department argued that the mother had not sufficiently engaged in services and asked to reopen the termination trial. RP at 496, 500. The mother's attorney disputed the department's version of the facts. RP at 497, 501-02. The court decided to reopen the termination trial and set a date for January 30, 2019. RP at 505. The court reiterated that the case was on a "fairly tight time frame." RP at 504.

The termination trial resumed on January 30, 2019. RP at 510. The court specified that it reopened the case to “look at whether we proceed to final findings in this case or whether we continue it further.” RP at 514. At the resumed trial, the court heard evidence about the mother’s mental health and about her services from November 2018 to January 2019.

The mother’s psychiatrist, Dr. Sands, testified that J.J. started seeing him as a teenager in 2004. RP at 517. He diagnosed her with obsessive compulsive disorder, bipolar disorder, and substance use disorder. RP at 519. He prescribed medication, including Prozac, Abilify, and Adderall. RP at 526. The mother last saw Dr. Sands in April 2016. RP at 522. He opined that she was responsive to treatment and did well when she took her medication. RP at 522.

From November 2018 to January 2019, the mother participated in some services and visits. She attended a meeting for protective parenting group but missed two other meetings. RP at 535-36. She did not participate in urinalysis testing. RP at 629-30. The mother tried to schedule a psychological evaluation but missed some appointments. RP at 591, 592-93. She rescheduled this evaluation for February 2019. RP at 604.

The mother also attempted to get health insurance but could not get insurance over this short span of time. RP at 654-55. She could not participate in a chemical dependency evaluation or mental health services

without insurance. RP at 458, 473. Finally, the mother missed or was late to some visits during this period. RP at 557-58, 564. During visits, the mother and her children were bonded and affectionate. RP at 566-67.

At the conclusion of trial, the court granted the state's petition and terminated the mother's parental rights. CP 169-76, 409-16, 612-19. J.J. appeals. CP 229.

V. LEGAL STANDARD

The Washington legislature recognizes that "the family unit is a fundamental resource of American life which should be nurtured." RCW 13.34.020. Parents have a fundamental liberty interest in the custody and care of their children. *In re Dependency of K.D.S.*, 176 Wn.2d 644, 652, 294 P.3d 695 (2013). The state cannot interfere with this interest "unless a child's right to conditions of basic nurture, health, or safety is jeopardized." RCW 13.34.020.

In order to permanently terminate the parent-child relationship, trial courts apply a two-step test. First, the court must find that the state has proven the six elements of RCW 13.34.180 by clear, cogent, and convincing evidence:

- a. That the child has been found to be a dependent child;
and
- b. That the court has entered a dispositional order pursuant to RCW 13.34.130; and

- c. That the child has been removed or will, at the time of the hearing, have been removed from the custody of the parent for a period of at least six months pursuant to a finding of dependency; and
- 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; and
- e. That there is little likelihood that conditions will be remedied so that the child can be returned in the near future; and
- f. That continuation of the parent-child relationship clearly diminishes the child's prospects for early integration into a stable and permanent home.

RCW 13.34.180(1)(a)-(f); *In re Welfare of S.V.B.*, 75 Wn. App. 762, 768, 880 P.2d 80 (1994). Clear, cogent, and convincing evidence exists when the ultimate fact in issue is shown by the evidence to be "highly probable." *K.D.S.*, 176 Wn.2d at 653.

Second, the court must find by a preponderance of the evidence that termination is in the child's best interest. RCW 13.34.190; *In re Welfare of A.J.R.*, 78 Wn. App. 222, 228, 896 P.2d 1298 (1995). Due process also requires a finding, by clear, cogent, and convincing evidence, that the parent is presently unfit to parent the child. *In re Welfare of A.B. (A.B. I)*, 168 Wn.2d 908, 919, 232 P.3d 1104 (2010).

On review, appellate courts examine whether the trial court's findings of fact are supported by substantial evidence and whether those findings support the trial court's conclusions of law. *In re Dependency of D.L.B.*, 188 Wn. App. 905, 914, 355 P.3d 345 (2015) (citing *In re Dependency of P.D.*, 58 Wn. App. 18, 25, 792 P.2d 159 (1990)). The reviewing court may not decide the credibility of witnesses or reweigh the evidence. *In re Dependency of A.V.D.*, 62 Wn. App. 562, 568, 815 P.2d 277 (1991). Substantial evidence exists when the evidence is sufficient to persuade a fair-minded, rational person of the truth of the declared premise. *In re Welfare of C.B.*, 134 Wn. App. 942, 953, 143 P.3d 846 (2006). "Guess, speculation or conjecture" does not amount to substantial evidence. *State v. Hutton*, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972).

VI. ARGUMENT

This Court should reverse the orders terminating the mother's parental rights for three reasons. First, the procedures used by the trial court in this case violated due process. Second, on the merits, the state failed to offer all services required by RCW 13.34.180(1)(d) and failed to prove that there was little likelihood the mother can parent in the near future as required by RCW 13.34.180(1)(e). Third, the trial court erred by finding the mother unfit based on her status as a victim of domestic violence and

without any connection between her alleged deficiencies and her ability to parent.

A. The Trial Court Violated Due Process by Continuing the Termination Trial After the State Failed to Meet Its Burden of Proof.

After the November 2018 trial, the state failed to meet its burden of proof. RP at 431. However, the trial court refused to dismiss the termination petitions. *Id.* Instead, the court continued the termination trial two months, ordered services for the mother, and held two dependency status hearings, on November 29, 2018, and January 15, 2019. RP at 432, 456, 494; CP 110-11. On January 30, 2019, the court reopened the trial and terminated the mother's rights. RP at 510, 691.

This procedure violated due process for three reasons. First, the proper remedy when the state fails to meet its burden of proof is to dismiss the termination petitions. Second, dependency and termination cases have different burdens of proof, objectives, and procedures. Third, the trial court improperly relied on the children's best interest even though the state failed to meet its burden of proof under RCW 13.34.180.

1. The trial court violated due process by failing to dismiss the termination petitions.

The trial court violated due process in this case by refusing to dismiss the termination petition after the state failed to meet its burden of proof in November 2018. Parents have "a fundamental civil right" to

control and custody of their children. *In re Dependency of K.N.J.*, 171 Wn.2d 568, 574, 257 P.3d 522 (2011). For this reason, “[p]rocedures used to terminate the relationship between parent and child must meet the requisites of the due process clause of the Fourteenth Amendment to the United States Constitution.” *Id.* Due process is not diminished just because the state has temporary custody of a child. *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S.Ct. 1388 (1982). “If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs.” *Id.*

The process due to a parent in a termination trial is determined by balancing the three factors enumerated by the United States Supreme Court in *Mathews v. Eldridge*: (1) the private interest affected by the proceeding; (2) the risk of erroneous deprivation of such interest through the procedures used, and the probable value of additional or substitute procedural safeguards; and (3) the state’s interest. 424 U.S. 319, 335, 96 S.Ct. 893 (1976).

Here, J.J.’s interest in parenting her children is “commanding” and “more precious than any property right.” *Santosky*, 455 U.S. at 758-59. She also has a compelling interest in an “accurate and just decision.” *In re Dependency of T.R.*, 108 Wn. App. 149, 158, 29 P.3d 1275 (2001) (citing

Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 28, 101 S.Ct. 2153 (1981)).

The state also has an important interest at stake: a *parens patriae* interest in protecting the welfare of children. *T.R.*, 108 Wn. App. at 158. As explained below, the final factor, the risk of erroneous deprivation, weighs in the mother's favor.

The Court of Appeals addressed continuances during termination trials in two different cases. In *T.R.*, the state filed a petition to terminate the mother's parental rights. 108 Wn. App. at 153. The trial court heard testimony and found that the state met its burden of proof. *Id.* at 155. However, the court wanted the parties to explore a guardianship. *Id.* The court held off on entering written termination findings. *Id.* at 153. Over a year later, the parties reconvened. *Id.* at 155-56. By that point, guardianship was no longer an option, and the court terminated the mother's rights. *Id.* at 157. The court declined to take additional evidence because the department met its burden of proof at the initial trial. *Id.*

The Court of Appeals in *T.R.* affirmed, finding that the evidence from the initial trial "does not evaporate with the passage of time." *Id.* at 158. Nor did any statute require entering orders within a specified timeframe. *Id.* The Court acknowledged that taking additional testimony "may have been preferable" but was not constitutionally required. *Id.* at

160. Weighing the *Mathews* factors, the Court found that the procedures used by the trial court satisfied due process. *Id.*

By contrast, the Court of Appeals in *In re Welfare of Shantay C.J.* reversed termination orders after a continuance. 121 Wn. App. 926, 91 P.3d 909 (2004). In that case, the court held a trial on petitions to terminate the parents' rights. *Id.* at 932. After trial, the court found that the state met its burden of proving some elements but declined to make findings on whether the state proved other elements. *Id.* Instead, the court continued the termination trial and ordered additional services for the parents. *Id.* at 932-33. The parents did not comply to the court's satisfaction. *Id.* at 934. Several months later, the court terminated the parents' rights based on the state's motion to strike the continuance order. *Id.* The court refused to reopen the trial or take additional evidence. *Id.*

The Court of Appeals reversed, holding that the trial court's procedure violated due process. *Id.* at 940. The Court could not tell whether the trial court terminated "because the state had met its burden under RCW 13.34.180 or because the state had demonstrated that the parents had failed to comply with the court's conditions for granting the continuance." *Id.* at 937. This made the trial court's decision "unclear and unreviewable." *Id.* The court should have resumed trial and taken additional testimony to make a clear record of the basis for its decision. *Id.* at 940. The Court

distinguished *T.R.* because in that case, the trial court found that the state met its burden of proof after the termination trial. *Id.* at 936.

This case differs from both *T.R.* and *Shantay C.J.* Here, the trial court found that the state failed to meet its burden of proving RCW 13.34.180(1)(d) and (e). RP at 431. Specifically, at the November 16, 2018, hearing the court said:

I think I cannot make a finding at this moment in time by clear, cogent and convincing evidence that all necessary services have been offered or that there is no reasonable likelihood of her correcting them within the immediate future.

Id. The court was “not willing to dismiss [the termination petitions] because I think there are a lot of issues.” *Id.* The court declined to enter written findings or conclusions. *Id.*

T.R., *Shantay C.J.*, and the present case all exist on a continuum. In *T.R.*, the trial court found that the state met its burden of proof on all elements of RCWs 13.34.180 and .190. 108 Wn. App. at 155. In *Shantay C.J.*, the court found that the state met its burden of proof on some elements and declined to make a decision on other elements. 121 Wn. App. at 932. Here, by contrast, the court found that the state failed to meet its burden of proof for two elements, RCWs 13.34.180(1)(d) and (e). RP at 431.

This distinction is critical because it underlies the difference in result between *T.R.* and *Shantay C.J.* When the state meets its burden of proof,

the court has discretion to enter orders at a later date. *See T.R.*, 108 Wn. App. at 160. When the state meets its burden of proof on some elements and the court declines to rule on others, the court may continue the trial but must take additional evidence before terminating. *Shantay C.J.*, 121 Wn. App. at 940. However, when the state *fails* to meet its burden of proof, the proper remedy is to dismiss the petition.

The procedures used by the trial court in this case violated due process because it created a high “risk of erroneous deprivation,” even though the court took additional evidence. *Mathews*, 424 U.S. at 335. Continuing the termination trial when the state failed to prove an element of RCW 13.34.180 signaled the court’s desire to resolve the case rather than hold the state to its burden of proof. It also shifted the burden of proof by implying that the mother’s rights would be terminated for failing to comply with the continuance order, regardless of whether the state met its burden under RCWs 13.34.180 or .190.

This procedure also signaled that the state would never lose a termination trial. Instead, the court would continue the trial indefinitely until the state met its burden. The trial court stated this explicitly. On January 30, 2019, when the termination trial resumed, the court posited the outcome as “whether we proceed to final findings in this case or whether we continue it further.” RP at 514. These were not the court’s only choices;

the court could have—and should have—denied the state’s petition because it failed to meet its burden of proof. This Court should reverse because the trial court violated the mother’s right to due process.

2. The trial court violated due process by holding dependency review hearings and status conferences during an active termination trial.

The trial court also erred by hearing dependency status hearings in the middle of the termination trial. This error violated due process by introducing evidence falling short of the admissibility standards at a termination trial and by muddying the distinction between these extremely different hearings.

Termination trials and dependency hearings are inherently incompatible. These hearings have “different objectives, statutory requirements, and safeguards.” *In re Welfare of Key*, 119 Wn.2d 600, 609, 836 P.2d 200 (1992). A dependency “has the important function of allowing state intervention in order to remedy family problems and provide needed services” to reunify. *In re Dependency of Schermer*, 161 Wn.2d 927, 942, 169 P.3d 452 (2007). By contrast, termination proceedings are adversarial, require a higher burden of proof, and can result in the permanent deprivation of fundamental rights. *Key*, 119 Wn.2d at 609.

Here, the trial court held dependency status hearings in the middle of the termination trial. RP at 456, 494. The court reviewed the mother’s

progress at hearings on November 29, 2018, and January 15, 2019. *Id.* Then, on January 30, 2019, the court resumed trial and terminated the mother's rights. RP at 494, 690.

This procedure violated due process for two reasons. First, the court combined two disparate types of hearings. By doing so, the court muddied the distinction between dependency and termination cases. *See Key*, 119 Wn.2d at 609. This tension is evident during the dependency statuses. For example, on January 15, the court opined that it was holding a "status" rather than an "evidentiary" hearing. RP at 500. The court allowed the parties to argue about reopening the case, but both the parties and the court were hampered by the difference in evidentiary rules between dependencies and terminations. RP at 498, 500-02. What began as a status on the dependency quickly turned into a hearing about whether the mother's termination trial should resume, a proxy for whether the mother's rights should be terminated. RP at 496-97, 500-02.

Second, the trial court's procedure violated due process by introducing evidence that would otherwise be inadmissible at a termination trial. For example, the court heard evidence and argument about services at the dependency status hearings. RP at 457-58, 496-97, 501-2. The court also signaled its views about the children's best interests, which is an

element at termination. RP at 466-67, 490. This court should reverse because combining these disparate hearings violated due process.

3. The trial court violated due process by considering the children's best interests before the state met its burden of proof under RCW 13.34.180.

Finally, the trial court violated due process by continuing the termination trial for a short amount of time based on the children's best interests. In November 2018, the state failed to meet its burden of proof under RCW 13.34.180. RP at 431. Despite this, the court relied on the children's best interests to make its continuance decision. RP at 434, 460. This procedure violated due process and the two-step test set forth by RCW 13.34.190.

As a matter of law, the trial court could not reach the question of the children's best interests because the state failed to meet its burden of proving all of the factors listed in RCW 13.34.180(1) by clear, cogent, and convincing evidence. RCW 13.34.190. Under Washington law, courts apply a two-step test to determine whether to terminate parental rights. RCW 13.34.190. The state must first prove the six factors listed in RCW 13.34.180(1) by clear, cogent, and convincing evidence. RCW 13.34.190(1). Only *after* this burden is met can the state move on to the second prong: proving by a preponderance of evidence that termination is in the children's best interests. *A.B. I*, 168 Wn.2d at 911.

Here, the trial court found that the state failed meet its burden of proving each element of RCW 13.34.180(1) by clear, cogent, and convincing evidence. RP at 431. However, the court then explicitly considered the children's best interests, both in its refusal to dismiss the termination petition and in its decision to continue the trial a mere two months.

On November 16, 2018, the court found that "permanency is in these children's best interest, and that's why I need to keep this on a relatively short timeline." RP at 434. On November 29, 2019, the court weighed the mother's access to services against the children's best interests, stating that the mother "could have secured Medicaid" and accessed services "had she been diligent," and "in the meantime, we have children who are in foster care and in a preadopt home and are stable." RP at 466-67. The court reiterated these concerns on January 15, 2019, stating, "part of why we were on a fairly tight time frame is we have got children whose permanency is at issue." RP at 498.

The trial court erred by repeatedly weighing the children's best interests before the state met its burden of proof under RCW 13.34.180(1). The court weighed the children's interests against the mother's access to services, eventually concluding that the termination trial should resume. RP at 498. This procedure violated due process because the state must prove

each element of RCW 13.34.180 before the court can consider the child's best interests. *A.B. I*, 168 Wn.2d at 911. This Court should reverse and remand.

B. The Trial Court Erred by Finding that the Department Provided All Court-Ordered and Necessary Services.

The trial court also erred by finding that the state offered services consistent with RCW 13.34.180(1)(d). During a dependency, the state must identify services that a parent needs and provide those services. *In re Termination of S.J.*, 162 Wn. App. 873, 883, 256 P.3d 470 (2011). The trial court may only permanently sever the parent-child relationship if it finds that the state “expressly and understandably offered or provided” all court-ordered services and “all necessary services, reasonably available, capable of correcting the parental deficiencies within the foreseeable future have been expressly and understandably offered or provided.” RCW 13.34.180(1)(d).

In this case, the trial court found that the state provided the mother with all court-ordered and necessary services. CP 172-73 at sections 2.9, 2.10, 2.11. The court also found that lack of health insurance was not an impediment to the mother accessing services. CP 171 at section 2.9.4. Substantial evidence does not support these findings, for two reasons. First, the state failed to provide the mother with the assistance she needed to

access services. The state refused to pay for the mother's chemical dependency assessment or mental health services and offered inadequate assistance with her health insurance application. Second, the state failed to provide timely mental health services to the mother. Instead, the state waited until November 2018 to offer these services, two months before the mother's rights were terminated.

1. The state failed to provide the mother with adequate access to services.

The department must provide parents with both court-ordered and necessary services. RCW 13.34.180(1)(d); *In re Dependency of T.L.G.*, 126 Wn. App. 181, 200, 108 P.3d 156 (2005). A service is "necessary" if it is needed to address a condition that precludes reunification of the parent and child. *In re Welfare of C.S.*, 168 Wn.2d 51, 56 n.3, 225 P.3d 953 (2010).

Here, the trial court ordered numerous services when it continued the termination trial on November 29, 2018. CP 110-11. Specifically, the court ordered random urinalysis testing, an updated chemical dependency assessment, protective parenting group, a psychological evaluation, and mental health services, including individual counseling and medication management. *Id.*

The social worker provided a list of providers where the mother could receive these services. RP at 610. However, the department refused

to pay for a new chemical dependency assessment, individual counseling, or medication management. RP at 458, 473. Instead, the mother had to get health insurance as a prerequisite to accessing these services. RP at 458, 473. The trial court's finding that health insurance did not impede accessing services was not supported by substantial evidence because the parties agreed that the mother needed insurance in order to get these mental health and chemical dependency services. *See* CP 171 at section 2.9.4.

The department also knew that the mother needed mental health services. In March 2017, her parenting assessment recommended individual counseling and medication management. Ex. 27 at 12. Despite this, there is no evidence that social workers helped the mother access health insurance until specifically ordered to do so in November 2018, during the termination trial.

On November 29, 2018, the social worker helped the mother complete an application for health insurance after court. RP at 616. The mother needed little assistance filling out the application itself. RP at 616-17. The challenging part was submitting the application and following up on its status.

The mother, her attorney, and the social worker each left court with a copy of the health insurance application. RP at 617, 619. The mother's attorney faxed the application to the health care authority on December 6,

2018. RP at 501. However, it does not appear that the state received it. RP at 501, 606. The social worker supervisor checked a state database, which did not have any information about the status of the application. RP at 606. The mother testified that she received a letter stating that the application was incomplete, then checked online and saw she was denied coverage. RP at 645-55. She did not provide verification of this letter or denial. RP at 625.

Throughout December, the parties went back and forth, trying to figure out what happened to application. RP at 605-07. The mother's testimony about the letter and the denial was not credible; it is unclear what she reviewed or why she believed she was denied coverage. CP 171 at section 2.9.4. From November 2018 onward, the social worker had the mother's health insurance application. Despite knowing that the mother struggled, the social worker did not submit her copy of the application until January 2019, shortly before the termination trial resumed. RP at 626.

Instead of promptly assisting the mother, the social worker effectively set up a test to see if the mother could navigate a complicated bureaucracy. She did not help the mother submit the application until January. RP at 626. Instead, she provided contact information for another agency, SeaMar, that reportedly could provide assistance. RP at 632.

The social worker's actions improperly delayed the mother's ability to obtain health insurance and access court-ordered and necessary services. *See* RCW 13.34.180(1)(d). Her actions also failed to "expressly and understandably" offer or provide services to the mother. *Id.* This Court should reverse because the state failed to provide services in a manner consistent with RCW 13.34.180(1)(d).

2. The state failed to provide mental health services to the mother in a timely manner.

The state must also provide services in a timely manner, so that the parent has the opportunity to benefit from them. *Id.* at 883-84 (reversing termination because the state failed to timely provide mental health treatment to the mother); *Matter of B.P.*, 186 Wn. 2d 292, 319-20, 376 P.3d 350 (2016) (reversing termination because the state failed to timely provide attachment services to the mother); *T.L.G.*, 126 Wn. App. at 203 (reversing termination because of the "protracted delay" in providing mental health evaluations to the parents). Here, the department failed to meet this requirement because it delayed providing mental health services to the mother until two months before her parental rights were terminated.

The department knew since at least March 2017 that the mother needed services for mental health issues. Her parenting assessment was completed on March 28, 2017. Ex. 27. In that assessment, the mother

disclosed diagnoses of bipolar disorder, anxiety, depression, obsessive compulsive disorder, attention hyperactivity disorder, and manic depression. *Id.* at 5. She reported seeing a counselor and a psychiatrist since she was a teenager. *Id.* The mother reported that she was prescribed multiple medications by her psychiatrist, Dr. Sands. *Id.* The parenting assessor, Josette Parker, recommended that the mother engage in individual counseling and medication management. *Id.* at 12.

The department did not follow Ms. Parker's recommendations. At the next review hearing, in May 2017, the court order specifically crossed out medication management. RP at 201-2. The social worker at the time, Kyle Wiest, testified that these services were included in the order by mistake and were a "clerical error." RP at 107. He testified that the mother did not believe she needed mental health services and did not request them. RP at 206-07.

The department finally offered mental health services to the mother after the November 29, 2018 hearing. The mother had approximately two months to engage in these services before her rights were terminated. As explained above, she also had to acquire health insurance during that time in order to even access these services. The mother struggled with mental illness for most of her life. The department knew she needed mental health services for 20 months before referring her to these services. This

timeframe does not amount to timely provision of services and does not meet the standard set forth by RCW 13.34.180(1)(d). This Court should reverse.

C. The Trial Court Erred by Finding that there is Little Likelihood the Mother Can Parent in the Near Future.

The trial court also erred by finding that there was “little likelihood that conditions will be remedied so that the child[ren] can be returned to the [mother] in the near future.” RCW 13.34.180(1)(e); CP 173 at section 2.18. What constitutes the “near future” depends on the age of the child and the circumstances of the child’s placement. *T.L.G.*, 126 Wn. App. at 205.

The state can prove element (e) by establishing a rebuttable presumption. The statute specifies that “a parent’s failure to substantially improve parental deficiencies within twelve months following entry of the dispositional order shall give rise to a rebuttable presumption that there is little likelihood that conditions will be remedied so that the child can be returned to the parent in the near future.” RCW 13.34.180(1)(e). However, there is a caveat: “The presumption shall not arise unless [the state] makes a showing that all necessary services reasonably capable of correcting the parental deficiencies within the foreseeable future have been clearly offered or provided.” *Id.*

Here, the trial court found that the state proved the rebuttable presumption. CP 173 at section 2.18. The court erred because the state did not meet its burden of proof under RCW 13.34.180(1)(d). As explained above, the state failed to provide all court-ordered and necessary services and failed to provide services in a timely manner. The court thus could not find the rebuttable presumption because of the caveat contained in RCW 13.34.180(1)(e).

The trial court also found that the state proved element (e) even without the rebuttable presumption. CP 173 at section 2.18. The court erred because the mother never received the opportunity to engage in mental health services in this case. As explained above, the mother has a lengthy history of mental health issues. Ex. 27 at 5. She has numerous diagnoses, was prescribed psychotropic medication, and was treated by a psychiatrist since she was a teenager. *Id.*; RP at 517, 519, 526. The mother needed mental health services in order to make progress in this case. The department referred these services a mere two months before her rights were terminated. Even then, the mother could not access these services because she did not have health insurance.

The trial court concluded that there was little likelihood the mother could parent in the near future based on—at most—two months of access to mental health services. The court accepted without question the social

workers' assessment that the mother would need nine months to a year of these services before she could parent. RP at 305, 348. However, the social workers never saw the mother while she received proper mental health services. The mother's psychiatrist, Dr. Sands, testified that her functioning improved significantly when she was on medication. RP at 522. Substantial evidence does not support the court's findings because the evidence at trial supported the conclusion that she can parent in the near future when receiving mental health services.

D. The Trial Court Erred by Finding the Mother Currently Unfit to Parent.

The trial court also erred by finding the mother unfit. To terminate parental rights, the state must show that a parent is currently unfit to care for the children in question. *A.B. I*, 168 Wn.2d at 918. Terminating a parent's rights in the absence of such a finding, either express or implied, violates due process. *Id.*; see Wash. Const. art. I, § 12. The state must prove unfitness by clear, cogent, and convincing evidence. *A.B. I*, 168 Wn.2d at 919. Whether a proceeding satisfies constitutional due process is a question of law that appellate courts review de novo. *In re Welfare of J.M.*, 130 Wn. App. 912, 920, 125 P.3d 245 (2005).

In order to prove unfitness, the State must show that the parent's deficiencies make him or her incapable of providing "basic nurture, health,

or safety.” *In re Welfare of A.B. (A.B. II)*, 181 Wn. App. 45, 61, 323 P.3d 1062 (2014). Appellate courts will not disturb the trial court’s findings of fact in a termination proceeding so long as substantial evidence in the record supports them. *In re Welfare of Hall*, 99 Wn.2d 842, 849, 664 P.2d 1245 (1983). However, because the State must prove its case in a termination proceeding by clear, cogent, and convincing evidence, that evidence must be “more substantial than in the ordinary civil case in which proof need only be by a preponderance.” *Id.*

Here, the trial court found that the mother was currently unfit to parent. CP 173 at sections 2.14, 2.15, 2.16, 2.18. Specifically, the court found that the mother’s parental deficiencies included her “substance abuse issues” and her “domestic violence issues.” CP 173 at sections 2.14, 2.15. The court also found that the mother is “in denial regarding her parental deficiencies” including “the condition of the home” when the children were removed. CP 173 at section 2.18.

This Court should reverse for two reasons. First, the trial court improperly found that the mother’s status as a victim of domestic violence was a parental deficiency. CP 173 at section 2.15. Due process requires that perpetrators—not victims—be held accountable for domestic violence. Second, the trial court failed to connect the mother’s other alleged deficiencies to her ability to parent.

1. The mother’s status as a victim of domestic violence was not a parental deficiency.

The trial court erred by finding that the mother’s “parental deficiencies include domestic violence issues.” CP 173 at section 2.15. During trial, the mother denied that the father was abusive. RP at 70, 78, 462-63. However, even if true, domestic violence must be held against the perpetrator, not the victim. The trial court erred because a parent’s status as a victim of domestic violence is not a parental deficiency. *See In re Dependency of D.L.B.*, 186 Wn.2d 103, 124, 376 P.3d 1099 (2016).

Victims of domestic violence are not to blame for abuse committed against them. *See, e.g., Nicholson v. Williams*, 203 F. Supp. 2d 153, 252 (E.D.N.Y. 2002), *vacated by, in part, remanded by Nicholson v. Scoppetla*, 116 Fed. Appx. 313, 316 (2nd Cir. 2004). “It desecrates fundamental precepts of justice to blame a crime on the victim.” *Id.* Reflecting this principle, Washington law recognizes that “[p]overty, homelessness, or *exposure to domestic violence* as defined in RCW 26.50.010 that is perpetrated against someone other than the child does not constitute negligent treatment or maltreatment in and of itself.” RCW 26.44.020(16) (emphasis added).

In this case, the department maintained that the father perpetrated domestic violence against the mother. *See Ex.s 1, 2, 7, 8.* Despite this, the

state's witnesses blamed the mother for the father's actions. Josette Parker, who completed the mother's parenting assessment, testified repeatedly that the mother did not hold the father "accountable" for his behavior. RP at 31, 32, 35, 57. Kyle Wiest, a department social worker, blamed the mother for "putting herself in" a domestic violence relationship. RP at 242. Ashton Dart, the current social worker, agreed that "domestic violence" was a parental deficiency for the mother. RP at 352. Amy Bielefeld, the social worker supervisor, described the mother's deficiencies to include "domestic violence" and a "lack of insight" into the ramifications of her "actions and decisions." RP at 304.

Domestic violence victims do not decide to be assaulted by their partners. Victims also are not responsible for holding perpetrators "accountable"—that responsibility should lie with the courts and the criminal justice system. Here, the trial court erred by uncritically adopting the victim-blaming testimony espoused by the state's witnesses. The court's findings contradict public policy, due process, and Washington law.

As explained above, exposure to domestic violence, perpetrated against someone other than the child, is not child abuse or neglect. RCW 26.44.020(16). Instead, the state must specifically connect this alleged deficiency to child safety and welfare. *See T.L.G.*, 126 Wn. App. at 203

(holding that mental illness alone is not a parental deficiency; the state must prove a nexus between an alleged deficiency and the ability to parent).

Courts have also followed this framework. For example, in *In re Dependency of S.M.H.*, a mother lost her rights in part because she refused to cut off contact with her boyfriend, a four-time child molester, and planned to have the boyfriend move back into the home. 128 Wn. App. 45, 50, 57, 115 P.3d 990 (2005). In *In re Welfare of L.N.B.-L.*, a mother's rights were terminated because she would not leave the father who had multiple domestic violence convictions as well as "unrealistic expectations about his children's development would put his children's safety at risk." 157 Wn. App. 215, 248, 237 P.3d 944 (2010).

Here, unlike in *S.M.H.* and *L.N.B.-L.*, there was no testimony about a risk of harm to the children beyond "exposure to domestic violence . . . perpetrated against someone other than the child[ren]." RCW 26.44.020(16). There was no testimony that the father harmed or threatened the children. RP at 70. The mother wrote in her 2016 application for a protection order that the father "has been neglectful of" the children but provided no additional information about what that meant. Ex. 24 at 4. Ms. Parker testified about hypothetical detrimental effects to children from witnessing domestic violence. RP at 35-36. However, those effects result from the abuser's violent actions against the victim. As explained above, it

violates public policy, due process, and RCW 26.44.020(16) to hold the abuser's actions against the victim.

Additionally, unlike *S.M.H.* and *L.N.B.-L.*, the mother had no plans to reunify with the father. RP at 74. The father was in prison at the time of the termination trial and would remain incarcerated for several years. Ex. 21. The mother testified that she did not want to resume a relationship with the father. RP at 74. The state's concerns that she would get back together with the father years in the future, or begin a domestic violence relationship with someone else, were entirely speculative. "Guess, speculation or conjecture" cannot amount to substantial evidence. *Hutton*, 7 Wn. App. at 728. This Court must reverse.

2. The state failed to prove that the mother's alleged deficiencies impacted her ability to parent.

The trial court also erred because the state failed to prove that the mother's alleged deficiencies impacted her ability to parent. It is not enough for the state to point to issues in a parent's life, the state must also show that those issues impact the ability to parent. *See T.L.G.*, 126 Wn. App. at 203. Here, the state failed to prove that connection.

The Court of Appeals explored this issue in *T.L.G.*, 126 Wn. App. 181. In that case, the department sought to terminate the parents' rights. *Id.* at 195. At trial, a psychologist testified that the father had "a series of

mental health problems, including possible bipolar disorder and a personality disorder,” and the mother had “possible depression, possible paranoid delusional disorder, an unspecified personality disorder, as well as a learning disability.” *Id.* at 196. The trial court terminated the parents’ rights, finding that their significant mental health issues rendered them unfit to parent. *Id.* at 196-97.

The Court of Appeals reversed. *Id.* at 185. The Court found that “parents before the court in dependency proceedings rarely come without significant difficulties.” *Id.* at 203. However, “mental illness is not, in and of itself, proof that a parent is unfit or incapable.” *Id.* Instead, the trial court must “examine the relationship between the mental condition and parenting ability.” *Id.* This is because “termination must be based on current unfitness; children may not be removed from their homes merely because their parents are mentally ill.” *Id.* In *T.L.G.*, the Court found the connection between the parents’ mental illnesses and their ability to parent lacking. *Id.* The Court also found that the state did not offer adequate services to address the parents’ mental illness. *Id.*

Termination is not a punishment for difficult or challenging parents. It is not enough for the state to show that a parent has personal issues; the state must also prove a connection between those issues and parenting ability. Here, like in *T.L.G.*, that connection is lacking.

In this case, the trial court identified three parental deficiencies for the mother: “domestic violence issues,” “substance abuse issues,” and the “condition of the home” at the time of removal. CP 173 at sections 2.14, 2.15, 2.18. As explained above, the court erred by categorizing the mother’s status as a domestic violence victim as a parental deficiency. The court also erred because there was no evidence that the children were currently at risk of exposure to domestic violence in the mother’s care.

The two remaining alleged deficiencies are equally unpersuasive. First, the state failed to show any connection between the mother’s substance use and her ability to parent. The mother tested positive for amphetamines and methamphetamines in November 2018. RP at 457-58. She also tested positive for amphetamines when M.E. was born, in March 2017. RP at 119. However, M.E. did not test positive, suggesting the mother’s use was not extensive. RP at 144. The mother also completed a chemical dependency assessment in March 2017, which did not recommend services. RP at 199. Social workers and visit supervisors never observed the mother under the influence or suspected her of being intoxicated. RP at 321-22.

At most, this evidence established that the mother has used methamphetamines on occasion. This may be a personal issue but standing alone it is insufficient to terminate the mother’s rights. The state failed to

prove any connection between the mother's substance use and her ability to parent. The mother did not show up to visits high, her youngest, M.E., did not test positive at birth, and she was not arrested or otherwise unavailable due to drug use. Like in *T.L.G.*, the trial court erred because the state failed to prove that substance use rendered the mother unfit to parent. 126 Wn. App. at 203.

Second, the trial court pointed to the condition of the home at the time of removal. CP 173 at section 2.18. The mother maintained at trial that her landlord wrecked the family trailer, and the children did not reside there under those conditions. RP at 62-63, 67. Even assuming the mother was not credible, the state failed to offer services to correct this issue. RP at 385. State social workers never provided the mother with cleaning assistance, training, or supplies. *Id.* A messy home, without services to address that concern, cannot be the basis for terminating parental rights. *See T.L.G.*, 126 Wn. App. at 203.

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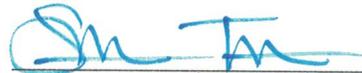
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VII. CONCLUSION

J.J., the mother, respectfully requests that the Court of Appeals reverse the trial court and vacate the orders permanently severing her parental rights. The procedures used by the trial court in this case violated due process. Additionally, the state failed to meet its burden of proof under RCWs 13.34.180(1)(d) and (e). Finally, the trial court erred by finding the mother unfit based on her status as a victim of domestic violence. This Court should reverse and remand.

RESPECTFULLY SUBMITTED this 26th day of June, 2019.



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CERTIFICATE OF SERVICE

I, Stephanie Taplin, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct to the best of my knowledge:

On June 26, 2019, I electronically filed a true and correct copy of the **Motion for Accelerated Review by the Mother, J.J.**, via the Washington State Appellate Courts' Secure Portal to the Washington Court of Appeals, Division II. I also served said document as indicated below:

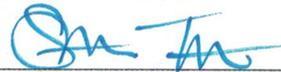
Marlo Oesch
Assistant Attorney General

(X) via email to:
marloo@atg.wa.gov,
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J.J., the mother

(X) confidential address

SIGNED in Tacoma, Washington, this 26th day of June, 2019.



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June 26, 2019 - 3:27 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 53152-6
Appellate Court Case Title: IN RE: D.E. V.E. M.E., minor children
Superior Court Case Number: 17-7-02259-8

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