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

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In re the Welfare of

D.E., V.E., and M.E.,

Minor Children.

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**RESPONSE OF THE DEPARTMENT OF CHILDREN, YOUTH,  
AND FAMILIES TO MOTION FOR ACCELERATED REVIEW**

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## I. INTRODUCTION

J.J. is the mother of D.E., V.E., and M.E. J.J. cannot be protective of her children. She is in denial regarding the domestic violence issues in her relationship with the children's father, S.E. J.J. does not recognize the seriousness of S.E.'s behavior and does not understand the danger posed to the children. The risk to children raised in a domestic violence environment is long-term trauma. Exposure to domestic violence can affect a child's physical development, social/emotional development, their ability to learn, and their ability to have healthy relationships in the future. It can also affect the way the child relates to the parent in that the child takes on the role of being the protector, a dynamic already exhibited between D.E. and his mother. Further, J.J. is in denial regarding her substance abuse issues. Over the past two years, the Department had repeatedly offered services to J.J. Despite multiple opportunities, J.J. has failed to effectively engage in services and is currently unfit.

J.J. appeals from an order terminating her rights to D.E., V.E., and M.E., arguing substantial evidence does not support the trial court's findings that the Department offered or provided all necessary services, there was little likelihood conditions would be remedied in the near future, and that J.J. was unfit. J.J. also argues the court violated her due process

rights when it continued trial, set two status hearings, and reopened the evidentiary record.

The Department of Children, Youth, and Families (Department) responds that substantial evidence supports the trial court's termination order. J.J. is in denial regarding her substance abuse and domestic violence issues and has failed to effectively engage in services. Further, the trial court afforded J.J. her procedural due process rights where it provided her with notice and an opportunity to be heard after a continuance of the trial and the trial court relied only on admissible evidence in making its findings.

## **II. RESTATEMENT OF THE ISSUES**

1. Whether sufficient evidence supports the trial court's finding that the Department offered or provided all necessary services, given the Department repeatedly offered J.J. services but J.J. failed to follow through?
2. Whether sufficient evidence supports the trial court's finding—in light of J.J.'s failure to address her parental deficits of substance abuse and domestic violence for over two years—that there is little likelihood that

conditions will be remedied such that J.J. could reunite with her children in their near future?

3. Whether the trial court violated J.J.'s right to procedural due process when it provided J.J. the opportunity to present all relevant evidence prior to making its decision?

### **III. RESTATEMENT OF THE CASE**

In March 2016, J.J. filed a petition for an order of protection against S.E., the father of their two children, D.E. and V.E., then three years old and an infant. Ex. 24. J.J. described S.E. as "extremely violent" and "mentally, verbally, and physically abusive" towards J.J. Ex. 24. J.J. reported S.E. was neglectful of the children and had been under the influence of methamphetamine. Ex. 24. The court granted a temporary order of protection, however, J.J. failed to follow through with serving S.E. with the petition. RP at 82.

Five months later, in August 2016, law enforcement placed D.E. and V.E. in protective custody after they found the children living in a trailer in deplorable conditions. Exs. 1, 2, 33; RP at 184-85. They were four and one year old, respectively. Ex. 1. Reported concerns included neglect, substance abuse and domestic violence issues. Ex. 1; RP at 26. There was a reported lack of food in the home and no running water. Ex. 1; RP at 26. J.J. claimed the trailer had been spotless before the landlord made it dirty in retaliation.

RP at 67-68. The trial court did not find this testimony credible. CP 173 at 2.18.

#### **A. December 2016 Domestic Violence Incident**

In November 2016, J.J. entered an agreed order of dependency. Ex. 4. J.J. agreed to participate in random urinalysis (UA) testing, with any missed or diluted UAs considered positive; to participate in a drug and alcohol assessment and follow recommendations; and to participate in a parenting assessment and follow recommendations. Ex. 4.

In December 2016, J.J. requested the Department conduct a walkthrough of the home where she and S.E. were living. RP at 84. J.J. indicated she and S.E. had spent August through December 2016 cleaning the home and that it was an appropriate placement for the children. RP at 84-86. However, the Department declined to conduct the walkthrough after a domestic violence incident in which S.E. swung a hatchet at J.J., damaging her car. RP at 177. Although J.J. initially reported to law enforcement that S.E. was responsible for the damage, she subsequently denied the incident occurred. RP at 172, 382, 384, 393. In addition, law enforcement found the condition of that home similarly deplorable to her previous residence, with garbage strewn throughout the home, filthy dishes stacked in the sink, and spoiled food sitting out. RP at 176-77.

Law enforcement arrested S.E. and a no contact order was put in place as part of the criminal matter. RP at 171, 177. However, J.J. and S.E. continued to live together and J.J. was present at an incident in January 2017, where law enforcement arrested S.E. Exs. 42-44; RP at 71-72. S.E. later pled guilty to Attempted Robbery in the Second Degree and Violation of a Protection Order - Domestic Violence. Exs. 42-44; RP at 71-72. J.J. told the Department she was not with S.E., however, the Department later learned there were multiple no-contact order violations during the months after the December 2016 incident. RP at 225-26. J.J. subsequently moved in with her stepfather in Eatonville, Washington. RP at 86.

In March 2017, J.J. gave birth to M.E. and tested positive for amphetamines. RP at 119. J.J. claimed it was due to prescription Sudafed, however, prescription Sudafed does not account for a positive amphetamine result. RP at 381-82, 119 547. M.E. was placed in out of home care at birth via court order. RP at 186.

### **B. Parenting Assessment**

The Department referred J.J. for a parenting assessment in October 2016. RP at 20. However, J.J. did not respond to multiple attempts to schedule the assessment, and the provider closed the referral in January 2017 due to lack of contact. RP at 22-23. The social worker immediately

submitted a new referral, and after cancelling three scheduled appointments, J.J. finally followed through in mid-March 2017. Ex. 27; RP at 24-25.

The provider noted J.J. minimized and denied the domestic violence and substance abuse in her life. J.J. described her relationship with S.E. as “perfect.” Ex. 27 at 4; RP at 26. J.J. told the provider the allegations about the hatchet were false. Ex. 27 at 3. Despite the allegations in her March 2016 petition, she said he was not violent and he did not use drugs. Ex. 27 at 3; RP at 31. She said he did not have a criminal history and did not disclose the incident from January 2017. Ex. 27 at 3. Further, she intended to continue her relationship with S.E. Ex. 27 at 10.

The provider noted that throughout the interview, J.J. was protecting S.E. and intended to continue her relationship with him despite the danger to herself and her children. Ex. 27 at 10. J.J. herself has experienced long-term instability and blames others for their concerns about S.E. and the conditions in the home. Ex. 27 at 10-11. The provider noted a strong concern that J.J. is unable to recognize the seriousness of S.E.’s behavior, and that she is reluctant to hold S.E. accountable for his behavior. Ex. 27 at 11. The provider felt that J.J. could not be protective of her children because she was in complete denial of all the reported concerns about the family and the care of the children at the time of removal. RP at 37. She opined J.J. is

not able to create a safe and nurturing environment free from violence. RP at 32.

As to her substance abuse, J.J. failed to disclose that she tested positive for amphetamine at M.E.'s birth. Ex. 27 at 4-5. She also failed to disclose a prior substance use disorder diagnosis from her psychiatrist. Ex. 27; RP at 519. When she first met with her psychiatrist in 2004, she reported using marijuana and alcohol for some time, but said she was abstinent at that time. RP at 520. She appeared to struggle with substance abuse again, as she reported 11 years later that she had been sober 6 years. RP at 520. While J.J. accurately reported she had recently completed a drug and alcohol assessment with no further recommendations, that evaluation was based entirely on J.J.'s self-report, as the provider did not receive any collateral from the Department. Ex 27 at 4-5; RP at 199.

As to mental health, J.J. reported multiple mental health diagnoses and reported that since she was a teenager, she had been seeing a psychiatrist that managed her medications. Ex. 27 at 5. J.J. gave the impression that she was currently seeing her psychiatrist; however, she had not seen him since April 2016. Ex. 27 at 5; RP at 33-34, 518. She also disclosed she had been on methadone for 7 years and was closely monitored by her family physician. Ex. 27 at 5.

The provider recommended J.J. engage in individual counseling regarding her relationship, attend a domestic violence support group (Personal Horizons), and attend a Protective Parenting Group. Ex. 27 at 12. The Parenting Protection Group was for J.J. to learn to be a protective parent, prioritizing the children over the relationship. RP at 33. The provider also recommended J.J. continue to address mental health concerns with her current provider and review medication plans for mental health and pain management. Ex. 27 at 12.

That same month, social worker Wiest requested that J.J. provide him a list of all of her medications and dosages. RP at 200. J.J. had also reported to social worker Wiest that she was taking medications for pain and depression. RP at 200. J.J. failed to provide a list of her medications. RP at 200. While social worker Wiest did not refer J.J. for medication management at that time, at trial J.J. indicated that after M.E. was born in March 2017, she had state insurance and it would cover the cost of medications. RP at 659-60. Further, she had found an agency that could prescribe medication that would accept state insurance. RP at 660-61. However, J.J. apparently failed to follow through. RP at 661. When asked if she made any appointments with that agency J.J. was “not sure what happened with that.” RP at 661.

### **C. J.J. Did Not Engage in Recommended Services**

In May 2017, J.J. entered an agreed order of dependency as to M.E. Ex. 10. The dispositional order was the same as it was for D.E. and V.E. Ex. 10. Though the parenting assessment recommended mental health counseling and medication management, the agreed order specifically lined out those services in M.E.'s order. Ex. 10.

In November 2017, the Department referred J.J. to Advantages Plus for Personal Horizons, as well as for the Parent Protection Group, and individual counseling. RP at 39-40, 43. J.J. responded to the agency's attempts to reach her and requested that she receive all three services on the same day through Advantages Plus. RP at 40. The provider rearranged her schedule, including moving clients, so that J.J. could receive all services on the same day, at the same location. RP at 40. This was to accommodate J.J.'s transportation issues, and assist her by conserving on gas. RP at 40-41. J.J. failed to appear for her appointment. RP at 41. The provider attempted to reach J.J. on four subsequent occasions and after receiving no response, she closed the referral. RP at 41-42.

### **D. June 2018 Domestic Violence Incident**

In June 2018, while JJ. and her new boyfriend were sleeping in a car, S.E. broke their car windows, attempted to cut the wires in the car, tased J.J.'s new boyfriend, and poured gasoline all over the car. Ex. 20; RP at 72-

73. In describing the events, J.J. had difficulty holding S.E. accountable. RP at 73, 409. J.J. described his pouring gasoline on the vehicle as “spilling” and was quick to note that the incident was “out of character” for S.E. RP at 73, 409.

#### **E. J.J. Failed to Complete UA testing**

Throughout the dependency, J.J. failed to follow through with UAs, with multiple excuses. RP at 194, 199, 130, 249, 339, 365-66. The Department attempted to accommodate her transportation issues by scheduling UAs near the visits when they were occurring in Puyallup. RP at 287-88. J.J. was living with her stepfather from January 2017 through April 2017, and at trial J.J. reported he assisted her with transportation by paying for gas. RP at 86-87, 90. However, she continued to miss UAs due to various excuses including a collapsed lung. RP at 249, 287. While her inconsistency was in part due to transportation issues, at a meeting in October 2017 she directly refused to provide a UA. RP at 365.

#### **F. Housing**

Throughout the dependency, J.J. spent a majority of her time staying with friends and family. RP at 83, 90-95, 109-10, 174. From about January 2017 to April 2017, she resided with her stepfather in Eatonville. RP at 86-87, 90. He was willing to have the children reside in the home if that became an option. RP 87. However, in April 2017, J.J.’s stepfather obtained a

protection order against J.J. and had law enforcement escorted her off the property. Exs 34-35; RP 87, 138. J.J. initially claimed her stepfather took these actions because she did not fold clothes on time, but she later admitted it was because she had stolen money from him. RP at 87-90. J.J. subsequently moved back to Yelm. RP at 90.

In July 2017, at a status hearing regarding visitation, the juvenile court ordered J.J. to look at local housing, including clean and sober housing. Ex. 13. The Department and defense social workers provided J.J. with housing resources; however, she failed to follow through, including failing to attend an intake for housing and failing to follow through with an application for a housing voucher. RP at 99-100, 215, 217, 244, 276, 341, 368. Further, J.J. refused to reside in clean and sober or domestic violence housing. RP at 217. At the initial termination fact finding in November 2018, J.J. reported she had been residing with her friend in Yelm since April 2018. RP at 95.

### **G. Transportation**

Throughout the dependency, J.J. reported transportation issues. The Department provided J.J. with an ORCA card, Intercity bus pass, as well as multiple gift cards to help pay for gas. RP at 104, 107, 222-23, 301, 627-29, 658, 665. Social worker Wiest even offered to pay for car repairs if J.J. could provide an estimate from a reputable repair shop. RP at 273. She

failed to do so. RP at 274. In addition, in an effort to assist her in conserving gas, a provider arranged for her to receive three of her services on the same day in the same location. RP at 40.

#### **H. Agreed Order Amending Services**

In August 2018, the parties met for a settlement conference regarding the termination matter. RP at 124-25. As a result, the parties entered an agreed order amending the service plan. Ex. 16. Per the agreed order, J.J. was required to participate in the Protective Parenting Group, Personal Horizon's and individual counseling, again all with Advantages Plus on the same day. Ex. 16. In addition, J.J. agreed to completed random UAs and participate in a chemical dependency assessment with collateral information upon a missed or positive UA. Ex. 16. J.J. indicated transportation would not be an issue. RP at 125. The parties also agreed to continue the termination matter because J.J. agreed to participate in services. RP at 334.

The Department arranged for J.J. to attend the Personal Horizon's domestic violence support group, the Parenting Protection Group, and individual counseling with Advantages Plus, on the same day, as planned. RP at 45. However, J.J. failed to follow through.

In September 2018, the provider notified J.J. that she was closing the referral due to lack of contact, to which J.J. replied that she did not need

any of the recommended services--in particular, the domestic violence support. Ex. 37; RP at 44-45.

Once J.J. became aware the provider closed the referral, she asked the social worker if she could access the same services with “B&R Counseling” in Yelm. RP at 343. However, the social worker could not find any such agency and J.J. failed to respond to the social worker’s attempt to clarify. RP at 343.

As to the UAs, J.J. tested negative for substances the same day the agreed order was entered; however, she had seven days’ notice of the request. RP at 338-39. When the social worker referred her for a second UA, J.J. requested it be set over two days. RP at 339. The social worker agreed and although J.J. tested negative, the UA was diluted. RP at 339. J.J. failed to follow through with subsequent UA. RP at 339-40. As a result, per the agreed order of the parties, J.J. was required to complete a new drug and alcohol evaluation, but she failed to do so. RP at 341, 360. The case proceeded to a termination of parental rights trial.

### **I. Initial Fact-Finding Termination Hearing and Continuance**

At the conclusion of the initial fact-finding, on November 16, 2019, the court declined to enter findings and continued trial. RP at 431. The court ordered J.J. to complete a UA that day and set a status hearing for November

29, 2018. RP at 434; CP 105. The purpose of the status was to enter an order regarding services and set another date for resolving trial. RP at 449-50. The UA ordered by the court is the only truly random UA J.J. has participated in during this dependency. RP at 434. J.J. tested positive for amphetamines and methamphetamines. RP at 545.

At the first status conference on November 29, 2019, the court entered an order outlining services for J.J. CP 110-11. The court ordered J.J. to participate in random urinalysis testing and individual counseling at Olympia Psychotherapy; participate in Protective Parenting Group with Sam Asbjornsen in Thurston County; and participate in a chemical dependency assessment and medication management at SeaMar Yelm. CP 110-11. The court ordered J.J. to contact SeaMar Yelm within 14 days, acknowledging J.J. may not be able to get an appointment by the next status hearing, RP at 473-74; CP 110-11. The court ordered the Department to provide bus passes, transportation cards, and/or Visa gift cards, as available. CP 110-11.

At the hearing, the parties discussed the need for J.J. to obtain health insurance to access services at SeaMar Yelm. RP at 458, 473. The social worker had brought the mother an application for health insurance and J.J. was court ordered to stay after the hearing to complete the application. CP

110-11. When J.J. left court that day, she had a copy of her completed health insurance application. RP at 618-19; Ex. 53.

At the conclusion of that hearing, the court set a second status hearing for January 15, 2019 as a “check-in” and an opportunity for either party to request to reopen the evidentiary hearing. RP at 490.

#### **J. J.J. Failed to Complete Protective Parenting Group**

The Department referred J.J. to Sam Asbjornsen in Olympia for her Protective Parenting Group. RP at 533. The provider notified J.J. via voicemail and email of the first session on December 17, 2019. RP at 534-35. J.J. claimed she tried to attend but the building was locked. Ex. 65; RP at 633. The provider testified, however, that she did, in fact, hold class on that date, and other participants were present. RP at 535. While J.J. attended the next session, on January 14, 2019, she failed to appear on January 28, 2019. RP at 536.

#### **K. J.J. Failed to Complete Random UAs and Individual Counseling**

J.J. failed to follow through with UAs or individual counseling at Olympia Psychotherapy. RP at 638, 657. In January 2019, the Department determined Olympia Psychotherapy was no longer partnering with the Department. RP at 638. The social worker then referred J.J. to Northwest Resources, which was located near where she met for her Protective

Parenting Group. Ex. 65; RP at 630. J.J. failed to follow through. RP at 630-31. Regardless, J.J. could have also obtained mental health counseling at SeaMar Yelm. Ex. 54.

#### **L. J.J. Failed to Complete a Psychological Evaluation**

The social worker scheduled a psychological evaluation for J.J. on January 8, 2019, and notified her via email on December 31, 2018. Exs. 55, 56. J.J. did not attend on January 8, and claimed the Department did not provide sufficient notice. Ex. 65 at 6. J.J. contacted the provider directly and scheduled the evaluation for January 22, 2019. Ex. 63A. The day before, J.J. contacted the provider, concerned that the appointment may interfere with her visit. Ex. 63A. The provider offered to start the appointment an hour earlier to accommodate her schedule. J.J. agreed, however, she did not attend the appointment. Ex. 63A. The morning of the appointment, J.J. cancelled the appointment, indicating the service was unnecessary and claiming it would leave her too mentally and emotionally drained to visit her children. Ex. 63A; RP at 597-98, 603.

#### **M. Further Fact-Finding**

At the status hearing in January 2019, the court granted the Department's request to reopen the evidentiary hearing and set a date for a fact-finding hearing. RP at 504. The fact-finding hearing was held on January 30, 2019. RP at 510. At the conclusion of the trial, the court

provided an oral ruling that the Department met its burden of proving the elements of RCW 13.34.180(1) by clear, cogent, and convincing evidence and that termination of the parental rights was in the best interest of these children. CP 167-76. The court entered its written findings on March 1, 2019. CP 169-76.

#### IV. ARGUMENT

Although parents have a fundamental liberty interest in the custody and care of their children, the Washington State Legislature has prescribed a statutory scheme that balances this liberty interest with the child's right to a safe and healthy environment. *In re Dependency of K.D.S.*, 176 Wn.2d 644, 652, 294 P.3d 695 (2013) (citation omitted). The Supreme Court has recognized that "it is the court's duty to see that [parental] rights yield, when to accord them dominance would be to ignore the needs of the child." *In re Aschauer's Welfare*, 93 Wn.2d 689, 695, 611 P.2d 1245 (1980).

Before a trial court may terminate parental rights, it must apply a two-step test. First, the trial court must find that the Department proved six elements of RCW 13.34.180 by clear, cogent, and convincing evidence. *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 evidence shows that the ultimate fact in issue is "highly probable." *In re Dependency of K.D.S.*,

176 Wn. 2d at 653 (citation omitted). Second, the trial court must find by a preponderance of the evidence that termination of the parent-child relationship is in the child's best interest. RCW 13.34.190(4); *In re Welfare of A.J.R.*, 78 Wn. App. 222, 228, 896 P.2d 1298 (1995).

**A. Sufficient Evidence Supports the Trial Court's Finding that Department Offered or Provided All Necessary Services**

The termination statute requires that the Department offer or provide all necessary, reasonably available services "capable of correcting the parental deficiencies within the foreseeable future." RCW 13.34.180(1)(d). To meet its statutory burden, the Department must show that it offered the required services and the parent failed to engage in them or that the parent waived his or her right to such services. *In re Welfare of S.V.B.*, 75 Wn. App. 762, 770, 880 P.2d 80 (1994). The Department must tailor the services *In re Dependency of P.D.*, 58 Wn. App. 18, 30–31, 792 P.2d 159 (1990); 108 Wn. App. 149, 161, 29 P.3d 1275 (2001). It is well settled that additional services that might have been helpful need not be offered when a parent is unwilling or unable to make use of the services provided. *In re Dependency of S.M.H.*, 128 Wn. App. 45, 54, 115 P.3d 990 (2005); *In re J.W.*, 111 Wn. App. 180, 187, 43 P.3d 1273 (2002); *In re Dependency of T.R.*, 108 Wn. App. at 163; *In re Dependency of P.A.D.*, 58 Wn. App. 18,

30–31, 792 P.2d 159 (1990); *In re Dependency of Ramquist*, 52 Wn. App. 854, 861, 765 P.2d 30 (1988).

**i. Substantial evidence supports the trial court’s finding that health insurance did not impede access to services**

J.J. argues substantial evidence does not support the trial court’s finding that health insurance did not impede accessing services, specifically, the chemical dependency assessment, individual counseling, and medication management.<sup>1</sup> Appellant’s Br. at 33. Health insurance was not an impediment to services where J.J. could have applied for health insurance online, over the phone, or in person and failed to do so, and in light of her failure to otherwise substantively engage in services.

J.J. left the November 29, 2018 hearing with a copy of her completed health care insurance application. Ex. 53; RP at 619. She knew she could turn it in to the DSHS office in Lakewood, which was across the parking lot from DCYF where she was headed that day to pick up a gift card. RP at 618-19. She picked up the gift card but failed to turn in her application. RP at 618-19. She claimed to rely on her attorney, who planned to fax the application for her. RP at 619. Regardless, the Department informed her

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<sup>1</sup> It appears insurance was not necessary for J.J. to engage in individual counseling with Olympia Psychotherapy, as they were contracted with the Department. Ex. 54. However, J.J. did not follow through with the Department’s initial referral and in mid-January, the social worker determined the agency was no longer partnering with the Department. Ex. 65; RP at 630-631. Regardless, J.J. could have accessed this service at SeaMar Yelm. Ex. 54.

that, although her attorney reported faxing the application, it did not appear to be turned in. RP at 608. Both the social worker and the CASA provided J.J. with contact information so that she could apply for insurance online, over the phone, or in person RP at 623-24, 646. The CASA told her that if she applied via phone, she could be added that day. RP at 646. In addition, J.J. was aware that SeaMar Yelm had staff who could assist with applications for insurance. Ex. 54; RP at 473.

Despite all of these options, J.J. failed to follow through with obtaining insurance. This included failing to go in person to SeaMar Yelm, which was just 10 minutes from where she visited with the children. RP at 632. J.J. claimed she confirmed online she was not eligible, however, the court did not find her testimony credible. CP 171 at 2.9.4. This court does not review credibility determinations. *In re A.V.D.*, 62 Wn. App. 562, 568, 815 P.2d 277 (1991).

Even without health insurance, J.J. had the opportunity to engage in multiple services. The Department referred J.J. for random urinalysis testing, the Personal Horizons domestic violence support group, Protective Parenting Group, and individual counseling multiple times over the course of the dependency. Exs. 37, 54; RP at 39-40, 44-45; CP 110-11. With the exception of one session of her Protective Parenting Group on January 14, 2019 and a few UAs, J.J. failed to follow through with any of the services.

RP at 338-40, 536, 545. The Department also offered a psychological evaluation, and despite the provider's willingness to accommodate J.J.'s schedule, she failed to follow through. Exs 54-56, 65. While the Department faxed her application in for her in January 2019, it appears any additional assistance in submitting her health insurance application would have been futile in light of her unwillingness to otherwise engage in services. RP 626. Substantial evidence supports the trial court's finding that health insurance was not an impediment to services.

**ii. The Department is not required to pay for services where parent has failed to exhaust funding options**

J.J. argues that because the Department would not pay for the chemical dependency assessment, individual counseling, and medication management prior to her obtaining health insurance, it failed to prove by clear, cogent, and convincing evidence that it provided all necessary, reasonably available services. Appellant's Br. at 32-33. Nothing requires the Department to pay for J.J.'s services where J.J. has failed to exhaust funding options.

RCW 13.34.025(2)(b) requires the Department to provide funds for remedial services if the parent is unable to pay, however, it also provides that as a condition for receiving funded remedial service, the court may

require that a parent make appropriate applications for funding to alternative resources for such services. That is the case here.

At the November 29, 2018 hearing, the court ordered J.J. to complete the application for health care coverage in order to access substance abuse and mental health services. Ex. 51; RP at 458, 473. As discussed above, J.J. failed to follow through with obtaining health insurance. Regardless, it appears that an offer to pay for services would have been futile where J.J. failed to engage in multiple other services she could have accessed without insurance. *In re Dependency of T.R.*, 108 Wn. App. 149, 165, 29 P.3d 1275 (2001). Substantial evidence supports the trial court's finding that the Department offered all necessary, reasonably available services.

**iii. The Department provided timely mental health services**

J.J. argues the Department failed to provide timely mental health services. Appellant's Br. at 35. The Department referred J.J. for individual counseling, a psychological evaluation, and medication management; however, she failed to follow through with any of these services and is unwilling to engage in services. Ex. 63A; RP at 30-40, 338, 536, 545.

In March 2017, J.J. completed a parenting assessment. Ex. 27. J.J. reported multiple mental health diagnoses at 17, and reported she had been seeing a psychiatrist since she was a teenager and that he managed her

medications. Ex. 27 at 5. J.J. gave the impression she was currently seeing her psychiatrist, however in actuality she had not seen him since April 2016. Ex. 27 at 5; RP at 33-34, 518.

Regarding mental health services, the parenting assessment provider recommended J.J. engage in individual counseling, continue to address her mental health concerns with her “current provider” and review medication plans for mental health and pain management. Ex. 27 at 12.

That same month, social worker Wiest requested J.J. provide him a list of all of her medications and dosages, however, she did not follow through. RP at 200. While social worker Wiest did not refer J.J. for medication management at that time, at trial J.J. indicated that after M.E. was born in March 2017, she had state insurance and it would cover the cost of medications. RP at 659-60. Further, she had found an agency that could prescribe medication that would accept state insurance. RP at 660-61. However, J.J. apparently failed to follow through. RP at 661. When asked if she made any appointments with that agency J.J. was “not sure what happened with that.” RP at 661.

When the parties next returned to court regarding M.E.’s dependency matter, they entered an agreed order that specifically lined out the requirement that J.J. participate in mental health counseling and medication management. Ex. 10. Regardless, the Department referred J.J.

for individual counseling in May 2018, August 2018, and November 2018. Ex. 54; RP 40, 45; CP 110-11. She failed to follow through with any of these referrals.

In November 2018, the Department referred J.J. for a psychological evaluation. Ex. 54-56; CP 110-11. She failed to appear for two separate appointments, despite the provider's willingness to accommodate her visit schedule. Ex. 63A. She subsequently told the provider she believed the psychological evaluation was unnecessary. Ex. 63A; RP at 669.

Also in November 2018, the Department referred J.J. to SeaMar Yelm for medication management. Ex 54; CP 110-11. SeaMar Yelm also provided counseling services. Ex. 54. Though J.J. needed health insurance in order to access that service, she was aware that SeaMar could assist her in applying for insurance. Ex. 54; RP at 473. However, J.J. failed to go to the agency. RP at 632. She claimed to have called the agency, but could not recall who she spoke with or when. RP at 662-63. The agency was located 10 minutes from where she visited with her children; however, she failed to contact them in person. RP at 632.

At trial, it became apparent J.J. has a history of being inconsistent with mental health treatment. RP 524, 528-29. Over the 12 years J.J.'s psychiatrist treated her, she repeated a cycle of getting off her medication, becoming depressed or more irritable, and then realizing she wanted to take

the medications. RP at 524. J.J. had also missed appointments with her psychiatrist, including April 2016, September 2016, and December 2016. RP at 528-29. Although funding was an issue for J.J. later in the case, it appears that at this time, her stepfather was paying for treatment. RP at 528.

This case is unlike *In re Dependency of T.L.G.*, where the Department failed to identify specific parental deficiencies and to provide obviously needed mental health and anger management services to difficult parents for over a year until they completed a psychological evaluation. *In re Dependency of T.L.G.*, 126 Wn. App. 181, 203, 108 P.3d 156 (2005). In this case, the Department identified specific parental deficiencies and referred J.J. for services, regardless of whether or not she was engaged in her remaining services. Exs. 54-56; RP at 20, 39-40, 43, 533, 630.

In addition, unlike in *In re Dependency of T.L.G.*, where there was no evidence the parents had resisted or refused services, in this case the mother has failed to follow through with individual counseling, a psychological evaluation, and medication management. *In re Dependency of T.L.G.*, 126 Wn. App. at 202.

This case is also unlike *In re Termination of S.J.*, where the trial court found the Department failed to provide all necessary services in part because it took a sequential approach to providing the parent's chemical dependency and mental health services. *In re S.J.*, 162 Wn. App. 873, 881–

82, 256 P.3d 470 (2011). Here, the Department has offered the mother individual counseling despite her failure to follow through with UAs or an updated chemical dependency assessment. Ex. 54; RP at 40, 45; CP 110-11.

A parent who claims she received insufficient services must point to evidence demonstrating how the service, if offered, would have corrected parental deficiencies. *In re Dependency of T.R.*, 108 Wn. App. at 163. In other words, “even where the State inexcusably fails to offer a service to a willing parent, which is not the case here, termination is appropriate if the service would not have remedied the parent’s deficiencies in the foreseeable future[.]”*Id.* at 164. J.J. has repeatedly stated she does not believe she needs the court ordered services. Ex. 54; RP at 46, 113, 117, 134, 154, 333-34. Even if this court finds the Department failed to provide sufficient access to services or failed to timely offer services, such offer was futile where mother unwilling to engage in services. *In re Dependency of T.R.*, 108 Wn. App. at 164. J.J. has failed to show how medication management would have remedied J.J.’s parental deficiencies in the foreseeable future.

In addition, J.J. does not challenge the trial court’s finding that while mental health may be an underlying personal issue for J.J., it is not one of her parental deficiencies that prevents reunification. CP 173 at 2.17. Unchallenged findings are verities on appeal. *In re Mahaney*, 146 Wn.2d 878, 895, 51 P.3d 776 (2002) (citation omitted). Over the course of the 12

years J.J. saw Dr. Sands, her psychiatrist, for mental health treatment, she still struggled with drug and alcohol issues, and her substance use disorder was a diagnosis concurrent with her mental health diagnoses. RP at 524, 528-29. Therefore, it does not appear that medication management would have resolved her substance abuse issues.

Here, the Department referred J.J. for a variety of services targeted at correcting J.J.'s parental deficiencies through multiple years, and she failed to follow through on virtually every referral. Substantial evidence supports the trial court's finding that the Department offered or provided all necessary, reasonably available services.

**B. Sufficient Evidence Supports the Trial Court's Finding There Is Little Likelihood That Conditions Will be Remedied so That the Children Can be Returned to J.J. in the Near Future and J.J. Is Currently Unfit**

J.J. argues the rebuttable presumption under RCW 13.34.180(1)(e) was not met because the Department did not provide all necessary services. Appellant's Br. at 37-38. As outlined above, the Department has offered J.J. all necessary services and the trial court properly found J.J. had not substantially corrected her parental deficiencies in the 12 months following entry of her dispositional order. CP 173 at 2.18.

Where a parent fails to "substantially improve" her parental deficiencies within the 12 months following the juvenile court's

dispositional order, a rebuttable presumption arises that there is little likelihood the parent will remedy conditions so that the child can be returned to the parent's care in the near future. RCW 13.34.180(1)(e). Even if this court finds the Department failed to provide a necessary service, substantial evidence supports the trial court's finding that, even if the presumption does not apply, there is little likelihood that conditions will be remedied so that the children could be returned to J.J. in the near future. CP 173 at 2.18.

This Court does not expect children to wait indefinitely for their parent to change. *In re Welfare of Ott*, 37 Wn. App. 234, 239, 679 P.2d 372 (1984). "When it is eventually possible, but not imminent, for a parent to be reunited with a child, the child's present need for stability and permanence is more important and can justify termination." *In re Welfare of C.B.*, 134 Wn. App. 942, 958–59, 143 P.3d 846 (2006). What constitutes the "near future" depends on the child's age and the circumstances of his or her placement. *In re Dependency of T.L.G.*, 126 Wn. App. at 204.

A person's parenting history and past compliance with services is relevant to whether conditions will likely be remedied in the near future. *In re Dependency of J.C.*, 130 Wn.2d 418, 428, 924 P.2d 21 (1996). Further, the trial court properly considers a parent's lack of insight when determining whether his or her problems are likely to reoccur and the likelihood that

deficiencies will be remedied in the near future. *In re Dependency of C.T.*, 59 Wn. App. 490, 499, 798 P.2d 1170 (1990).

The “near future” must be viewed from the child’s perspective and must consider the child’s age. “Although [an additional one] year may not be a long time for an adult decisionmaker [sic], for a young child it may seem like forever.” *In re Dependency of A.W.*, 53 Wn. App. 22, 32, 765 P.2d 307 (1988) (one to three years was too long for a three year-old). *See also In re Welfare of Hall*, 99 Wn.2d 842, 849–51, 664 P.2d 1245 (1983) (eight months was too long for a four year-old); *In re Dependency of P.D.*, 58 Wn. App. at 27 (six months was too long for a 15 month-old); *In re Dependency of T.R.*, 108 Wn. App. at 164–66 (one year was too long for a six year-old).

J.J. argues substantial evidence does not support the trial court’s finding regarding little likelihood because J.J. did not receive the opportunity to engage in mental health services, claiming J.J. needed mental health services in order to make progress. Appellant’s Br. at 38-39. This is not a case where the parent participated in services but failed to make progress. J.J. completed a chemical dependency assessment and parenting assessment, however, she otherwise failed to substantively engage services. Ex. 27; RP at 338-40, 455, 536, 545, 638. She repeatedly told the Department and providers that she did not need the court ordered and recommended services. Ex. 63A; RP at 46, 113, 117, 134.

She dismissed services as unnecessary and continued to offer excuses for not engaging in services. Ex. 63A; RP at 46, 113, 117, 134. Had she participated in services, it would have taken at least nine months of engaging in services and maintaining progress before the Department could consider reunification. RP at 305, 348, 374. That is not the near future for these children, especially D.E., who at 6 years old is aware he is in limbo. RP at 649.

Regardless, J.J. does not appear to be willing to engage in services and there was no evidence to suggest medication management would have changed her opinion about the necessity of services or otherwise given her insight into her domestic violence relationship. In addition, J.J. does not dispute the trial court's finding that while mental health may be an underlying personal issue for J.J., it is not a parental deficiency that prevents reunification. CP 173 at 2.17. Substantial evidence supports the trial court's finding that there is little likelihood parental deficiencies will be remedied in the foreseeable future.

**i. Substantial evidence supports the trial court's finding that J.J. is unfit due to her domestic violence issues**

J.J. argues that substantial evidence does not support the trial court's finding that J.J. is unfit based in part on her "domestic violence issues," because her status as a domestic violence victim is not a parental deficiency.

Appellant's Br. at 41. Being the victim of domestic violence is not a parental deficiency, the Department did not advance that position, and the trial court made no finding to that effect. J.J.'s "domestic violence issues" are her lack of insight and her apparent unwillingness to acknowledge the domestic violence issues or address them through services. Substantial evidence supports the trial court's finding J.J. is currently unfit based on her domestic violence issues.

In addition to establishing the six elements of RCW 13.34.180(1), the Department must also show whether, at the time of trial, J.J. is currently fit to parent. *In re Welfare of A.B.*, 168 Wn.2d 908, 918–910, 232 P.3d 1104 (2010), as amended (Sept. 16, 2010) (citations omitted). This inquiry turns on "whether the existing parental deficiencies, or other conditions, prevent the parent from providing for the children's basic health, welfare, and safety. *Matter of K.M.M.*, 186 Wn.2d. 466, 493, 379 P.3d 75 (2016). Although domestic violence victims face great challenges, a parent must exercise good judgment to avoid genuine risk of harm to her children. *In re Dependency of G.G., Jr.*, 185 Wn. App. 813, 830, 344 P.3d 234, 243 (2015). In *In re G.G.*, the Washington State Supreme Court affirmed a trial court's termination of parental rights in part because of "her failure to make appropriate choices and participate in recommended services to address

parental deficiencies related to domestic violence trauma that placed her children at risk of harm.” *In re G.G.* at 830.

Like in the mother in *G.G.*, the focus of the trial court’s finding in this case was not J.J.’s status as a domestic violence victim; rather, it was her failure to be protective of herself or her children and her failure to participate in recommended services to address parental deficiencies related to domestic violence trauma that placed her children at risk of harm. CP 173 at 2.15. As the social worker supervisor stated at trial, J.J.’s “lack of insight into her own situation with regard to domestic violence” is the concern. RP at 320.

Although at trial J.J. denied any domestic violence concerns as to her children, she alleged neglect in an earlier protection order petition, and indicated her fear that S.E. will “take off” with the kids or commit suicide if she leaves with the children. Ex. 25; RP at 382, 384, 395.

Further, she appears to be in denial regarding the domestic violence between her and S.E. After the hatchet incident, which she reported to law enforcement but subsequently denied occurred, she described her relationship with S.E. as “perfect.” Ex. 27 at 4; RP at 172, 177, 382, 384, 393. In recounting an incident in which S.E. smashed windows, attempted to cut wires in the car, tased her then boyfriend, and poured gasoline over the car, she characterized him as “spilling” the gasoline” and was quick to

note the incident was “out of character” for S.E. RP at 73, 409. At trial she denied the statements in her protection order petition that S.E. is “extremely violent” and “mentally, verbally, and physically abuse” towards her. RP at 78, 396. J.J. does not have insight into the concerns that brought her children into care and she does not recognize the seriousness of S.E.’s behavior, and as a result, cannot be protective of her children. RP at 37. She is in denial regarding S.E.’s domestic violence issues and she has failed to engage in services to address this parental deficiency. RP at 37.

J.J. argues there is no nexus to her ability to parent, however, the parenting assessment provider offered uncontroverted testimony that the risk to children raised in a domestic violence environment is long-term trauma. RP at 35. Exposure to domestic violence can affect a child’s physical development, social/emotional development, their ability to learn, and their ability to have healthy relationships in the future. RP at 35-36. It can also affect the way the child relates to the parent in that the child takes on the role of being the protector. RP at 36. That provider observed such a dynamic between J.J. and D.E. RP at 36. For example, D.E.’s statement’s “were more to try to protect his mom and her feelings,” he was overly apologetic, and he tried to take ownership of things with his sister. Ex. 27 at 8-9; RP at 36. The provider noted that based on what she read in police

reports, in conjunction with her interview of J.J., J.J. did not understand the danger posed to the children. RP at 31, 204, 345, 410.

Whether it is an unwillingness or inability to recognize and/or acknowledge the domestic violence she is experiencing, her denial of the issue is another indicator of her parental deficiency. In *In re S.M.H.*, the mother of the children refused to sever her relationship with a boyfriend who was a sexual predator and refused to acknowledge that he was even a risk to her children. *In re Dependency of S.M.H.*, 128 Wn. App. 45, 57–58, 115 P.3d 990, 997 (2005). The appellate court thus affirmed the trial court’s termination of the mother’s parental rights in part because she was unable to comprehend the risk posed by her partner. *In re Dependency of S.M.H.*, 128 Wn. App. at 57–58. In a similar case, the court affirmed a trial court’s termination order as to the mother because of her “passivity and her inability to protect the children, particularly from KL.” *In re Welfare of L.N.B.-L.*, 157 Wn. App. 215, 254, 237 P.3d 944, 964 (2010). Further, a doctor opined that even if she separated from KL, she could not protect her child’s safety because she was either “either unwilling or unable to use the services to sufficiently improve her ability to raise and protect her children.” *Id.* at 251. Here, J.J. is similarly unable to comprehend the risk posed to her children. J.J. also expressed an unwillingness to change her situation because despite

multiple no-contact orders, she still lived with S.E. and told multiple people she intended to carry on a relationship up to the point that he was put in jail.

J.J. argues there are no concerns if S.E. is incarcerated and she is not currently engaged in a relationship. Appellant's Br. at 44. However, J.J. appears to continue to be protective of S.E., as she was during the parenting assessment. Ex. 27 at 3,10; RP at 31, 73, 409. J.J. has failed to engage in services to address the domestic violence issues, including the Protective Parenting Group, which would have addressed this issue specifically, as it teaches parents to be protective by prioritizing the children over their relationship. RP at 33. The parent assessment provider opined that without engaging in services to address the domestic violence issues, the provider was not convinced that J.J. did not intend to continue her relationship with S.E. RP at 37. If J.J. has not engaged in services or even acknowledged the issues, there is nothing to suggest that she will not return a domestic violence relationship, as is her pattern. Ex. 27. Thus, substantial evidence supports the trial court's finding that J.J. is unfit due to her unaddressed domestic violence issues.

**ii. Substantial evidence supports the trial court's finding that J.J. is unfit due to her substance abuse issues**

J.J. argues the Department failed to connect J.J.'s parenting deficiencies to her inability to parent. Appellant's Br. at 46-47. Specifically,

J.J.'s substance abuse issues and the "condition of the home." *Id.* As to the condition of the home, the Department did not allege, and the trial court did not find that the condition of the home was a parental deficiency.

As to the substance abuse issues, J.J. has denied her substance use throughout this case. She failed to disclose to the Department or her providers a prior substance use disorder diagnosis from her psychiatrist, from when she started seeing him in 2004. Ex. 27; RP at 519. She failed to inform her parenting assessment provider she tested positive for amphetamines at M.E.'s birth in March 2017. Ex. 27. Substantial evidence supports the trial court's finding that one of J.J.'s parental deficiencies is substance abuse.

J.J. argues that because she only tested positive on one other occasion- in November 2018, when she tested positive for amphetamines and methamphetamines- that her use was not extensive. Appellant's Br. at 46. However, the November 2018 test is the only truly random UA J.J. has completed. At a Department meeting in October 2017, J.J. refused to provide a UA. RP at 365. In early August 2018, J.J. provided a negative UA; however, she had received seven days advance notice of the UA. RP at 338. Five days later the social worker referred J.J. for a random UA. RP at 339-41. J.J. requested it be referred two days later. RP at 339-41. That UA, though negative, was diluted. RP at 339. J.J. failed to follow through

with subsequent UAs. RP at 339-49. Throughout the dependency, J.J. has otherwise failed to engage in urinalysis testing, offering various excuses. RP at 130, 194, 199, 249, 339, 365. In the two months the court continued trial in November 2018, J.J. failed to follow through with two random UAs. RP at 638, 630-31;

J.J. argues her initial chemical dependency evaluation is proof she does not have a problem, as it makes no further recommendations. Appellant's Br. at 46. However, that evaluation was based entirely on self-report. RP at 199. Regardless, per the parties agreed order in August and per the court's order in November 2018, J.J. was required to complete a new chemical dependency assessment. Ex 16; CP 110-11. She failed to follow through.

J.J. has failed to admit her substance use issues, claiming her positive UA from November 2016 was "impossible." RP at 670. Her alleged Sudafed usage does not account for the positive results over the course of this case. RP at 547. J.J. argues that the lack of testimony she appeared intoxicated is further proof that her use is not extensive. Appellant's Br. at 46. But signs of in person intoxication is not the only indication of substance use. As social worker Dart testified, instability in an individual's life, a lack of communication, as well as lack of motivation outside of obtaining certain substances are indicators of use. RP at 347.

J.J.'s substance use affected her ability to maintain stability in her life. RP at 95, 347. J.J. reported residing with a friend in Yelm since April 2018. RP at 95. J.J. does not work. RP at 123-24. With the exception of one Protective Parenting Group, she has failed to engage in services and yet she is consistently late to visits, even after moving them to Yelm. RP at 557-58. Her stepfather had to obtain a protection order in order to have her removed from his home after she stole money from him. Ex. 34; RP at 87, 138. She does not have stable housing and has failed to follow through with housing assistance, including an intake appointment for housing. RP at 217, 276, 368. She refuses to consider living in clean and sober housing. RP at 217. When she has had housing, it has been under deplorable conditions. Ex. 33; RP at 65, 177.

J.J. has been unable to show stability such that she could provide for the children's basic health, welfare and safety, and is currently unfit. Substantial evidence supports the trial court finding J.J. is currently unfit due in part to her substance abuse issues.

**C. The trial court did not violate J.J.'s right to procedural due process when it provided J.J. the opportunity to present all relevant evidence prior to making its decision**

Generally, the appellate court does not consider issues raised for the first time on appeal. RAP 2.5(a). However, a party may raise a claimed manifest error affecting a constitutional right for the first time in appellate

court. RAP 2.5(a)(3). An error “is manifest if either it results in actual prejudice, ... or the party makes a plausible showing that the error had practical and identifiable consequences to the trial.” *Matter of Det. of Monroe*, 198 Wn. App. 196, 201, 392 P.3d 1088 (2017). Because J.J. did not object below to the continuance, the interim status conferences, or the court’s consideration of best interests when setting the shortened timeline, she must demonstrate that the process was a manifest error affecting a constitutional right. J.J. fails to do so here, where the trial court provided J.J. greater procedural due process when it: *more* precisely formulated the issues, allowed *more* time, and ruled on the basis of *more* competent evidence.

The process due to parents at risk of deprivation of parental rights 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. *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).

Courts have long recognized that a biological parent has a fundamental liberty interest in the care, custody, and control of his or her child, but that this fundamental right is not absolute. *In re A.V.D.*, 62 Wn.

App. 562, 567, 815 P.2d 277 (1991). The State has two interests at stake in a termination proceeding: a *parens patriae* interest and a fiscal and administrative interest. The *parens patriae* interest is in preserving and promoting the welfare of the child. This interest is “urgent” and its goal is to provide the child with a safe, stable, and permanent home, and speedy resolution of any dependency or termination proceedings.

However, a child also has the “right to basic nurturing, which includes the right to safe, stable, and permanent home and the speedy resolution of . . . termination proceedings. *In re Dependency of T.R.*, 108 Wn. App. 149, 154, 29 P.3d 1275, 1279 (2001). “When the rights of a child conflict with the rights of a parent, the rights of the child prevail.” *In re Dependency of T.R.*, 108 Wn. App. at 154 quoting *In re Dependency of K.R.*, 128 Wn.2d 129, 146, 904 P.2d 1132, 1141 (1995) and 13.34.020

- i. **A trial court’s oral ruling is not binding and thus, it did not violate J.J.’s procedural due process rights when after its oral ruling, the court declined to enter findings and instead continued trial**

J.J. argues the trial court violated due process when expressed in its oral ruling it could not make findings and continued trial instead of dismissing the petition. Appellant’s brief at 21-27. However, this argument belies case law on how courts do and may render judgments.

Washington courts have long held that “a trial judge’s oral decision is no more than a verbal expression of his informal opinion at that time . . . and may be altered, modified, or completely abandoned. It has no final or binding effect, unless formally incorporated into findings, conclusions, and judgment.” *DGHI, Enterprises v. Pac. Cities, Inc.*, 137 Wn.2d 933, 944, 977 P.2d 1231 (1999) (quoting *Ferree v. Doric Co.*, 62 Wn.2d 561, 566–67, 383 P.2d 900 (1963)). Until final judgment is entered, the trial judge is not bound by a prior expressed intention to rule in a certain manner. *DGHI, Enterprises*, 137 Wn. 2d at 944. Further, the trial court has broad discretion to give further study to the issues and to consider additional evidence after rendering an oral decision. *In re Marriage of Harshman*, 18 Wn. App. 116, 120, 567 P.2d 667 (1977), *disapproved of by In re Marriage of Johnson*, 28 Wn. App. 574, 625 P.2d 720 (1981), *abrogated by Elam v. Elam*, 97 Wn.2d 811, 650 P.2d 213 (1982).

In this case, despite the trial court’s oral ruling as to the areas with which it struggled in making a decision regarding this case, the trial court was specific that it was continuing the matter without findings by the court. RP at 431, 441, 446. The court did not enter any written finding regarding whether or not the Department had met its burden or incorporate any of its oral ruling into written findings. Thus, the statements in the oral ruling are not binding.

J.J. also asserts that the trial court erred by not dismissing the dependency petition. Appellant's Br, at 21. As noted in *In re Dependency of T.R.*, the statute does not require that termination orders be entered within a specified period after the fact-finding. *In re Dependency of T.R.*, 108 Wn. App. 149, 29 P.3d 1275 (2001). Nor does it require that the termination matter be dismissed. Here, the trial court noted that it could not make a finding without additional information and opined there were many issues that left the court with the need to "get to the heart of where we are." RP at 431, 436, 441. Thus, it ordered a continuance. RP 441. Like *T.R.*, it was well within the courts authority to order a continuance in order to obtain additional information, and the decision to continue trial did not violate J.J.'s procedural due process rights.

**ii. The Trial Court did not violate J.J.'s procedural due process rights in issuing its oral ruling because it gave her adequate notice and the opportunity to be heard**

As stated above, to prove a procedural due process violation, the court balances (1) J.J.'s private interest; (2) the risk of error; and (3) the State's interest. *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). "Termination of parental rights can be ordered only after the statutory factors are provided by a required standard of proof at fact-finding hearing in which the parent is afforded the right to be represented by counsel, to introduce evidence, to be heard, and to examine

witnesses.” *In re Dependency of T.R.*, 108 Wn. App. 149, 158, 29 P.3d 1275 (2001) (citing RCW 13.34.090(1), 180(4)). “Fundamental fairness may be maintained in parental rights termination proceedings even when some procedures are mandated only on a case-by-case basis, rather than through rules of general application.” *In re Dependency of T.R.*, 108 Wn. App. 149, 160, 29 P.3d 1275 (2001) quoting *Santosky v. Kramer*, 455 U.S. 745, 766, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982).

This case is distinguished from *In re Welfare of Shantay C.J.*, 121 Wn. App. 926, 91 P.3d 909 (2004), where the trial court violated the parents’ rights to due process by failing to reconvene the fact-finding hearing before entering an order terminating the parent’s rights where the trial court had concluded after the initial fact-finding hearing that the Department had not met its burden of proof for termination. The court’s process in this case resulted in a complete record unlike the court in *Shantay C.J.*

A balancing of the *Mathews* factors establishes that the trial court’s process in this case did not violate J.J.’s procedural due process rights. In this case, the trial declined to enter findings, continued trial, and subsequently reopened the record before making her findings. This allowed the parties the opportunity to introduce evidence, to be heard, and to examine witnesses. RP at 431, 441, 446, 510. Additionally, the court based

its ultimate findings of fact and conclusions of law solely on the evidence properly adduced at trial that the state had met its burden. CP 169-76. There is no likelihood of erroneous deprivation of J.J.'s parental rights where the court provided J.J. the opportunity to present all relevant evidence for the trial court to consider prior to making its decision regarding the termination of parental rights. Thus, the court's process in this matter did not violate J.J.'s procedural due process rights.

**iii. Trial court's status hearings also did not violate due process**

J.J. argues the trial court violated procedural due process when it held two status hearings during the termination trial. Appellant's Br. at 27. The status hearings did not violate procedural due process where the trial court's findings only relied on admissible evidence from the fact-finding.

At the conclusion of the court's oral ruling, the court set a status hearing to confirm services and set another date for resolving trial. RP at 434. At that hearing, the court set a second status hearing as a "check-in" and an opportunity for either party to request to reopen the evidentiary hearing. RP at 490. At the second status hearing on January 15, 2019, while the court necessarily obtained information on J.J.'s compliance with the court's interim orders, it was in the context of whether and when the court should reopen the evidentiary hearing. RP at 495-508. The trial court based

its ultimate findings on the admissible evidence presented at trial, and there is nothing to suggest the trial court relied on information from these status hearings that was not otherwise introduced during trial. Thus, the status hearings held by the court did not violate J.J.'s due process rights.

**iv. Trial court's consideration of children's best interests when scheduling continuance did not violate due process**

J.J. argues the trial court violated due process by continuing the termination for a short amount of time based on the children's best interest. Appellant's Br. at 29.

It is undisputed that only after the Department has proven the six factors listed in RCW 13.34.180(1) by clear cogent convincing evidence, can the Department move onto the second prong: proving by a preponderance of the evidence that *termination* is in the children's best interest. RCW 13.34.190. Regardless, the overriding goal of a termination proceeding is to serve the children's best interests. *In re Dependency of A.W.*, 53 Wn. App. at 33.

After the initial fact-finding, the trial court ordered that the termination matter be continued without findings by the court. RP at 431, 441, 446. In considering the length of the continuance, the court noted it needed to keep the cases on a "relatively short timeline" because permanency is in these children's best interest. RP at 434. The court

considered the children's best interest in the context of the appropriate length of a continuance, not whether an order terminating parental rights was in the children's best interest.

J.J. also argues the court impermissibly weighed J.J.'s access to services against the children's best interest in setting a short continuance. Appellant's Br. at 30. The legislature has directed courts to resolve conflicts between the rights of parents and children in favor of the child in proceedings of this nature. RCW 13.34.020. That includes the child's right to a permanent home and a speedy resolution of these proceedings. RCW 13.34.020. At the first status hearing, the court observed that J.J. could have accessed services had she been diligent, noting that in the meantime, the children remained in foster care. RP at 446-67. The trial court did not violate due process when it weighed the children's right to a speedy resolution against J.J.'s interest in having additional time to engage in services, and determined a short continuance was in the children's best interest. The trial court's consideration of the children's best interest in this context does not violate due process.

## **V. CONCLUSION**

The Department respectfully requests that this Court affirm the trial court's order terminating J.J.'s parental rights in D.E., V.E., and M.E. The trial court properly found that the Department offered J.J. all court-ordered

and reasonably available necessary services to correct her parental deficiencies in the foreseeable future, that J.J. was unfit, and that there was little likelihood the parental deficiencies could be corrected in the near future. Further, the trial court afforded J.J. her procedural due process rights where the court held an evidentiary hearing after continuing trial for two months, and based its ruling on competent evidence. Because the findings of fact support the trial court's conclusions of law and the trial court did not violate J.J.'s procedural due process rights, this Court should affirm.

RESPECTFULLY SUBMITTED this 26<sup>th</sup> day of July, 2019.



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MARLO S. OESCH  
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WSBA #41887

## DECLARATION OF SERVICE

I, Melanie Wimmer, declare under penalty of perjury under the laws of the state of Washington that the following is true and correct:

On July 26, 2019, I caused a true and correct copy of the Response of the Department of Children, Youth, and Families to Motion for Accelerated Review to be filed electronically with the Court of Appeals, Division II, and to be served on the parties electronically through the Court's filing system.

SIGNED in Tacoma, Washington, this 26<sup>th</sup> day of July, 2019.



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