IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Dependency of B.B., DOB: 07/31/15, STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES, Respondent, v. M.C., Appellant.	No. 77686-0-I (Consolidated with No. 77687-8-I and No. 77688-6-I) DIVISION ONE UNPUBLISHED OPINION FILED: January 22, 2019

CHUN, J. — M.C. appeals the trial court's orders terminating her parental rights to her son and denying the appointment of a dependency guardian. She contends that the order of termination must be reversed because the Department of Children and Youth Services[1] did not meet its burden under RCW 13.34.180(1)(f) to prove that continuation of the parent-child relationship clearly diminished her son's prospects for early integration into a stable and permanent home. She also argues that the trial court erred by improperly weighing the competing guardianship and termination petitions and in finding that guardianship was not in her son's best interest. We affirm.

[1] At the time of the termination trial, the agency was named the Department of Social and Health Services. See RCW 43.216.906.

BACKGROUND

M.C. is the mother of B.B., born July 31, 2015. D.B. is B.B.'s father.[2] Both M.C. and B.B. tested positive for opiates at B.B.'s birth. The Department filed a dependency petition. B.B. was removed from M.C.'s care at the hospital and placed with M.C.'s sister, Katelyn Polson.

Polson ultimately became unable to care for B.B. due to the needs of her own children, and in December 2015, the Department held a meeting to discuss alternative placement options. M.C. "wasn't really talking to [D.B.'s] family" and was "adamantly opposed" to B.B. being placed with any of his paternal relatives. M.C. particularly disliked Samantha Franklin, B.B.'s paternal aunt, and stated that B.B. would only be placed with the Franklin family "over her dead body." D.B. agreed that placement with any of his family members would cause "too much conflict."

Instead, M.C. agreed that B.B. should be placed with Dianna and David Rule, Polson's mother-in-law and father-in-law. Because the Rules were not biologically related to either M.C. or D.B., they were "kind of like Switzerland" with regard to family dynamics. B.B. has lived with the Rules ever since.

The Franklins continued to express an interest in caring for B.B., and the record indicates that they babysat B.B. frequently. However, M.C. remained opposed to B.B.'s placement with the Franklins. In March 2016, M.C.'s attorney sent an email to the Department social worker reiterating M.C.'s objections to B.B. living with paternal relatives.

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[2] D.B. relinquished his parental rights to B.B. and is not a party to this appeal.

M.C. used heroin and methamphetamines throughout the dependency proceedings. She did not participate in any of the remedial services ordered by the juvenile court, and rarely visited B.B. In December 2016, the Department filed a petition to terminate M.C.'s parental rights. M.C. continued to support B.B.'s placement with the Rules and described them as "like family."

Sometime thereafter, M.C. reconciled with the Franklins, and in March 2017, M.C. requested that the juvenile court adopt a plan of guardianship with the Franklins for B.B. By this time, B.B. had lived with the Rules for more than 15 months, the vast majority of his young life. In May 2017, M.C. filed a petition to appoint the Franklins as B.B.'s dependency guardians.

Trial on the termination and guardianship petitions began in July 2017. At the time of trial, B.B. was two years old and had lived with the Rules since he was five months old.

The Department presented the testimony of Dr. Joanne Solchany, a psychiatric nurse practitioner and family therapist, who conducted a "Child Psychiatric Attachment Evaluation." Dr. Solchany observed B.B. with the Rules, with the Franklins, and with M.C. Dr. Solchany testified that B.B. obviously felt "extremely comfortable" with the Franklins and the Franklins "were loving and attentive." However, Dr. Solchany concluded that Dianna Rule, who B.B. called "Mom," was B.B.'s primary attachment figure. Dr. Solchany testified that the impact of removing B.B. from the Rules would be devastating.

> [B.B.] would be going from being with caregivers who have been stable in his life for the past 18 months. Losing these caregivers would be paramount to experiencing the deaths of both his

> caregivers at the same time. Losing one caregiver for a young child can be devastating. Losing both can cause intense grief and trauma that can impact the child throughout his childhood.

Dr. Solchany also testified that termination, not a guardianship, was in B.B.'s best interest. She stated that guardianships were most appropriate for older children who "had a good relationship with" their biological parents. Dr. Solchany testified that B.B.'s bond with M.C. was poor. She stated:

> My concern is that, especially with the family dynamics that have been described in all of the documents I've reviewed, that in this family, there seems to be a lot of kind of "if I'm mad at you, then I take things away. If I'm not mad at you, then I like you and we'll go do these things."
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> My concern would be that [B.B.] would be in a situation where he would never feel that sense of permanency and there would always be a risk of somebody intruding and disrupting his life, whether that be for trying to vie for more rights later on or, you know, keeping this child involved in some kind of a court process when things came up or disagreements happened.

M.C. presented the testimony of Emma Puro, a social worker who conducted a private home study for the Franklins. Puro testified "that it's in [B.B.'s] best interest to be raised amongst his family by his aunt, that they are people that know and love him, and it would be a fairly easy transition, and in the long term, in his best interest." Puro agreed with Dr. Solchany that adoption, rather than guardianship, was preferable for a child B.B.'s age.

After hearing testimony from 14 witnesses and reviewing 65 exhibits, the trial court entered findings of fact and conclusions of law and an order terminating M.C.'s parental rights to B.B. The trial court concluded that a guardianship with the Franklins was not in B.B.'s best interest and denied M.C.'s guardianship petition. M.C appeals.

ANALYSIS

To terminate the parent-child relationship, the Department must prove each of the following six statutory elements by clear, cogent, and convincing evidence:

> (a) That the child has been found to be a dependent child;
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> (b) That the court has entered a dispositional order pursuant to RCW 13.34.130;
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> (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;
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> (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;
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> (e) That there is little likelihood that conditions will be remedied so that the child can be returned to the parent in the near future . . . [and]
>
> (f) That the continuation of the parent and child relationship clearly diminishes the child's prospects for early integration into a stable and permanent home.

RCW 13.34.180(1). If all of these elements are proven, the trial court must also find by a preponderance of the evidence that termination is in the "best interests" of the child. RCW 13.34.190(1).

Although the burden of proof is different, the first five statutory elements for guardianship and termination are identical. See RCW 13.36.040(2)(c)(i)-(v). Unlike a termination, however, the court is not required to find as a prerequisite to establishing a guardianship that continuation of the parent-child relationship clearly diminishes the child's prospects for early integration into a stable and

permanent home. In addition, the court must find by a preponderance of the evidence that "it is in the child's best interests to establish a guardianship, rather than to terminate the parent-child relationship and proceed with adoption, or to continue efforts to return custody of the child to the parent." RCW 13.36.040(2)(a).

When a court is faced with petitions both for termination and for a dependency guardianship, the court must first consider the dependency guardianship as an alternative to termination. In re Dependency of A.C., 123 Wn. App. 244, 246, 98 P.3d 89 (2004). "If guardianship is not preferable, then the court must decide whether continuing the parent's relationship with the child would diminish the child's prospects for early integration into a stable and permanent home, such that parental rights should be terminated." A.C., 123 Wn. App. at 246.

This court reviews an order of termination to determine whether the findings of fact are supported by substantial evidence in the record and whether the findings support the conclusions of law. In re Dependency of C.B., 79 Wn. App. 686, 692, 904 P.2d 1171 (1995). We treat unchallenged findings of fact as verities. In re Interest of J.F., 109 Wn. App. 718, 722, 37 P.3d 1227 (2001).

M.C. first argues that that the best interests standard of RCW 13.36.040(2)(a) is unconstitutional and violates substantive due process because "[t]he law is not narrowly tailored if it allows the court to choose between guardianship and termination solely on the basis of the best interests of the child." She contends that "because the State's compelling interest is preventing

harm, not choosing the best home for a child, a viable guardianship alternative can be rejected only if it would be harmful, not because the government prefers the home it has chosen."

But M.C.'s argument misapprehends the nature of the guardianship statute. In making the best interests determination, a trial court is not tasked with merely determining that a specific guardianship placement is in the child's best interest.[3] Rather, a trial court is required to find that dependency guardianship rather than termination is in the child's best interest. While the circumstances of a specific placement may be relevant to this determination, a trial court should consider a variety of "case-specific factors relevant to the best interests of the child," including "the strength and nature of the parent-child bond; the benefit of continued contact with the parent or extended family; [and] the likelihood the child would be adopted if parental rights were terminated." A.C., 123 Wn. App. at 255.

Here, the trial court's finding that a dependency guardianship was not in B.B.'s best interest was not based solely on a determination that the Rules' home was preferable to the Franklins' home. The trial court found that dependency guardianship, in general, would not "offer the permanency and security necessary for the child's development." This finding was supported by substantial evidence. Both Dr. Solchany and Puro testified that termination of

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[3] The dependency guardianship statute requires a separate finding that "the proposed guardian is qualified, appropriate and capable of performing the duties of guardian under RCW 13.36.050" or "[t]he proposed guardian has signed a statement acknowledging the guardian's rights and responsibilities toward the child and affirming the guardian's understanding and acceptance that the guardianship is a commitment to provide care for the child until the child reaches age eighteen." RCW 13.36.040(2)(b), -(c)(vi) (emphasis added).

parental rights was preferable based on B.B.'s age and his lack of a bond with M.C. Dr. Solchany also testified that the potential for modification inherent in a dependency guardianship would be too disruptive for B.B.

Moreover, the trial court found that "[r]emoval from his current placement would be detrimental to [B.B.'s] long-term welfare" and "[i]t would be tantamount to a death in the child's life to be severed from Mr. and Mrs. Rule." These findings were also supported by substantial evidence. M.C. does not challenge the trial court's findings that "[B.B.]'s primary attachment is with his current caregiver" and "[B.B.] is strongly bonded to the current caregivers, more than to the Franklins." These findings are verities on appeal. And Dr. Solchany testified at length about the negative effects of removing B.B. from the Rules' home and placing him with a different family.

M.C. argues that the best interests standard violates the two-part structure of the termination statute and "essentially renders meaningless the requirement of RCW 13.34.180(1)(f)." But it is well settled that "the availability of a guardianship is material to whether the State can meet its burden to prove RCW 13.34.180(1)(f)." In re Welfare of R.H., 176 Wn. App. 419, 428, 309 P.3d 620 (2013). And, as Division Two of this court held in Matter of J.B., 197 Wn. App. 430, 438, 387 P.3d 1152 (2016), RCW 13.34.180(1)(f) "implicitly touches on the best interest of the child standard."

> Thus, when the juvenile court considers whether termination element (f) has been established, R.H. allows it to consider the proposed potential guardianship. R.H., 176 Wn. App. at 428-29. In turn, that guardianship can only be established by determining whether it is in the child's best interest, which requires consideration of the parent-

> child bond and the potential adoptive home. Id.; A.W., [182 Wn.2d 689, 711-12, 344 P.3d 1186 (2015)]. Coming full circle, when a juvenile court determines whether element (f) is established, it necessarily considers to some degree what is in the child's best interest. Cf. In re Dependency of K.D.S., 176 Wn.2d 644, 656, 294 P.3d 695 (2013).

J.B., 197 Wn. App. at 439-40.

M.C. next argues that the trial court erred in denying her guardianship petition because guardianship, not termination, was in B.B.'s best interest. M.C. argues that the trial court should have rejected Dr. Solchany's conclusion that removing B.B. from the Rules' home would be devastating to his well-being and that the Franklins would not adequately protect B.B. in interactions with M.C. But this argument goes to the weight and persuasiveness of the evidence and is therefore beyond the scope of our review. See In re Dependency of A.V.D., 62 Wn. App. 562, 568, 815 P.2d 277 (1991) (this court defers to the trier of fact on issues of conflicting testimony, credibility of the witnesses, and the weight or persuasiveness of the evidence).

Finally, M.C. contends that the trial court erred in finding that the Department met its burden to prove that the continuation of the parent-child relationship impeded B.B.'s prospects for early integration into a stable and permanent home, as required by RCW 13.34.180(1)(f). The Department can satisfy RCW 13.24.180(1)(f) by proof that (1) prospects for a permanent home exist but the parent-child relationship prevents the child from obtaining that placement or (2) the parent-child relationship has a damaging and destabilizing effect on the child that would negatively impact the child's integration into any permanent and stable placement. R.H., 176 Wn. App. at 428.

M.C. argues that because either the Rules or the Franklins would have been willing to become B.B.'s dependency guardians, B.B. could achieve permanency without M.C.'s parental rights being terminated.[4] But there was no petition before the court to appoint the Rules as guardians. See In re Dependency of I.J.S., 128 Wn. App. 108, 121, 114 P.3d 1215 (2005) (a court need not consider a dependency guardianship as an alternative to termination when no petition has been filed). And, as discussed above, the trial court properly denied M.C.'s guardianship petition because guardianship with the Franklins was not in B.B.'s best interest.

We affirm the trial court's order terminating M.C.'s parental rights to B.B. and denying M.C.'s guardianship petition.

Chun, J.

WE CONCUR:

Leach, J.

Dwyer, J.

[4] M.C.'s reliance on In re Welfare of S.V.B., 75 Wn. App. 762, 880 P.2d 80 (1994) is misplaced. In S.V.B., the court held that it was error to terminate the parental rights of a child who was already in a dependency guardianship because the parent-child relationship did not interfere with the child's permanent home.