IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Dependency of A.A., D.O.B. 1/12/2015, STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES, Respondent, v. SUDI SHIRE, Appellant.	)	No. 78021-2-I DIVISION ONE UNPUBLISHED OPINION FILED: January 22, 2019

MANN, J. — The Department of Social and Health Services (Department) petitioned for the termination of Sudi Shire and Abdisalam Ahmed's parental rights of their child, A.A. Prior to the termination proceeding, A.A.'s prospective adoptive parents offered Shire and Ahmed an open adoption agreement. While Ahmed agreed to the settlement, Shire declined and proceeded to trial. The trial court then granted the Department's petition for termination. Shire appeals. We affirm.

I.

Sudi Shire is the mother and Abdisalam Ahmed is the father of A.A., a child born in January 2015. In January 2016, the Department received a referral alleging negligent treatment and maltreatment of A.A., and suspected drug abuse and criminal activity by both of the parents. The referral also indicated concerns about domestic violence between the parents.

A Child Protective Services (CPS) social worker met with the parents on January 8, 2016. A.A. appeared healthy and active and both parents denied the allegations in the referral. Over the next two months, CPS reached out to the parents on two different occasions but neither responded. Then on March 3, 2016, CPS reached out to the housing complex that the family was living in and learned that due to their failure to pay rent, the housing complex had initiated eviction proceedings against the parents.

On April 5, 2016, the housing complex informed CPS that the family had been evicted. CPS social workers then contacted A.A.'s maternal grandmother, who informed CPS that A.A. had been living with her but was back with Shire. The maternal grandmother also informed CPS that she was concerned about A.A.'s safety because Ahmed could be very violent and because both parents were using heroin.

Over the next month, CPS continued its attempt to contact both parents. Then on April 21, 2016, Shire's uncle informed CPS that Shire had returned to her mother's house with A.A. A social worker responded to the home and was able to make contact with Shire. Shire admitted that she and Ahmed regularly used heroine, which contributed to her eviction, family issues, and inability to engage with Departmental

services. Shire then agreed to leave A.A. at her mother's home and to go to a detox and inpatient treatment center. Shire did not remain at the center, however.

On May 11, 2016, the Department held a Family Team Decision meeting. Shire and Ahmed were invited but did not attend. At the meeting, A.A.'s grandmother agreed to take primary care of A.A. and the Department decided to file a dependency petition.

On May 18, 2016, A.A. was officially removed from the custody of his parents and has not returned home since. A.A. was found to be dependent as to Ahmed on July 22, 2016 and as to Shire on August 19, 2016. The dependency court placed A.A. in the care of his maternal grandmother, and allowed Shire to have visits with A.A. twice a week.

The dependency court also ordered Shire to participate in services including a drug evaluation and treatment recommendations, random urinalysis testing, a psychological evaluation, and parenting classes. The Department made repeated attempts to involve Shire in these services. Social workers repeatedly referred Shire for random urinalysis testing, referred her to drug and alcohol evaluations, took her to psychological evaluations, and scheduled visits with her and A.A.

Despite the Department's assistance, Shire has not completed any of the court ordered services. Shire has also only visited A.A. at most ten times since the dependency hearing. Shire was also arrested on a criminal warrant after removing A.A. from her grandmother's home, without authorization, and taking him to the jail where Ahmed was incarcerated. Shire further admitted to using both heroin and methamphetamine, admitted to missing and being late to appointments with social workers, and admitted to spending time with Ahmed despite a no-contact order.

Based on Shire's failure to engage meaningfully in court ordered services and failure to maintain a relationship with A.A., on July 10, 2017, the Department petitioned for termination of her and Ahmed's parental rights. Over the course of three days in January 2018, the trial court held a termination hearing. Initially, both Ahmed and Shire appeared and contested the petition. Then, after the second day of hearings, Ahmed agreed to voluntarily relinquish his parental rights in an open adoption settlement offer with A.A.'s prospective adoptive parents. In the agreement, Ahmed was granted limited contact with A.A. Shire was also offered the open adoption agreement but declined to voluntarily relinquish her parental rights and opted to contest the termination petition.

On January 16, 2018, the trial court granted the Department's petition for termination of Shire's parental rights. The court determined that Shire was offered and understood what services she was required to complete, but that she had not followed through on any of them. Shire "admitted candidly [to] using heroin to self-medicate." Shire "[i]nexplicably . . . failed to take advantage of the majority of the visits that were provided with [A.A.,] . . . . understands that [A.A.] should not have to wait . . . to obtain stability in his own life[,] . . . [and A.A.] has some special needs that Ms. Shire hasn't even inquired about." The court further determined that termination was in the best interest of A.A.

II.

Shire does not dispute the trial court's findings or conclusion supporting the termination of her parental rights.[1] Instead, for the first time on appeal Shire asserts

[1] Shire does not argue that the Department failed to prove by clear, cogent, and convincing evidence that the statutory factors for termination in RCW 13.34.180(1) were met. Therefore, we do not address the sufficiency of the Department's evidence.

that RCW 26.33.295, the open adoption agreement statute, and RCW 13.34.200, the statute revoking a biological parent's legal standing after parental rights are terminated, was unconstitutional as applied to her proceeding. Shire contends that she should have been allowed to seek an open adoption agreement after the termination order was entered. We disagree.

We review constitutional challenges de novo. Dependency of M.-A.F.-S., 4 Wn. App. 2d 425, 445, 421 P.3d 482 (2018). Statutes are presumed constitutional and the burden falls to the "challenger of a statute [to] prove beyond a reasonable doubt that the statute is unconstitutional." In re Welfare of A.W., 182 Wn.2d 689, 701, 344 P.3d 1186 (2015).

RCW 26.33.295 provides birth parents the ability to voluntarily relinquish their parental rights to adoptive parents in exchange for some contact with the child.

> Agreements regarding communication with or contact between child adoptees . . . and a birth parent or parents shall not be legally enforceable unless the terms of the agreement are set forth in a written court order entered in accordance with the provisions of this section. The court shall not enter a proposed order unless the terms of such order have been approved in writing by the prospective adoptive parents, any birth parent whose parental rights have not previously been terminated, and, if the child or siblings of the child are in the custody of the department or a licensed child-placing agency, a representative of the department or child-placing agency. . . . The court shall not enter a proposed order unless the court finds that the communication or contact with the child adoptee, as agreed upon and as set forth in the proposed order, would be in the child adoptee's best interests.

RCW 26.33.295(2).

RCW 13.34.200 provides in pertinent part:

> Upon the termination of parental rights . . . all rights, powers, privileges, immunities, duties, and obligations, including any rights to custody, control, visitation, or support existing between the child and parent shall be severed and terminated and the parent shall have no standing to appear at any further legal proceedings concerning the child.

A.

Shire did not raise her constitutional concerns below and "a party generally waives the right to appeal an error unless there is an objection at trial." State v. Kalebaugh, 183 Wn.2d 578, 583, 355 P.3d 253 (2015). RAP 2.5(a)(3) provides an exception to that general rule for a "manifest error affecting a constitutional right." Appellate courts "will not sanction a party's failure to point out at trial an error which the trial court, if given the opportunity, might have been able to correct to avoid an appeal and a consequent new trial." State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). In order to establish a manifest constitutional error, the appellant must demonstrate both an error of constitutional magnitude and that the error is manifest.

On appeal, we first determine whether the alleged error raises a constitutional interest. "We look to the asserted claim and assess whether, if correct, it implicates a constitutional interest as compared to another form of trial error." O'Hara, 167 Wn.2d at 98. If the alleged error raises a constitutional interest, we look next to whether the error is manifest. "'Manifest' in RAP 2.5(a)(3) requires a showing of actual prejudice." State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007). "To demonstrate actual prejudice, there must be a 'plausible showing by the [appellant] that the asserted error had practical and identifiable consequences in the trial of the case.'" O'Hara, 167 Wn.2d at 99 (quoting Kirkman, 159 Wn.2d at 935). The focus of the actual prejudice analysis is whether the error is obvious on the record. O'Hara, 167 Wn.2d at 99-100.

> It is not the role of an appellate court on direct appeal to address claims where the trial court could not have foreseen the potential error or where the prosecutor or trial counsel could have been justified in their actions or

> failure to object. Thus, to determine whether an error is practical and identifiable, the appellate court must place itself in the shoes of the trial court to ascertain whether, given what the trial court knew at that time, the court could have corrected the error.

O'Hara, 167 Wn.2d at 100.

Shire asserts that the intersection of RCW 26.33.295 and RCW 13.34.200 violated her Fourteenth Amendment substantive due process right. If correct, this is certainly an error of constitutional magnitude. The Department appears to agree with this conclusion as it only argues that RCW 26.33.295 and RCW 13.34.200 did not have a practical effect on Shire's termination proceeding.

The Department argues that neither RCW 26.33.295 nor RCW 13.34.200 had a practical effect on the trial because both statutes operate independently from the termination proceeding. But, here, both parents were offered open adoption agreements pursuant to RCW 26.33.295 as a settlement of the termination proceeding, which RCW 13.34.200 indicated if they declined the agreement and subsequently lost at trial, they would not be able to pursue again. This indicates that both statutes had a practical effect on the trial.[2] Shire had the opportunity to forego trial and maintain some contact with her child, but she instead opted to risk termination in order to argue for the continuation of her parental rights. Therefore, both RCW 26.33.295 and RCW 13.34.200 had a practical effect on this trial.

B.

Shire argues that because of RCW 26.33.295 and RCW 13.34.200, she was essentially forced to choose between voluntarily relinquishing her parental rights but

[2] Further, Ahmed accepted the RCW 26.33.295 settlement in the middle of the termination proceeding, which meant that instead of having two different parties arguing against termination, suddenly on the last day of trial Shire stood alone in her argument against termination.

maintaining some limited contact with A.A. and going to trial to attempt to maintain her parental rights. She argues that this situation violated her substantive due process rights to maintain the family unit because while open adoptions should depend on the best interest of the child and not on the parent's desire to continue to trial, here she was essentially punished for asserting her right to go to trial.

The Fourteenth Amendment provides that "No person may be deprived of life, liberty, or property without due process of law." U.S. CONST. amend. XIV. "Parents have a fundamental liberty and privacy interest in the care and custody of their children." M.-A.F.-S., 4 Wn. App. 2d at 445 (citing Santosky v. Kramer, 455 U.S. 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982)). But, "when parental actions or decisions seriously conflict with the physical or mental health of the child, the State has a parens patriae right and responsibility to intervene to protect the child." In re Welfare of Sumey, 94 Wn.2d 757, 762, 621 P.2d 108 (1980).

"Substantive due process protects against arbitrary and capricious government action[,]" Amunrud v. Board of Appeals, 158 Wn.2d 208, 218-19, 143 P.3d 571 (2006), not against the actions, however grievous, of other individuals. See Faircloth v. Old Nat'l Bank of Wash., 86 Wn.2d 1, 541 P.2d 362 (1975) (private conduct is not controlled by the Fourteenth Amendment due process clause unless it is significantly intertwined with state involvement.); Civil Rights Cases, 109 U.S. 3, 11, 3 S. Ct. 18, 21, 27 L. Ed. 835 (1883) ("It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment.").

Here, Shire contends that the intersection of RCW 26.33.295 and RCW 13.34.200 violated her substantive due process right. But Shire fails to show what state

action was implicated here. An open adoption agreement is an agreement between the adoptive parents, the birth parents, and the child. Despite having to approve of the agreement, the Department is not a party. In re Dependency of T.C.C.B., 138 Wn. App. 791, 800, 158 P.3d 1251 (2007). That the prospective adoptive parents, here, were willing to negotiate an open adoption agreement with the parents does not indicate that the state acted in any way which affected Shire's due process rights. See Kennebec, Inc. v. Bank of the West, 88 Wn.2d 718, 723, 565 P.2d 812 (1977) ("mere enactment of a statute which permits private conduct, with no further significant participation by the state, is passive involvement and does not constitute 'state action.'"). Therefore, Shire's constitutional claims fail based on a lack of state action.

In In re Adoption of Hernandez, Division Three of this court determined that there was a lack of state action in voluntary relinquishment proceedings. 25 Wn. App. 447, 452, 607 P.2d 879 (1980). There, after voluntarily relinquishing her parental rights, the mother alleged that she was denied due process of law because she was not afforded an attorney at the relinquishment hearing. Hernandez, 25 Wn. App. at 450. The appellate court disagreed based on the "substantial difference in the precise nature of the governmental function under" voluntary versus involuntary proceedings. Hernandez, 25 Wn. App. at 451. While involuntary proceedings are adversarial in nature, voluntary relinquishment proceedings are not. Therefore, the mother was not "deprived of liberty" when she "voluntarily decided to terminate her rights as a parent" because it was the mother, not the state, that acted. Hernandez, 25 Wn. App. at 451, 452–53. See also In re Adoption of Infant Boy Crews, 60 Wn. App. 202, 217, 803 P.2d 24 (1991) (holding "there is no 'state action' in voluntary termination proceedings to

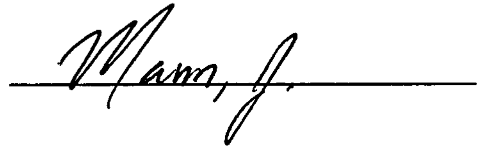
trigger due process concerns"), aff'd, 118 Wn.2d 561, 825 P.2d 305 (1992), overruled on other grounds by In re Adoption of T.A.W., 186 Wn.2d 828, 383 P.3d 492 (2016).

In Welfare of H.Q., Division Two of this court held that "a parent has a substantive due process right to pursue voluntary relinquishment of his or her parental rights as an alternative to involuntary termination." 182 Wn. App. 541, 549, 330 P.3d 195 (2014). There, the father, who was so severely developmentally disabled that he was unable to adequately care for his child, wanted to voluntarily relinquish his parental rights in an open adoption agreement. The trial court however, without holding a hearing to this effect, determined that the father was incapable of voluntarily relinquishing his rights. Instead, the trial court held an involuntary termination hearing and terminated the father's parental rights. H.Q., 182 Wn. App. at 548-49.

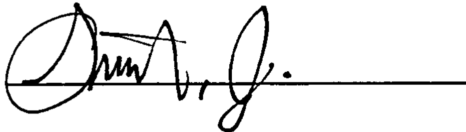
On appeal, the court held that this violated the father's substantive due process right. The court reasoned that "it is well settled that parents have a 'fundamental liberty interest[]' in 'the care, custody, and management of their children,' which is protected by the Fourteenth Amendment." H.Q., 182 Wn. App. at 550 (quoting Troxel v. Granville, 530 U.S. 57, 65-66, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000)). The court then went on to distinguish Crews and Hernandez, noting that while in those cases "the state was not involved in the [parents'] decision to relinquish their parental rights . . . [in H.Q.] the Department did act to terminate [the father's] parental rights. Thus, there was state action." H.Q., 182 Wn. App. at 552. The court then held that "[s]ubstantive due process requires that parents be permitted the opportunity to pursue voluntary relinquishment prior to the involuntary termination of their parental rights if voluntary relinquishment is available as a viable alternative." H.Q., 182 Wn. App. at 553.

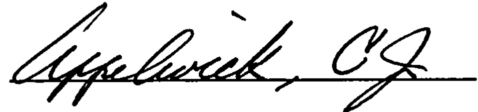
Collectively, these cases stand for the proposition that the state cannot prevent a parent from pursuing voluntary relinquishment and an open adoption agreement, if available, but that voluntary relinquishment, without more, does not have sufficient state action to trigger constitutional protections. Here, Shire was afforded the opportunity to pursue voluntary relinquishment before the involuntary termination proceeding. While Ahmed agreed to voluntary relinquishment and an open adoption settlement, Shire declined that option and proceeded to trial.

We affirm.



WE CONCUR:





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