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**COURT OF APPEALS FOR DIVISION II
STATE OF WASHINGTON**

In re the Welfare of: M.R.K.

BRIEF OF RESPONDENT

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I. PRELIMINARY STATEMENT

This is an appeal by the mother, H.B., from a decision of the Superior Court for Clark County, terminating her parental rights as to the child, M.R.K. M.R.K. was found to be dependent pursuant to Chapter 13.34 RCW. H.B. appealed the finding of dependency, and the Court of Appeals affirmed this finding. At the time of the termination trial on August 10, 2005, dependency had been established for over two years, and the child had been placed out of her parents' care pursuant to a dispositional order for over two years as well. The court held a trial on the petition to terminate the parents' parental rights on August 10, 2005, and issued an oral decision that day terminating parental rights of the mother and father. The father is not a party to this appeal. A written order of termination as to the mother was entered on October 14, 2005.

Throughout this brief, the Department of Social and Health Services will be referred to as "the Department." The Report of Proceedings for August 10, 2005, will be referred to as "RP." Clerk's Papers will be referred to as "CP." Exhibits will be referred to as "Ex."

II. COUNTERSTATEMENT OF FACTS

H.B. is the mother of M.R.K., who was born October 7, 2000. H.B. has a criminal history related to drug use dating back to November 9, 1999, when she was arrested in Multnomah County, Oregon, for

possession of a controlled substance - methamphetamine, and driving under the influence of intoxicants. Ex. 28; RP at 54. The mother later plead guilty to charges of Possession of a Controlled Substance in the Second Degree and Driving Under the Influence of Intoxicants. Ex. 28; RP at 54. On November 10, 1999, the mother was released on her own recognizance, and ordered to participate in the Pretrial Release Supervision Program, in which she was to be supervised pending further court action. Ex. 28; RP at 53. While being supervised by the Pretrial Release Supervision Program, three warrants were issued in 2000 for the arrest of H.B. for failure to comply with requirements of release. Ex. 28.

On October 18, 2002, H.B. was arrested by Washington State Patrol Officer Gabriel Olson, who had observed her driving erratically. Ex. 9, at 1. H.B. was in the driver's seat, and M.R.K. was in an infant child seat that Officer Olson concluded was "poorly installed in the vehicle." Ex. 9, at 2. Officer Olson observed that "H.B.'s eyes were 'red and puffy,' that there was a brown substance on her face beneath her nose, that she appeared 'nervous' and 'excited,' and that she spoke fast." Ex. 9, at 2. When asked to submit to a field sobriety test, the mother responded that she had been advised not to do so "if she was drunk or high." Ex. 9, at 3. H.B. was arrested on an outstanding warrant, and on suspicion of driving under the influence. Ex. 9, at 3. A search of H.B.'s

purse yielded two glass pipes and a baggie, the contents of which were determined to be methamphetamine. Ex. 9, at 3. M.R.K. was placed in protective custody. Exs. 1, 9, at 4. H.B. signed a voluntary placement agreement allowing the child to remain in relative care. Ex. 1. H.B. also signed a voluntary service agreement in which she agreed to participate in parenting education, domestic violence and anger management services, as well as drug and alcohol services. Ex. 9, at 4. H.B. completed a drug and alcohol evaluation on November 27, 2002, in which she was diagnosed with severe amphetamine dependence and intensive outpatient treatment was recommended. Ex. 14. H.B. failed to complete substance abuse treatment services recommended by this evaluation, as well as any other services under the voluntary service plan, despite the fact that these services had been referred by the assigned social worker. Ex. 9, at 4-5; RP at 16.

On April 18, 2003, the Department filed a Dependency Petition as to M.R.K. based on H.B.'s drug abuse and failure to engage in services to address this problem. Ex. 1. A dependency fact-finding hearing was held on June 27, 2003, and the Order of Dependency as to the mother was entered on July 1, 2003. Ex. 2. The mother was found to have been "in possession of methamphetamine" on October 18, 2002. Ex. 5. The court also found that the mother had "refused the Department's offer of

substance abuse treatment, mental health services, and anger management services,” and concluded that the mother needed to establish a stable living environment. Ex. 2. The mother appealed the finding of dependency, and the Court of Appeals affirmed this finding on April 26, 2004. Ex. 9.

In a dispositional order entered on July 8, 2003, the mother was ordered to complete the following services: mental health evaluation; intensive outpatient treatment and substance abuse support groups; submit to random urinalysis testing; refrain from the use of drugs or alcohol; resolve all criminal matters; maintain regular contact with the assigned social worker; and maintain a safe and stable living environment. Ex. 3. The assigned social worker, Alice McGrew, reviewed the court-ordered services with the mother. RP at 17. The mother was not willing to listen when Ms. McGrew discussed these services with her. RP at 17. H.B. was referred to substance abuse treatment, which she did not complete. RP at 18-19, 45-46. Ms. McGrew referred the mother to random urinalysis testing (hereinafter referred to as “UAs”) as well. RP at 19. H.B. submitted a few clean UAs then stopped. RP at 19. The assigned social worker was also aware that H.B. had been ordered to do drug treatment as part of her community supervision related to criminal convictions in Oregon. RP at 24. Completion of treatment in Oregon would have satisfied the dependency substance abuse treatment

requirements. RP at 24. Ms. McGrew told H.B. that substance abuse treatment completed in Oregon would be sufficient for her purposes, but never received verification that H.B. completed treatment in Oregon. RP at 41. Ms. McGrew did not refer the mother to mental health services, because it was determined that these would not be beneficial to the mother until she had demonstrated that she had not used drugs for six months and she engaged in substance abuse treatment. RP at 18-19. At the first dependency review hearing on November 18, 2003, the mother was found to have not complied with outpatient treatment, substance abuse support groups and random UAs. Ex. 7.

According to the voluntary placement agreement in place prior to the filing of the Dependency Petition, as well as the dispositional order entered on July 8, 2003, M.R.K. had initially been placed with relatives. Exs. 1, 3; RP at 20. However, placement was changed to foster care on August 12, 2003, when the relatives requested that M.R.K. be moved. Ex. 4; RP at 20. The relatives were concerned that visitation allowed to H.B. was very liberal, in that she could drop in any time of the day or week, and that she only visited a couple times a month. RP at 21. This arrangement was not beneficial to the child, and the relatives requested that she be placed in foster care. RP at 21.

After the child was placed in foster care, the mother attended only 33 percent of visits, and was often late. RP at 23. H.B.'s reasons for missing visits were that she had transportation problems, and periods of incarceration. RP at 23. However, H.B. frequently missed visits without providing advance notice or was up to an hour late to visits. RP at 23. The social worker provided H.B. with bus tickets to help her attend visits, and scheduled the visit times to coincide with the father's visits in order to facilitate greater visitation. RP at 23-24. Despite these accommodations, the mother's attendance at visits did not improve. Ex. 7.

Social worker Kathy Hammersley was assigned the case on December 19, 2003. RP at 106. When Ms. Hammersley received the case, H.B. had been referred for court-ordered UAs and a drug and alcohol evaluation. RP at 108. Mental health services were not referred because H.B. had not demonstrated six months of sobriety. RP at 108-109. Six months of sobriety was required because drug use can alter the results of the mental health assessments. RP at 124. Ms. Hammersley provided H.B. with monthly referrals to a drug and alcohol assessment at TASC in Vancouver as well as bus passes for H.B. to travel from Portland to Vancouver for these services. RP at 110.

H.B. completed a chemical dependency assessment at Northwest Recovery Center on January 21, 2004. Ex. 16. The evaluator diagnosed

H.B. with amphetamine dependence and recommended that she complete nine months of substance abuse treatment. Ex. 16, at 3. On January 27, 2004, H.B. left the treatment facility without leaving a urine sample, stating she could not give a sample, and that she “had things to do and could not stick around” and at that point it was determined that she had aborted treatment Ex. 16, at 3-4. H.B. participated in another intake on February 18, 2004, at Northwest Recovery Center and submitted a UA on February 18, 2004, that was positive for methamphetamine. Ex. 17. On March 4, 2004, H.B. was discharged from Northwest Recovery Center due to repeated no-shows, and a total failure to comply with treatment expectations. Ex. 18, at 3. The treatment counselor stated that H.B. had “lied about her continued use of felony drugs (methamphetamines)” and the counselor found her to have “no motivation for positive change.” Ex. 18, at 3. The treatment counselor concluded that H.B. was “completely manipulative,” continuing to use, refusing to submit urinalysis samples to her probation officer and CPS workers, and that recommended treatment “may take a year to address [her] level of denial and lack of motivation.” Ex. 18, at 5.

On April 6, 2004, the court changed the placement of the child to the home of paternal relatives in Grants Pass, Oregon. Ex. 8; RP at 111-12. The mother had just been unsuccessfully discharged from substance

abuse treatment at Northwest Recovery. Ex. 18; RP at 111. The assigned social worker requested this change of placement because the child had been out of her parents' care for a year and a half, the Department was required to begin to move toward termination and permanency for the child and the relatives' home was a potential permanent placement. RP at 111.

As a result of her post-conviction and probation requirements related to convictions of Possession of Controlled Substance and Driving While Under the Influence of Intoxicant in Oregon, H.B. had been court-mandated to be supervised by a probation officer. RP at 54. As a requirement of probation, H.B. was also ordered to complete Clean Court, a Portland post-conviction drug court. RP at 55. However, on April 6, 2004, H.B.'s probation was revoked for unsuccessful discharge from Clean Court and she was again incarcerated. RP at 55-56.

On June 30, 2004, H.B. was released from incarceration and was ordered to be supervised by Post-Prison Supervision. Ex. 29. H.B. was ordered by Multnomah County to submit to breath and urine testing for controlled substances or alcohol, to participate in a substance abuse evaluation and comply with all recommendations, as well as to "not have contact with [M.R.K.] without written approval from the assigned Parole Officer." Ex. 29. H.B.'s probation officer directed her to initiate

urinalysis testing on August 5, 2004, but she did not comply. RP at 60-61. The probation officer again directed H.B. to submit to a UA on October 12, 2004, and she admitted that the result would be positive. RP at 61. H.B. never completed the substance abuse treatment requirements of her probation. RP at 66.

Pursuant to the Multnomah County Order of Supervised Conditions entered on June 29, 2004, and signed by H.B. on June 30, 2004, H.B. was not to have contact with M.R.K. without written approval by the assigned parole officer. Ex. 29. The Department was willing to set up visitation between the mother, who resided in Portland, Oregon, and the child in Grants Pass, and the social worker communicated this to H.B. by letter dated July 15, 2004. Ex. 21; RP at 112-113. Ms. Hammersley informed H.B. that she would be “looking into setting up visitations for [H.B.] and [M.R.K.] in the near future.... You will need to check in with your probation worker to make sure it is ok with them.” Ex. 21. The Multnomah County probation officer indicated by written memorandum dated August 4, 2004, that he required H.B. become compliant with “the conditions set forth by Washington State’s Division of Children and Family Services” in order to have contact with M.R.K. Ex. 22. Ms. Hammersley discussed the August 4, 2004, memorandum with the mother and advised her that she needed to complete a drug and alcohol

evaluation, and follow through with recommended treatment, support groups, and random UAs before the social worker could approve visitation. RP at 115.

H.B. took limited advantage of opportunities to maintain written contact with her daughter, but never complied with the court-ordered services that would have allowed her to visit in Grants Pass or contact M.R.K. by phone. RP at 115-116. The social worker was therefore restricted by the requirements of H.B.'s probation from allowing H.B. contact with M.R.K. RP at 131.

The assigned social worker also encouraged the mother to address the issue of visitation in court. RP at 131. On April 26, 2005, a review hearing was held at which the mother was present. Ex. 12. The court found that the mother had been unable to visit M.R.K. due to "noncompliance with probation requirements" and did not order a different visitation arrangement. Ex. 12. The court also found that H.B. had not complied with identical requirements related to substance abuse in the dependency. Ex. 12. Because the mother's Multnomah County, Oregon, requirements of probation required that she be in compliance with services prior to being allowed contact with the child, and the mother failed to engage in any of those services, she was unable to visit after M.R.K. was placed with relatives in Oregon. RP at 131.

In August 2004, H.B.'s Multnomah County probation officer denied her request to move to Grants Pass, Oregon, where her child had been placed. RP at 68, 76. He made this decision because H.B. was not in compliance with the requirements of her supervision in that she had not completed treatment, had submitted positive UAs, and had absconded from supervision. RP at 68. Additionally, H.B. planned to move to a homeless shelter rather than to a stable home, which the probation officer could not authorize. RP at 77.

After providing a positive UA to her probation officer in September 2004, H.B. was required to complete a drug and alcohol evaluation at ASAP Treatment Services in Portland, Oregon. Ex. 23, at 2. H.B. completed an intake substance abuse assessment on October 18, 2004, in which she denied drug use, even after a positive UA in September 2004 and another UA that was positive for methamphetamine on October 18, 2004. Exs. 23, at 3-4, 24. H.B. was diagnosed with amphetamine dependence and found to be "extremely resistant during assessment." Ex. 23, at 2. On November 17, 2004, H.B. was discharged from treatment due to poor attendance. Ex. 23, at 4.

As a result of her unsuccessful discharge from treatment on November 17, 2004, the mother's probation officer requested a warrant for the mother's arrest, and she was arrested on February 27, 2005. RP at 70.

Due to the violation with treatment, H.B. was sanctioned by Multnomah County on March 4, 2005, and required to participate in the Day Reporting Center program. RP at 70. Day Reporting Center provides intensive case management to those determined to be medium and high risk offenders. RP at 85. The program required that H.B. participate in daily stabilization groups, submit to random UAs, and comply with any other recommendations. RP at 87. H.B. was not in compliance with the daily in-person meeting requirements. RP at 88. H.B. participated in an initial intake on March 19, 2005, but did not meet with her corrections counselor at Day Reporting to provide a UA until March 28, 2005. RP at 88. A referral was made for substance abuse treatment, but H.B.'s attendance was sporadic, and she failed to complete the treatment program. RP at 94-95. H.B. did not follow through with referrals made to an addictions awareness class. RP at 96. H.B. also had four no-shows for mandatory random UAs and provided UAs that were positive for methamphetamine, including one on the last weekend in May 2005. RP at 97, 100-101. On June 2, 2005, H.B. was discharged from the Day Reporting Center program due to missed appointments, general non-compliance and a positive UA. RP at 99.

On June 15, 2005, the mother's probation was revoked following the positive UA and termination from the Day Reporting Center program.

RP at 71-72. H.B. remained incarcerated due to the revocation of her probation on the date of the termination trial. RP at 72.

H.B. also failed to appear at numerous intake appointments for substance abuse evaluations referred by her assigned social worker between March 2004 and February 2005. Ex. 19. H.B. missed intake appointments for substance abuse evaluations on the following dates: March 31, 2004; July 30, 2004; August 31, 2004; September 30, 2004; November 30, 2004; January 3, 2005; January 31, 2005; and February 28, 2005. Ex. 19.

At every dependency review hearing since the dependency of M.R.K. was established, H.B. has been found non-compliant with all court-ordered services related to substance abuse and mental health services. Exs. 7, 10-12. Social worker Kathy Hammersley was not able to refer the mother to a mental health or psychological evaluation because the mother never demonstrated a period of being clean and sober by submitting clean UAs. RP at 117. As late as April 26, 2005, the mother reported to the court that if she were to provide a UA that day it would be dirty. RP at 118.

While not incarcerated, H.B. continued to live in the same home, which was neither safe nor stable. RP at 120-121. H.B. admitted to Ms. Hammersley that her home was not safe and stable, and reported

being fearful in the home at times. RP at 121. The probation officer for H.B. visited her residence as part of her supervision. RP at 61-62. In H.B.'s home were other people who had been on community supervision or involved in criminal activity. RP at 62. The probation officer discussed his concerns about the safety of the residence with H.B., and she responded that people in the home harassed her, that someone put something in her water, and that people took things from her room when she was not home. RP at 64. H.B. reported during the drug and alcohol assessment in October 2004, that she was uncomfortable in her home "due to other people living there using drugs...." Ex. 23, at 2. The Day Reporting Center counselor made an effort to help find alternate housing for H.B., but due to H.B.'s non-compliance with probation and substance abuse treatment requirements, she was not eligible for housing when it became available in May 2005. RP at 90-91.

At the time of the termination trial M.R.K. had been in care for almost three years. RP at 126. During that time H.B. had not made any progress addressing those issues that led to the dependency of her daughter. RP at 126. The mother still needed to become clean and sober, establish a safe and stable living environment, and address domestic violence issues. RP at 127. The social worker was unable to estimate how long it would take the mother to make these changes because no change

had happened during the 34 months the child had been removed from the mother's care. RP at 127.

If M.R.K. must wait for H.B. to engage in services, she is prevented from having a permanent home. RP at 127. M.R.K. has "blossomed socially" in her current placement, which is a permanent home for her. RP at 139. She has friends in the neighborhood, is developmentally on target, and is thriving. RP at 139. M.R.K. needs to know that she is "in her forever home." RP at 140. It could be detrimental to her to not have the level of security that she needs. RP at 140. Diane Warren, the C.A.S.A. representative, testified that termination is in the best interest of M.R.K. RP at 140.

After hearing the testimony of the witnesses and reviewing the evidence presented, the Honorable Barbara Johnson, Clark County Superior Court Judge, granted the Department's petition to terminate H.B.'s parental rights. The court found that H.B. had been repeatedly offered and provided extensive services by the Department and by the criminal justice system in Oregon, that H.B. did not ever successfully complete these services, that H.B.'s home was unsafe, that H.B. was in and out of jail throughout the course of the dependency due to substance abuse, that there was little or no hope that the H.B. will be in a position to remedy her addiction due to the long-standing nature of the substance

abuse problem and the lengthy treatment needed, and that there was little likelihood that conditions which led to the dependency will be remedied so the child may be returned to her in the near future. CP at 39. The court therefore terminated H.B.'s parental rights to M.R.K. as it found that all of the statutory elements for termination had been proven. CP at 39.

III. ARGUMENT

A. Requirements For Termination Of Parental Rights

Each of the following elements set forth in RCW 13.34.180(1) must be established by clear, cogent, and convincing evidence in order for a court to terminate parental rights:

- (a) That the child has been found to be a dependent child;
- (b) That the court has entered a dispositional order pursuant to RCW 13.34.130;
- (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;
- (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;
- (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 continuation of the parent and child relationship clearly diminishes the child's prospects for early integration into a stable and permanent home.

RCW 13.34.190(1)(a).

If the Department proves that all necessary services reasonably capable of correcting parental deficiencies in the foreseeable future were offered or provided, and the deficiencies remain substantially unimproved after twelve months of dependency, a rebuttable presumption arises that there is little likelihood that conditions would be remedied to allow return of children in the near future. RCW 13.34.180(1)(e).

In addition, the termination order must be in the best interest of the child. RCW 13.34.190(2). This finding need only be supported by the preponderance of the evidence. *In re A.V.D.*, 62 Wn. App. 562, 571, 815 P.2d 277 (1991).

B. The Findings Of The Trial Court Should Not Be Disturbed If They Are Supported By Substantial Evidence

In an appeal from a termination order, the findings of the trial court should not be disturbed if they are supported by substantial evidence. *In re Hall*, 99 Wn.2d 842, 849, 664 P.2d 1245 (1983); *In re Dependency of C.B.*, 79 Wn. App. 686, 692, 904 P.2d 1171 (1995). The appellate court is not entitled to "second guess the trial court," or to weigh either the evidence or the credibility of witnesses. *In re Interest of Pawling*,

101 Wn.2d 392, 401, 679 P.2d 916 (1984). This strong deference is based on the trial court's advantage in having the witnesses before it, with the concomitant ability to observe demeanor and evaluate credibility. *In re Sego*, 82 Wn.2d 736, 739-40, 513 P.2d 831 (1973).

In termination proceedings, because the Department is required to prove each of the statutory allegations by clear, cogent and convincing evidence, the evidence must be substantial enough to allow the appellate court to conclude that the allegations are "highly probable." *Sego*, 82 Wn.2d at 739; *accord A.V.D.*, 62 Wn. App. at 568. Thus, in reviewing the trial court's termination under RCW 13.34.190(1)(a), this Court must determine whether the Department presented substantial evidence from which the trial court could find the existence of all statutory elements for termination on a highly probable basis.

In the present case, the Department presented substantial evidence that provides the basis for the trial court's findings that the allegations were proven by clear, cogent, and convincing evidence. These findings necessarily led to the trial court's conclusion that H.B's parental rights should be terminated. Accordingly, the order of termination should be affirmed.

C. The Placement Of The Child In A Safe, Stable and Permanent Home When The Mother Was Non-Compliant With Services Did Not Cause A De Facto Termination

The mother asserts that her constitutional due process rights were violated in the dependency when the child was placed with relatives in Grants Pass, Oregon, and she was restricted from contact with the child due to her probation requirements. Appellant's Brief at 7 (Issue 1 relates to due process afforded the mother when the child was placed with paternal relatives during the dependency; Issue 2 relates to due process afforded the mother when her probation requirements restricted her from visiting the child during the dependency). The time to litigate matters such as placement and visitation was during the dependency, rather than at termination when the issue before the court was current parental unfitness. The mother was afforded all necessary due process rights during the dependency when M.R.K. was placed in a permanent home with relatives. The child was properly placed in a permanent stable home after her mother had been non-compliant with necessary substance abuse services for greater than a year. After the child was placed with relatives the Department offered services necessary to maintain the parent-child bond between H.B. and her daughter; unfortunately, the mother's failure to meet the requirements of her Multnomah County, Oregon, probation restricted this contact.

The time to make arguments regarding placement of the child and visitation was on appeal of the order placing the child with the relative, or dependency review orders entered thereafter that did not alter the visitation that had been arranged. The termination trial is not an opportunity to re-litigate dependency decisions. *See In re Dependency of K.R.*, 128 Wn.2d 129, 141, 904 P.2d 1132 (1995). Neither the order that changed placement to the home of the paternal relative on April 6, 2004, nor the dependency review orders subsequently entered were appealed by the mother.

In any event, the mother was afforded her constitutional rights to due process in the dependency of M.R.K. The essential due process protections afforded parents are notice and an opportunity for a hearing appropriate to the nature of the case. *In re Dependency of M.S.*, 98 Wn. App. 91, 94, 988 P.2d 488 (1999); *In re C.R.B.*, 62 Wn. App. 608, 614, 814 P.2d 1197 (1991); *In re Myricks*, 85 Wn.2d 252, 254, 533 P.2d 841 (1975); RCW 13.34.090(1). Parents have a constitutionally protected interest in the care and custody of their child. *In re Dependency of J.B.S.*, 123 Wn.2d 1, 12, 863 P.2d 1344 (1993). But this interest is not absolute; when the rights of a child conflict with the rights of a parent, the rights of the child prevail. RCW 13.34.020; *K.R.*, 128 Wn.2d at 146. Moreover, “what is perhaps eventually possible for the [mother] must

yield to the child's present need for stability and permanence.”
In re Dependency of T.R., 108 Wn. App. 149, 166, 29 P.3d 1275 (2001).

After having been out of her mother's care for 18 months, and a dependent of the State of Washington for nine months, M.R.K. was placed by the court with paternal relatives in Grants Pass, Oregon. Exs. 1, 3, 8. All constitutional and statutory requirements for removal of the child from the mother's care, and placement with a relative, were met. A dependency fact-finding hearing had been held pursuant to RCW 13.34.110 at which the mother was present and represented by counsel. Ex. 3. The mother appealed the finding of dependency, and it was affirmed by the Court of Appeals. Ex. 9. A dispositional hearing had been held pursuant to RCW 13.34.130 on July 1, 2003, at which the mother was present and represented by counsel, and M.R.K. was placed in relative care. Ex. 3. A hearing had been held on April 6, 2004, at which the mother was represented by counsel, in which the court placed the child with the paternal grandmother, who lives in Grants Pass, Oregon. Ex. 8; RP at 112. In the order changing the child's placement, the court made the findings necessary to remove a child from a parent, as is required by RCW 13.34.130(2). Ex. 8. The mother did not appeal this order. When the mother addressed her concerns about contact with the child to the social worker, she was told to consult with her attorney and bring the

matter to court. RP at 131. The mother did not appear at the next dependency review hearing on April 26, 2005, but was represented by counsel. Ex. 12. The court found that the mother had been unable to visit M.R.K. due to “noncompliance with probation requirements” but did not order a different visitation arrangement. Ex. 12. The mother did not appeal this order. Thus, all due process rights were afforded the mother when the child was placed in Oregon and she had concerns about visitation.

M.R.K. was properly placed in a permanent stable home after her mother had been non-compliant with necessary substance abuse services for greater than a year. When a child’s rights of basic nurture are in conflict with the legal rights of a parent, the child’s rights prevail. RCW 13.34.020. One of a child’s rights is that of a safe, stable, and permanent home. RCW 13.34.020. The Department is required to work towards achieving permanency for a dependent child as soon as possible, preferably before the child has been in out-of-home care for 15 months. RCW 13.34.145(1)(c). Relative placement is the preferred out-of-home placement for a child. RCW 13.34.130(2).

As of April 2004, M.R.K. was in foster care, waiting for her mother to address her substance abuse and mental health issues and establish a safe, stable home. The child had been out of her mother’s care

for 18 months, and had been a dependent child for nine months. However, in March 2004, H.B. was again unsuccessfully discharged from substance abuse treatment for lying about her continued use of methamphetamines and repeatedly no-showing for treatment sessions. Ex. 18. M.R.K. had a right to a permanent and stable home, and the statutory preference was that this be a relative placement. Further, the mother's interest in geographic proximity was outweighed by the child's right to a permanent, stable home. Therefore, the Department sought out an appropriate relative placement that could also be a permanent home.

H.B.'s frequent incarceration restricted her ability to visit M.R.K. H.B. was unsuccessfully discharged from Clean Court and was sentenced to six months in jail on April 6, 2004. RP at 56. She was released sometime in July 2004. RP at 54. She then returned to Washington where she violated her probation and was in jail again for 15 days in August 2004. Ex. 13. After testing positive on October 18, 2004, she was admitted to treatment but left after a week and was subsequently considered on abscond status by her probation officer as of November 2004. Ex. 23; RP at 70. H.B. was arrested again on February 27, 2005, and sentenced to 10 days in jail. RP at 70. On June 15, 2005, her probation was revoked for non-compliance with the

Day Reporting program, and she again was incarcerated, where she remained the day of the termination trial. RP at 72.

After M.R.K. was placed with relatives in Oregon and H.B. was released from jail, the Department offered services necessary for H.B. and M.R.K. to maintain their bond, but the mother's non-compliance with Multnomah County, Oregon, probation requirements prevented mother-daughter contact. When informed that H.B. had been released from jail and wanted to visit M.R.K. after she had been placed with relatives in Grants Pass, Oregon, the assigned social worker communicated her willingness to set up visits between H.B. and M.R.K., and stated that the mother needed to "check in with [her] probation worker to make sure it is ok with [him]." Ex. 21. The social worker also communicated to the mother her willingness to facilitate transportation to visit the child. RP at 112. At this point H.B. was subject to probation restrictions, including that she have "[n]o contact with [M.R.K.] without written approval from assigned Parole Officer." Ex. 29. The assigned parole officer issued a memorandum stating that H.B. was authorized to have contact with M.R.K. once she was in compliance with substance abuse services required in the dependency of M.R.K. Ex. 22.

Due to her own personal probation requirements, the mother was restricted from having contact with M.R.K. until she was compliant with

substance abuse services required under the dependency. The services the mother was required by her probation officer to participate in were: complete a drug and alcohol evaluation and recommended treatment; submit random UAs; and participate in substance abuse support groups. Ex. 22. These services were simple, had been repeatedly offered in Washington by Department social workers and in Oregon by the probation officer, and did not constitute an unreasonable hurdle. However, the mother never did comply with these services; therefore, as a result of the mother's inaction the social worker could not facilitate visitation with M.R.K. The Department made further attempts to maintain the bond between H.B. and M.R.K. by offering to provide postage for written communication and gifts. RP at 114-115. Unfortunately, H.B.'s failure to comply with her probation requirements limited greater contact.

D. The Mother Had No Constitutional Right To Be Physically Present At The Hearing

The essential due process protections afforded parents in a proceeding to terminate parental rights are notice and an opportunity for a hearing appropriate to the nature of the case. *M.S.*, 98 Wn. App. at 94; *C.R.B.*, 62 Wn. App. at 614; *Myricks*, 85 Wn.2d at 254; RCW 13.34.090(1).

H.B. has not challenged the sufficiency of the notice of the termination proceedings. Thus, only her opportunity to be heard is at issue. Despite the many protections guaranteed to parents in a termination proceeding, there is no absolute right to personally attend a judicial proceeding. *In re Dependency of J.W.*, 90 Wn. App. 417, 429, 953 P.2d 104 (1998) (citing *State ex rel. Taylor v. Dorsey*, 81 Wn. App. 414, 421, 914 P.2d 773 (1996)). “Due process is a flexible requirement, providing procedural protections based upon each particular situation.” *Dorsey*, 81 Wn. App. at 420. A parent’s right to personally attend a termination proceeding must rest upon convincing reasons and is usually left to the sound discretion of the trial court. *J.W.*, 90 Wn. App. at 429 (citing *In re Interest of Darrow*, 32 Wn. App. 803, 808, 649 P.2d 858 (1982)).

In termination proceedings, Washington courts apply a three-part balancing test, modeled on the United States Supreme Court’s decision in *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), to ensure that a parent’s due process right to be heard is protected when they are not allowed to attend a hearing. *M.S.*, 98 Wn. App. at 94; *J.W.*, 90 Wn. App. at 429; *Darrow*, 32 Wn. App. at 806. The three factors are: (1) the private interest at stake; (2) the government’s interests; and (3) the risk that the procedures used will lead to erroneous decisions.

Mathews, 424 U.S. at 335. In a proceeding to terminate parental rights, the private interest and the government's interests are strong countervailing interests; thus a pivotal issue is the risk of error created by the challenged procedure. *In re Adoption/Guardianship No. 6Z980001 in Montgomery Cy.*, 131 Md. App. 187, 198, 748 A.2d 1020 (Md. Ct. Spec. App. 2000).

The weight of each factor to be considered in the due process analysis will vary with the type of proceeding and the situation involved. However, at each stage of the dependency process, from dependency fact-finding to termination of parental rights, it has been held that a parent was not absolutely entitled to personally attend a hearing. *M.S.*, 98 Wn. App. at 94 (father not denied due process when he was unable to testify by telephone during termination proceeding and failed to submit an affidavit or deposition of testimony after the hearing); *J.W.*, 90 Wn. App. at 429 (father not denied due process when disposition and termination proceeding took place without his personal presence because he was represented by counsel and had previously discussed the case with his attorney); *Darrow*, 32 Wn. App. 803 (father not denied due process when he was not able to personally attend termination hearing where he was represented by counsel); *In Re Clark*, 26 Wn. App. 832, 611 P.2d 1343 (1980) (father not denied due process when termination hearing took place

without his presence but he was able to submit a pro se brief and was represented by counsel).

A common factor in each of these cases was the fact that the parent was represented by counsel. When a parent is represented by an attorney at termination, he has a full opportunity to present evidence weighing against termination. The parent's testimony may be presented by alternative means such as depositions, telephone testimony, and other evidence techniques. The use of these and other alternative means of participation in hearings has been approved by many courts where incarcerated parents are not able to be physically present at termination. *Darrow*, 32 Wn. App. at 808; see also *Adoption/Guardianship No. 6Z980001*, 131 Md. App. at 192-193.

As long as the incarcerated parent is afforded an opportunity to defend himself through counsel, with a full and fair opportunity to present evidence or rebut evidence presented against him, the due process requirements of *Mathews* are satisfied. *Darrow*, 32 Wn. App. at 808-9. H.B.'s right to be heard, to introduce evidence, and to confront the state's witnesses were satisfied in these proceedings. H.B. was represented by a capable and experienced court-appointed counsel at the termination hearing. RP at 10; CP at 39, at 4. Additionally, counsel for H.B. stated that she had met with H.B. prior to the termination hearing, and she

corrected information in the record based on this meeting. RP at 4-5. The testimony of H.B. was arranged and she was able to testify on her own behalf by telephone. H.B. was afforded a meaningful opportunity to participate in the termination trial, and her due process rights to a fair hearing were not violated.

Further, the trial court properly exercised its discretion in denying the mother's request for a continuance. The mother claims that the trial court violated her right to due process and thereby abused its discretion when it denied her motion for a continuance to allow her additional time to appear in person once she had been released from jail. This claim should be rejected. The mother was afforded a full and fair hearing, was represented by counsel, and was able to testify by telephone at the hearing. The trial court properly exercised its discretion by denying the mother's motion for continuance.

Pursuant to RCW 13.34.020 a child has a right to a speedy resolution of any proceeding under RCW 13.34. The denial of a motion for continuance is within the discretion of the trial court and will not be disturbed absent a showing of abuse of discretion and prejudice. *In re Detention of G.V.*, 124 Wn.2d 288, 295, 877 P.2d 680 (1994). A trial court abuses its discretion if its exercise was manifestly unreasonable, based upon untenable grounds, or granted for untenable reasons. *Id.* In

deciding whether to grant continuances, the trial court should consider the totality of the circumstances, including factors such as diligence, due process, the need for orderly procedure, the possible impact on the trial, and the granting of other continuances. *State v. Early*, 70 Wn. App. 452, 458, 853 P.2d 964 (1993), *review denied*, 123 Wn.2d 1004, 868 P.2d 872 (1994).

Applying the *Early* factors to this case, it is clear that the trial court properly denied the mother's motion for continuance. First, in considering the totality of the circumstances, the trial court took into consideration the fact that the mother did not regularly appear for hearings in the underlying dependency as well as her propensity to be incarcerated off and on throughout the dependency. RP at 9. Based on these considerations, the court was concerned that the mother would not attend a hearing even if it were continued to a later date. RP at 9. Decisions regarding placement, visitation and services were made at every review hearing, the result of which was a petition for termination. These are high stakes for a parent, and were appropriately considered when the court looked at the totality of the circumstances as they relate to H.B.

The court considered other factors as well. It took into consideration the fact that the mother has a history of being in and out of jail, which impeded her ability to be present at hearings. RP at 9. The

court also considered the mother's rights to due process in noting that H.B. was represented by experienced counsel and ensuring that the mother could testify by telephone. RP at 10. Lastly, the court considered that while the mother was to be released in a few days, the termination trial could not proceed until her counsel was available in eight weeks, and that this would also require the availability of a judge and other attorneys, which could extend the trial date much further. RP at 9. Based on these appropriate considerations, the court properly exercised its discretion in denying the mother's motion for continuance.

E. There Is Substantial Evidence to Support The Trial Court's Finding That The Services Ordered Under RCW 13.34.136 Have Been Expressly And Understandably Offered Or Provided And That All Necessary Services, Reasonably Available, Capable Of Correcting The Parental Deficiencies Within The Foreseeable Future Have Been Expressly And Understandably Offered or Provided

The mother assigns error to Finding of Fact 11 in which the trial court finds that "[t]he department expressly and understandably offered and re-offered the mother all necessary services, reasonably available and capable of correcting her parental deficiencies." CP at 39, at 13. However, she fails to cite authority or specify areas in the record that otherwise support her assignment of error, therefore this Court need not consider the assignment of error. *In re Welfare of H.S.*, 94 Wn. App. 511, 520, 973 P.2d 474 (1999); *Bryant v. Palmer Coking Coal Co.*,

86 Wn. App. 204, 216, 936 P.2d 1163 (1997), *review denied*, 133 Wn.2d 1022, 950 P.2d 476 (1997). The appellant must present an argument that explains how a specific finding is not supported by the evidence and must cite to the record to support the argument. *In re Estate of Lint*, 135 Wn.2d 518, 532, 957 P.2d 755 (1998) (citing RAP 10.3); *Inland Foundry v. Dep't of Labor & Indus.*, 106 Wn. App. 333, 340, 24 P.3d 424 (2001) (mere assertions of error are not enough).

Nevertheless, the Department did prove by clear, cogent and convincing evidence “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” as required by RCW 13.34.180(1)(d).

H.B. was repeatedly offered services necessary to correct her parental deficiencies, including substance abuse services, random UAs, and assistance in locating safe and stable housing. When Ms. McGrew was assigned the case in early 2003, the child was in relative care pursuant to a voluntary placement agreement signed by the mother. RP at 15. The mother had also signed an agreement to complete services voluntarily, including a substance abuse assessment, outpatient treatment, and to refrain from criminal activity. RP at 16. The mother completed the

assessment but did not complete the recommended outpatient substance abuse treatment. RP at 16. Once the assessment was completed and the recommendation made for treatment, H.B. had only to make an appointment to initiate treatment. RP at 28. She did not do so. RP at 28. Once dependency was established Ms. McGrew reviewed with H.B. the services that she was now court-ordered to complete. RP at 17. Referrals for substance abuse treatment and random UAs were made. RP at 19. The mother did not fully engage in these substance abuse services. RP at 30.

H.B. again participated in a drug and alcohol evaluation on February 18, 2004, but did not appear for the treatment sessions and was discharged on March 4, 2004. RP at 109. Despite the mother's refusal to submit UAs when requested and complete treatment as had been recommended, Ms. Hammersley, who was assigned the case of M.R.K. on December 19, 2003, continued to provide referrals for drug and alcohol assessments and random UAs as well as bus passes to assist H.B. in traveling to services in Vancouver from her residence in Portland. RP at 107, 124. Additionally, when H.B.'s attorney notified Ms. Hammersley in July 2004, that the mother had been released from jail, wanted to engage in services, and would be at the office that day, Ms. Hammersley drafted a letter to the mother listing the services she

needed to complete, included a referral to the treatment provider, and left the letter at the front desk with a bus pass. Ex. 21; RP at 113-114. Later when the mother requested visits with M.R.K., Ms. Hammersley communicated to the mother the requirement imposed by her probation officer that she be compliant with substance abuse treatment services and UAs. RP at 115. The mother did not comply with these services. RP at 116. Throughout the time Ms. Hammersley was assigned the case, H.B. never demonstrated a period of sobriety by regularly submitting clean UAs. RP at 117-118. She also never successfully completed substance abuse treatment. RP at 115-116. The mother admitted in her own testimony that she attempted substance abuse treatment four times and was never able to complete it. RP at 152.

Assistance in obtaining stable housing was also offered to the mother, and she failed to take advantage of this service. The mother never established a safe residence. RP at 17. Ms. McGrew offered H.B. the assistance of a home support specialist in locating housing, and was aware that the mother knew of the homeless shelters in the community and that these resources could help her to obtain transitional housing. RP at 26. Despite this, the mother was “not interested.” RP at 26. In December 2003, H.B. did not have a place to live, but she subsequently moved into the home of her boyfriend. RP at 121. H.B. admitted that this was not a

safe, stable living situation. RP at 121. The mother had conversations with her probation officer about moving to Jean's Place, a women's shelter, but H.B. equated the shelter with a jail and did not want to move. RP at 64, 157. Ms. Hammersley tried repeatedly to impress upon H.B. the importance of moving to a safe, stable home, but the mother did not believe she should have to move, and remained at her boyfriend's admittedly unsafe home. RP at 121.

The record is replete with substantial evidence supporting the court's finding that the Department proved by clear, cogent and convincing evidence that the services ordered under RCW 13.34.136, have been expressly and understandably offered or provided and that all necessary services, reasonably available, capable of correcting the parental deficiencies within the foreseeable future have been expressly and understandably offered or provided.

F. There Is Substantial Evidence To Support The Trial Court's Finding That There Is Little Likelihood That Conditions Will Be Remedied In The Near Future

The mother next claims that there is insufficient evidence to support the court's finding that there is little likelihood that conditions will be remedied so that the child can be returned to her in the near future. RCW 13.34.180(1)(e). Her claim is unsupported by the record.

In determining the likelihood of remediation or change of conditions in the near future, the court must give paramount consideration to the best interests of the child, including the child's need for permanence and stability. *See Sego*, 82 Wn.2d at 738. In addition, the focus of the determination as to whether there is a likelihood of change is whether parental deficiencies have been corrected. *K.R.*, 128 Wn.2d at 144-45. The court may consider documented unwillingness of a parent to complete substance abuse treatment when determining the likelihood that conditions will be remediated in the near future. RCW 13.34.180(1)(e)(i).

Here, the mother asserts that without visitation, conditions could not be remedied so that the child could be returned to her in the near future. Brief of Appellant at 28. The issue of whether the mother might have done services if visitation had been structured differently is not relevant to the issue of whether the child can be returned to the mother in the foreseeable future. The issue on the day of trial was whether the mother's parenting deficits have been remedied so that her child could be returned in the foreseeable future.

In this case, the Department provided the trial court with substantial evidence that there is little likelihood that conditions will be remedied so that the child could be returned to the mother in the near future. There is no evidence in the record to show that the mother would

become clean and sober and establish a safe and stable lifestyle any time soon, if ever.

The Department worked with H.B. for almost three years, repeatedly offering services and informing her that the sooner she engaged in these services the sooner her child would be returned to her care. She was also informed that “the clock is ticking” and that after between a year and eighteen months the Department is required to begin planning for permanency for the child, thus underscoring the need for H.B. to engage in services. RP at 29. When Ms. McGrew transferred the case, H.B. had made no progress with services and still had not even acknowledged that she had a substance abuse problem. RP at 29. The mother participated in very few services and was incarcerated off and on throughout the dependency. At the time of the termination trial, she was incarcerated and still had an unsafe living environment. RP at 72, 125. H.B. also had a serious substance abuse problem that she still had not addressed. RP at 126.

The mother had not even begun being candid about her drug abuse at the termination trial. She testified at trial that she didn’t begin using drugs until her daughter was removed from her care. RP at 161. This, despite the fact that she had pled guilty to possession of methamphetamine in Oregon in 1999 prior to the birth of M.R.K., and was determined by the

Juvenile Court and Court of Appeals to have been in possession of methamphetamine when she was arrested on October 18, 2002, in Washington while driving erratically with her daughter in her car. H.B. did not admit use of drugs until April 2005. RP at 118, 123. H.B. testified at the hearing on August 10, 2005, that she'd been clean for 72 days. RP at 161. She was incarcerated when her probation was revoked on June 15, 2005, and remained incarcerated at the time of the trial. RP at 72. The mother's clean date closely approximates the date of her reentry into jail. She still had not exhibited an ability to stay clean when not incarcerated.

H.B. needed to complete substance abuse treatment to begin to address the parental deficiencies that led to the removal of M.R.K. from her care, and she still had not done so at the time of the termination trial. RP at 126. The mother continued to use methamphetamines throughout the dependency of M.R.K. Exs. 17, 24, 28, at 28. She had been unsuccessfully discharged from treatment four times. Exs. 15, 18, 23, 25. The court properly considered the fact that there was documented evidence that the mother had demonstrated ongoing use of a controlled substance and had been unable to complete substance abuse treatment when determining that there was little likelihood that conditions would be remedied such that the child could be returned home.

Considering the evidence as a whole, including the mother's untreated substance abuse problems, unstable lifestyle and frequent incarcerations, there is ample support for the finding that there is little likelihood that conditions will be remedied so that the child can be returned to her mother's care in the near future.

G. There Is Substantial Evidence To Support The Trial Court's Finding That Continuation Of The Parent-Child Relationship Clearly Diminishes The Child's Prospects For Early Integration Into A Stable And Permanent Home

The mother also claims there was insufficient evidence to support the finding that "continuation of the parent-child relationship clearly diminishes the child's prospects for early integration into a stable and permanent home." RCW 13.34.180(1)(f). This claim is contradicted by the record.

The finding required by RCW 13.34.180(1)(f) necessarily follows from an adequate showing of the allegation made pursuant to RCW 13.34.180(1)(e) ("little likelihood that conditions will be remedied so that the child can be returned to the parent in the near future"). *In re Dependency of J.C.*, 130 Wn.2d 418, 427, 924 P.2d 21 (1996).

In this case, Ms. Hammersley was unable to estimate how long it would take H.B. to address those parental deficiencies that led to the removal of M.R.K., and determined that it would be too long for the child

to wait. M.R.K. had been out of her mother's care for almost three years at the time of the termination trial. RP at 127. She had been placed in a stable, potentially permanent placement for over a year. RP at 127. If the child had been forced to wait an indeterminate amount of time, after having already waited almost three years, for her mother to become clean and sober and establish a stable lifestyle, she would have been prevented from having a permanent home. RP at 127. She would not have known who would care for her, what school she would continue to attend, who her friends would be, or where she would live. RP at 127. This child needs and deserves stability. RP at 140. It could be detrimental to her to not have the security of a forever home. RP at 140. To make M.R.K. wait while her mother attempted to become clean, sober and stable would have been problematic to M.R.K.'s development of security. RP at 140. H.B. never evidenced an ability to create a stable home for her child. To wait for her mother to finally become a stable resource to her daughter would endanger M.R.K.'s ability to have safe and a stable home.

H. There Is Substantial Evidence To Support The Trial Court's Finding That Termination Is In The Best Interests Of The Child

Finally, the mother contends that the trial court erred in finding that termination of her parental rights is in the child's best interests.

Viewing the record as a whole, there is substantial evidence supporting the finding that termination was in the child's best interests.

The trial court's determination of the best interests of the child must be supported by a preponderance of the evidence. *In re Dependency of H.W.*, 92 Wn. App. 420, 425, 961 P.2d 963 (1998). Appellate courts are to very strongly rely on a trial court's determination of what course of action will be in the best interest of the child. *Pawling*, 101 Wn.2d at 401.

M.R.K. had come into care a child who was developmentally delayed. RP at 22. In her first developmental assessment she scored below the cutoff for gross motor, fine motor and communication skills. RP at 22. Almost three years later, she was developmentally on target and had blossomed in her home with her paternal grandmother. RP at 139. To force this child to wait while her mother began the needed services to become clean and establish stability would jeopardize M.R.K.'s successes. It was in M.R.K.'s best interests to move forward with terminating her mother's parental rights and establishing her current home as her permanent home.

IV. CONCLUSION

The Department has proven by clear, cogent, and convincing evidence all elements under RCW 13.34.180(1)(a)–(f) necessary for

termination of the mother's parental rights. The Department has also proven by clear, cogent, and convincing evidence that termination of the mother's parental rights is in the child's best interests even though RCW 13.34.190(2) only requires proof by a preponderance of the evidence. The child has been out of the mother's care now for over three years. Her placement in a permanent and stable home should no longer be delayed. Thus, the Department respectfully asks this Court to affirm the trial court's order terminating the mother's parent-child relationship with the child.

RESPECTFULLY SUBMITTED this 19 day of April, 2006.

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STATE OF WASHINGTON
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COURT OF APPEALS FOR DIVISION II
STATE OF WASHINGTON

IN RE THE INTEREST OF:

M.R.K.

CERTIFICATE OF MAILING
TO PETER B. TILLER,
ATTORNEY FOR APPELLANT

STATE OF WASHINGTON)
)§§
COUNTY OF CLARK)

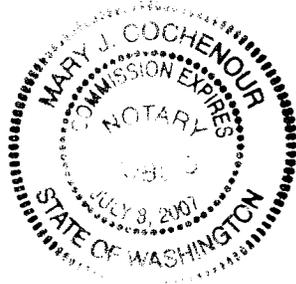
I, Kathryn J. Thomas, hereby declare under penalty of perjury:

That I am over the age of eighteen years; that on the 20th day of April, 2006, I mailed to Peter B. Tiller, The Tiller Law Firm, PO Box 58, Centralia, Washington 98531-0058; a copy of the Brief of Respondent, in regards to the above-referenced case. The document was sent by regular mail, postage prepaid.

DATED this 20th day of April, 2006.

Kathryn J. Thomas
KATHRYN J. THOMAS

SUBSCRIBED AND SWORN to or affirmed before me on the 20th day of April, 2006, by Kathryn J. Thomas.



Mary J. Cochenuir
Title: Notary Public
My Commission Expires: July 8, 2007