

RECEIVED

DEC 27 2006

In the Office of the Clerk of Court
Washington Court of Appeals, Division Three

By

ANC

received

80759-1

NO. 24923-9-III

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

In re the Dependency of A.B.

**CORRECTED RESPONSE TO MOTION FOR ACCELERATED
REVIEW**

ROB MCKENNA
Attorney General

KIMBERLY A. LORANZ
Assistant Attorney General
WSBA #17430
1433 Lakeside Court, No. 102
Yakima, Washington 98902
(509) 575-2468

COPY

I. COUNTERSTATEMENT OF THE CASE

This is an appeal by the father from a decision of the Superior Court for Yakima County, terminating his parental rights as to his child A.B. Dependency was established on February 4, 2002. Ex 3¹; 2RP 203². Due to an inability of remedying the parental deficiencies, the Department of Social and Health Services (DSHS) filed a termination petition on September 13, 2004. CP 74-80. The mother's rights to A.B. were terminated by order entered on July 8, 2005. CP 66-70. The father contested the termination petition and the trial occurred on June 13-17, 2005 and November 16-22, 2005. The trial court granted the termination petition, and a written order of termination was entered on March 31, 2006. CP 85-94. The father timely appealed the termination order. CP 4-23.

¹ The Respondent, DSHS, designated the trial exhibits on August 17, 2006. References to the trial exhibits will be to the same exhibit number designated by the trial court for ease of reference.

² Appellant's Brief indicated that there are nine volumes of verbatim report of proceedings as follows:

1RP	-	6/13/05
2RP	-	6/14/05
3RP	-	6/15/06
4RP	-	6/16/06
5RP	-	6/17/06
6RP	-	11/16/05
7RP	-	11/17/05
8RP	-	11/18/05, 11/21/05
9RP	-	11/22/05.

A supplemental volume of transcripts containing additional proceedings from 11/21/05 is referenced as 10RP followed by page number. Appellant's Brief at 8, fn 2. For continuity and ease of reference, the same citations will be used herein.

II. COUNTERSTATEMENT OF FACTS

A.B. was born on October 27, 2001. 2RP 203; CP 86 (FOF 1.1).

A.B. has never resided in the father's home. 1RP 186.

The father has a drug dependency. 1RP 78-79; 3-506. He started using drugs as a young man and entered drug court in Nevada around the time of the child's birth in October 2001 as a result of a drug-related burglary charge. 1RP 80; CP 88 (FOF 1.16). He successfully completed that program in 2003 and has remained clean and sober since December 2001. 1RP 80; CP 88 (FOF 1.16). There is no dispute that he has remained clean and sober.

At the time of the child's birth, the father and mother were not married and he resided in Nevada. 1RP 77. Eventually, he was able to get to Washington State and had his first visit with his daughter in February, 2003. 1RP 74; 2RP 342; CP 87 (FOF 1.13). She was 16 months old at that time. He requested a home study be completed on him for placement in Nevada. An interstate compact request was made by the social worker to Nevada, but it was denied on May 13, 2003 due to the father's criminal history and because paternity had not been established. 1RP 77-78; 2RP 208-09; Ex. 7. Paternity was finally established on June 25, 2003. CP 87 (FOF 1.12); Exs. 24, 25, 27. A second request for a home study for

placement with the father was made, but also was denied due to the father's criminal history. 1RP 78; Ex. 8.

In the interim, dependency was established by agreed order entered on February 4, 2002 (Exs. 2, 3) and the disposition order placed the child with a maternal relative (a cousin). Ex. 4. The child has remained in that placement since that date. 3RP 480; 3RP 482. At a subsequent dependency review hearing on October 19, 2003, the juvenile court commissioner ruled that the paternal grandmother and step-grandfather no longer need to be considered for placement and an Interstate Compact (ICPC) request did not need to be made by DSHS.³ Ex. 19. Neither the disposition order entered on February 4, 2002 nor the review order entered on October 19, 2002 were appealed or challenged by the father through the revision process outlined in RCW 2.24.050 or any other appellate process.

The father was able to re-locate to Washington State in June 2003. 1RP 81; 2RP 215-16. A regular visitation schedule was set up along with services, which included parent education classes, one-on-one parent education, urinalysis (UA) testing, and a domestic violence assessment and treatment program. 2RP 200; 2RP 235.

³ The father and his family have never accepted this decision and do not feel that the placement (a maternal cousin) is a true relative and therefore is not entitled to placement. During the course of the dependency, the father has continued to challenge the legitimacy of the placement's family connection and this position was continued throughout the termination hearing. 3RP 599-600; 4RP 640-42; Exs. 60, 61, 62, 63.

The father completed a parenting assessment in July 2003, which recommended on-going parent education. CP 88 (FOF 1.17); Ex. 14. He participated in parent education until February 2005 when he re-located back to Nevada. 1RP 87; 1RP 114. In addition to individual parent education at visitation, he also completed group parent education in both English and Spanish. 2RP 225-26; Exs. 10, 11, 12, 13. Although, overall, the father made improvement in his parenting skills, the parent educator, Steve Bergland, still had concerns about the lack of a father-child relationship and attachment, in spite of two years of parent education and visitation. 1RP 117-18; CP 88 (FOF 1.17).

While living in Washington State, the father became involved in a relationship with Christina Scott, an individual known to DSHS. 1RP 175; 2RP 271-72. The father was advised by the social worker that it was not a good idea for him to associate with Ms. Scott due to her own issues, including mental health history and domestic violence. 2RP 271-72. A service plan was identified for her, as she was going to be part of the father's household. 2RP 263-64.

The father married Ms. Scott in May 2004, in spite of the above concerns expressed by the social worker and the September 2003 incident. 1RP 63. They have one biological child together (A.S., born on January 1, 2005) (1RP 185-86) and Ms. Scott has another child (G.S., born March 24,

2004) (3RP 423) that resided with her while she and the father resided together. 1RP 61; CP 89 (FOF 1.24).

In early 2005, in spite of the father's assertions that they were "separated," Ms. Scott was allowed by the father to reside in his home in Washington State, along with her children G.S. and A.S., and her disabled sister. 1RP 61; 1RP 63. It was while residing in the father's home that Ms. Scott failed to provide care for her disabled sister resulting in a conviction for criminal mistreatment. 1RP 64-65. The father asserted at the termination trial that he did not know what was happening in his home. 3RP 499-500. Interestingly, just before law enforcement entered the home due to the allegations of abuse against Ms. Scott's sister, the father's mother, Edelmira Rocke, came to get Ms. Scott's two children, G.S. and A.S., because Ms. Scott did not want DSHS/CPS to get her children and for financial reasons. 3RP 498; 3RP 548-49; Ex. 67. It was shortly after this that the father then re-located to Nevada without notice to anyone involved in the dependency action. 1RP 174-75.

In July 2005, at the court's urging during the termination trial, the father initiated a dissolution proceeding. 5RP 909-12; 6RP 1005; Ex. 34. Joint custody was awarded to both Ms. Scott and the father. 6RP 1007; Ex. 34. But his child with Ms. Scott, A.S., is currently in a guardianship in Nevada with the paternal grandmother and step-grandfather. 6RP 1013;

CP 89 (FOF 1.24); Exs. 35, 36, 37. The father continues to have some contact with Ms. Scott, in spite of his belief that she is still using drugs, and even allowed her to stay in the home with his parents in the summer of 2005 (in between the two phases of the termination trial). 6RP 1010-11; 6RP 1028; 6RP 1068-72; See, Ex. 67.

In January 2004, the father was assessed because of concerns of domestic violence in his relationship with Ms. Scott. 1RP 16. Rose Roberson completed the assessment and recommended a 20-week program. 1RP 24. Part way through that program, at week 10, the father admitted to being involved with two separate domestic violence incidents with his wife, Ms. Scott, in July 2004. 1RP 28; 1RP 36. Based upon his self-report, Ms. Roberson extended the program to a 52-week program. 1RP 30; 1RP 32. The father did not complete this program. 1RP 32. Instead, he relocated to Nevada in March 2005. 1RP 34; 1RP 41.

In July 2005 (during the termination trial), the father obtained a new domestic violence assessment in Nevada at the court's urging. The new assessment recommended a 26-week batterer's program. 6RP 1029-30; Ex. 64. The father did not share much information about the previous domestic violence program he has been involved in in Washington State with his new evaluator in Nevada. 6RP 1030-32. In late September 2005, he started a batterer's program in Nevada. 6RP 1032-33; Ex. 64. At the

conclusion of the termination trial in November 2005, the father felt he did not need any domestic violence treatment and had not completed a program in Washington or Nevada. CP 89 (FOF 1.21).

The father had his first visitation with A.B. in February, 2003, when she was 16 months of age. 1RP 74; 2RP 342. A regular, consistent visitation schedule started in June 2003, after he re-located to Washington State and was available for visitation. 2RP 219-20. He visited weekly, often times multiple times a week, between June 2003 and September 2003. 2RP 222. During this visitation time period, he seemed to be progressing in establishing a relationship with A.B. and the social worker recommended an increase in visitation, to include unsupervised, and a transition to the father's home. 2RP 227; 2RP 229; 2RP 230; 2RP 231-32. In fact, the transition plan was never accomplished because the father missed his first visit in the transition plan because he had been arrested for an assault during an incident involving Ms. Scott over the weekend. 2RP 232; CP 88 (FOF 1.18). This arrest lead to an assault conviction and an immigration hold being placed on the father. 1RP 67-68. He was incarcerated from September 2003 until December 2003. 1RP 68; 2RP 233.

Throughout the visitation in 2003, 2004 and 2005, the father and his family complained about the placement or the placement's mother.

(whom the child viewed as her grandmother) being part of the visitation. 2RP 243-44; 4RP 636-37. The professionals involved with visitation felt it was too traumatic to the child to have visitation without the child having someone present whom she trusted and was comfortable with. 1RP 117; 6 RP 987. The juvenile court commissioner determined who would be present during visitation and allowed the placement or the placement's mother to be present. 2RP 238-39.

Following his release from incarceration, there were concerns about the impact his absence had on A.B. so an assessment was completed in January and February 2004 on the child by Tawnya Wright, a therapist. 2RP 236. Following that assessment, in February 2004, a supervised schedule visitation resumed, but the child's relationship with the father was different than it had been in September 2003, when she had last visited. 1RP 153; 1RP 154; 2RP 239; CP 90 (FOF 1.27).

Since the father's visitation resumed in February 2004, his visitation has remained supervised due to concerns regarding the lack of a bond and relationship between the father and A.B. and concerns of the impact of visitation on her. 1RP 110. In spite of numerous visits, the father's relationship has not improved or returned to the point it had been in September 2003 and had not progressed to the point where

unsupervised visitation or visitation without the presence of the placement or placement's mother could occur. 1RP 110; CP 90-91 (FOF 1.29).

The child was assessed again by Martha Burns in the summer of 2005 and Ms. Burns opined A.B. had no special needs and would not benefit from therapy. 6RP 944-45; 6RP 952-53; 6RP 973. Ms. Burns also opined regarding the difficulty with providing therapy for very young children (4 years of age or younger) due to the child's inability to have insight and verbalize at such a young age. 6RP 952-53. Ms. Burns could also find no identifiable reason why the child related to the father the way she did as the child was able to interact and relate to others appropriately. 6RP 944-45; 6 RP 952.

The termination trial began on June 13, 2005. At the conclusion of testimony on June 17, 2005, the court deferred making a ruling on DSHS' petition. He kept the record opened and requested that additional steps be taken by DSHS and the father to supplement the record at a future hearing. 5RP 909-12; CP 70 (FOF 1.28). The trial resumed on November 16 and was concluded on November 22, 2005. The court issued a memorandum decision on January 5, 2006. CP 24-43. As part of his decision, he urged the parties again to try and reach an agreed resolution on the matter. Id. When these efforts were unsuccessful, he entered findings of fact,

conclusions of law and an order terminating parental rights on March 31, 2006. CP 85-94. This appeal followed. CP 4-23.

III. ARGUMENT

A. **The Trial Court's Decision Should Be Affirmed Because There Was Substantial Evidence To Support The Trial Court's Findings by Clear Cogent And Convincing Evidence.**

Parents have a constitutionally protected right to the care, custody, and companionship of their child. In the Matter of Sumey, 94 Wn.2d 757, 762, 621 P.2d 108 (1980). However, parents' constitutional rights are not absolute. When parental actions, decisions, or inability to act seriously conflict with the physical or mental health of the child, the parents' rights must be balanced against both the child's right to basic nurture, safety, and physical and mental health, and the State's right and responsibility to intervene to protect the child. RCW 13.34.020; Krause v. Catholic Community Services, 47 Wn. App. 734, 743, 737 P.2d 280 (1987). Therefore, the dominant concern on review should be the welfare of the child. In the Matter of Sego, 82 Wn.2d 736, 738, 513 P.2d 831 (1973).

In a termination proceeding, the trial court is afforded broad discretion and its decision is entitled to great deference on review. The findings of the trial court will only be disturbed on appeal if they are not supported by substantial evidence. In the Matter of H.J.P., 114 Wn.2d

522, 532, 789 P.2d 96 (1990). Substantial evidence is evidence in sufficient quantum to persuade a fair-minded person of the truth of the stated premise. Even where the evidence conflicts, the appellate court need only determine whether the evidence most favorable to the prevailing party below supports the challenged findings. Washington Belt & Drive Systems Inc. v. Active Erectors, 54 Wn. App. 612, 616, 774 P.2d 1250 (1989), review denied, 113 Wn.2d 1035 (1990).

The elements necessary to establish termination, as set forth below, are listed at RCW 13.34.180(1)(a)-(f) and must be proven at trial by clear, cogent and convincing evidence:

- (a) That the child has been found to be a dependent child under RCW 13.34.030(4); and
- (b) That the court has entered a dispositional order pursuant to RCW 13.34.130; and
- (c) That the child has been removed or will, at the time of the hearing, have been removed from the custody of the parent for a period of at least six months pursuant to a finding of dependency under RCW 13.34.030(4); and
- (d) That the services ordered under RCW 13.34.136 have been expressly and understandably offered or provided and all necessary services, reasonably available, capable of correcting the parental deficiencies within the foreseeable future have been expressly and understandably offered or provided; and

- (e) That there is little likelihood that conditions will be remedied so that the child can be returned to the parent in the near future. A parent's failure to substantially improve parental deficiencies within twelve months following entry of the dispositional order shall give rise to a rebuttable presumption that there is little likelihood that conditions will be remedied so that the child can be returned to the parent in the near future. The presumption shall not arise unless the petitioner makes a showing that all necessary services reasonably capable of correcting the parental deficiencies within the foreseeable future have been clearly offered or provided.
- (f) That continuation of the parent and child relationship clearly diminishes the child's prospects for early integration into a stable and permanent home.

There is an additional element that must be proven under a separate statute. RCW 13.34.190(4) requires that termination must be shown to be in the child's best interests. The burden of proof for the best interest element is a preponderance of the evidence. In re the Dependency of A.V.D., 62 Wn. App. 562, 571, 815 P.2d 277 (1991). Proving RCW 13.34.180(1)(a) through (f) establishes present parental unfitness and thus does not violate the father's due process rights. In re the Welfare of H.S., 94 Wn. App. 511, 973 P.2d 474 (1999).

The father asserts in his brief that his "current unfitness" was not proven and therefore the termination order must be reversed and the case remanded with a directive for reunification. Appellant's Brief at 32-38.

Contrary to the father's argument, termination of his parental rights was based upon his current parental unfitness and In re Churape, 43 Wn. App. 634, 719 P.2d 127 (1986), and In re Dependency of T.L.G., 126 Wn. App. 181, 108 P.3d 156 (2005), are distinguishable and not applicable.

In Churape, "the only 'unremediable' condition testified to was lack of contact with the children prior to September 1983. The DSHS counselor testified that Mr. Churape could be an adequate parent, who was fond of the children, and would be a gentle but firm disciplinarian." 43 Wn. App. at 638. In this case, however, the expert testimony submitted by DSHS established that his deficiencies involved more than just lack of contact with the child.

Rather, in this case, the testimony established that the father not only had a domestic violence issue that was not remedied, but there were also significant lack of attachment and bonding issues between he and his child that that not been remedied in over two years of service and visitation and would not likely be remedied in the near future. Further, none of the DSHS witnesses testified he was currently fit parent to A.B.. The only expert witnesses who testified the father was fit were his own experts/professionals retained for the purpose of trial and which the court found the transition plan proposed by them was not appropriate, given the

child's needs. Just because the trial court accepted the opinions of DSHS' witnesses does not mean it was error.

Likewise, T.L.G. is also distinguishable and not applicable. In T.L.G., the case was reversed primarily because proper notice had not been given under the Indian Child Welfare Act (ICWA), 25 USC § 1901 – 1963, although the court also found under the facts of the case that it had not been established that “family reunification cannot be occur within the foreseeable future.” 126 Wn. App. at 206.

In this case, the father's parental deficiencies were initially identified as his drug/alcohol problem, for which he was involved in drug court in Nevada. 1RP 72. His lack of contact and bonding was also identified and a visitation plan and parent education services were put in place by DSHS to attempt to remedy his deficiency. 2RP 216. Later, he became involved in a relationship with Christina Scott that involved domestic violence, so a domestic violence assessment and treatment program were then offered. 2RP 235.

In this case, none of the DSHS witnesses testified that family reunification was likely in the foreseeable future. The only expert witnesses who testified reunification was possible were his own experts/professionals retained for the purpose of trial and which the court found the transition plan proposed by them was not appropriate, given the

child's needs. Again, just because the trial court accepted the opinions of DSHS' witnesses does not mean it was error.

In both Churape and T.L.G., the court reversed and remanded to the trial court to conduct further proceedings—it did not dismiss the termination petition or direct that reunification should be ordered, as urged by the father here. Appellant's Brief at 38. Thus, factually both cases are distinguishable.

B. The Unchallenged Findings Are Verities On Appeal.

In his appeal, the father does not challenge the following findings of fact made by the trial court:

1.8 At the time the child was placed into protective custody, the mother was arrested and incarcerated for unrelated outstanding warrants. The father was residing in Las Vegas, Nevada with his mother and step-father, the Rocke's. The father was notified of the shelter care hearing.

1.9 On February 4, 2002, an order was entered in Juvenile Court for Yakima County finding [A.B.] dependent pursuant to RCW 13.34.030. An order of Disposition was entered on that same date, placing [A.B.] in out of home care. She has remained in out of home placement since that date.

1.10 The child was placed with Trina Luna, a maternal cousin, in February 2002 and has resided there since. Trina Luna has been determined by the court to be a maternal blood relative of the child. Also present in Ms. Luna's home is [D.], a half-brother of [A.B.]. [D.] is now three years of age and has lived with Ms. Luna since birth and she has adopted him.

1.11 [A.B] has been out of her parent's home for over six months pursuant to the finding of dependency. She has never resided with her father.

1.12 The parents were never married. The father underwent genetic paternity testing. On June 25, 2002 the results of the testing indicated he was the biological father of the child. An order of paternity was subsequently entered.

1.13 DSHS has had contact with the father commencing in October 2001 and has continued to have contact with him ever since. The father had his first visit with the child on February 25, 2003 when the child was 16 months of age. On June 11, 2003, the father re-located from Las Vegas, Nevada to Yakima, Washington. A visitation schedule with the father was begun on June 13, 2003 and has continued, with several interruptions, since then. The father has participated in a variety of services since February 2002 both in Yakima, Washington and Las Vegas, Nevada. The father re-located back to Las Vegas, Nevada in March 2005.

...

1.16 At the time of DSHS' initial involvement, the father was involved in a felony drug court program in Las Vegas, Nevada. He successfully completed that program in 2003. While he was involved in that program, he was unable to physically re-locate to Washington State. He has been clean and sober since December 2001.

1.17 In July 2003, the father participated in a parenting assessment through Personal Parenting and Assessment Services. He continued to participate in that program until February 2005, when he re-located back to Las Vegas, Nevada. Steve Bergland was the primary parent educator who worked with the father. Over the two years that Mr. Bergland worked with the father he did see improvement in the father's parenting abilities, but still had concerns about the lack of a bond and father-child relationship.

1.18 The father plead guilty to fourth degree assault in late 2003 following a September 2003 arrest. The victim of the assault was Christina Scott, his girlfriend at that time.

...

1.22 The father's life has been very complicated in the last four years. His basic residence and family support has always been in Las Vegas, Nevada, where he now lives with his mother and step-father. He has indicated from the very beginning a strong desire to have custody of the child and to also have his own family involved in her life. He moved back and forth from Las Vegas, Nevada to Yakima, Washington in an attempt to cover a wide variety of legal and personal responsibilities. However, certain legal troubles in Las Vegas, Nevada and Yakima, Washington, as well as financial difficulties, have hampered his ability to successfully complete all treatment recommendations and to maintain consistent and meaningful contact with the child. Despite these circumstances, he has demonstrated a sincere and conscientious commitment in this case regarding his child.

1.23 The father has been able to maintain steady employment since he returned to Las Vegas, Nevada in March 2005.

1.24 The father married Christina Scott in Yakima, Washington on May 8, 2004. The marriage was dissolved in Las Vegas, Nevada on August 21, 2005. One child was born to Ms. Scott and the father named [A.S], born on January 1, 2005. The Decree of Divorce provided for joint custody, but the primary residential placement has been and continues to be with the father in Las Vegas. Further, Ms. Scott and the father agreed that the child should be placed on a temporary basis with the father's mother and step-father as guardians. That guardianship is still legally in place.

...

1.26 Christina Scott is also the mother of [G.S], born on March 11, 2004. The natural father is unknown. Mr. Salas-Orozco currently has custody of this child pursuant to a Yakama Indian Nation dependency order.

1.27 The father began a regular visitation schedule in June 2003, when the child was 20 months of age. He visited weekly and sometimes twice weekly. Initially, in 2003, the father began to develop a positive relationship with the child. By September 2003, the DSHS plan was to increase the father's visitation and move towards a placement in his home in Yakima, Washington. This plan was interrupted, however, by the father's incarceration for an assault pertaining to Christina Scott and a subsequent immigration hold, which kept him incarcerated for several months. His visitation did not resume until February 2004 after he was released. Since his visitation resumed in early 2004, his relationship with his child has not been the same. The father visited weekly from February 2004 until February 2005 when he re-located back to Las Vegas, Nevada. After he moved, he did not visit the child for four months, but then returned to visiting the child approximately every 2 weeks from July 2005 until November 2005.

1.28 The trial record in this case was accomplished in two stages. At the end of the first stage in June 2005, the Court was not satisfied that DSHS had identified and addressed all necessary issues relating to the father-child relationship. The Court made some suggestions in that regard. This led to the second stage of the trial in November 2005 at which time all parties supplemented the record.

...

1.30 Specifically, the Court is concerned about the location of the visits, the participation of the caretakers, certain behaviors of the child during the visits, lack of affectionate physical contact between the father and child during the visits, sharing of food during visits, utilization of toys, books and other activities during visits, and comments made by the child during the visits.

...

1.33 The child is currently 4 years of age. The child's caretaker, Trina Luna, and the caretaker's immediate family have been the central and dominant part of the child's life. The child's attachment to them is profound and exclusive. This attachment with them may change in the next few years as the child develops more contacts with the outside world at school, at play, and in the larger community. During this transition, there is a likelihood that the child's bonds with her caretaker will soften and evolve and the child may be more open and accepting of a relationship with her father. Hopefully that relationship will be fostered on an informal basis.

...

1.36 The guardian ad litem recommends that the parent-child relationship be terminated.

These unchallenged findings of fact are verities on appeal. In the Interest of J.F., 109 Wn. App. 718, 37 P.3d 1227 (2001); Fuller v. Employment Security, 52 Wn. App. 603, 762 P.2d 367 (1988); In re Santore, 28 Wn. App. 319, review denied, 95 Wn.2d 1019, 623 P.2d 702 (1981).

The courts of our State have consistently refused to hear arguments that fail to challenge specific findings of fact and fail to provide support for such challenges. See, e.g., Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (refusing to consider the plaintiff's arguments because they failed to refer to the record or cite

authority); Bryant v. Palmer Cooking Coal Co., 86 Wn. App. 204, 216, 936 P.2d 1163 (1997) (same).

The unchallenged findings in this case overwhelmingly establish the legal requirements necessary for termination of parental rights and support the trial court's decision. Given these verities, the court should find, as a matter of law, that the findings are sufficient to support termination.

C. The trial court deserves deference in this matter.

The trial court heard the testimony, observed the witnesses' demeanor and received the evidence directly. For this reason, the appellate court should rely heavily on the trial court's factual findings. As explained in In re A.M., "[i]n proceedings to terminate parental rights, we give particular deference to the trial court's advantage derived from having the witnesses before it." 106 Wn. App. 123, 131, 22 P.3d 828 (2001), *citing* In re Aschauer, 93 Wn.2d 689, 695, 611 P.2d 1245 (1980); In re H.J.P., 114 Wn.2d 522, 532, 789 P.2d 96 (1990); *see also*, In re Hall, 99 Wn.2d 842, 849, 664 P.2d 1245 (1983); In re Ramquist, 52 Wn. App. 854, 860, 765 P.2d 30 (1988).

Here, the trial court found clear, cogent, and convincing evidence existed to terminate the father's parental rights and the appropriate deference should be afforded the trial court. RCW 13.34.190(1).

D. The Father's Claim That There Is Insufficient Evidence Upon Which To Base A Decision To Terminate His Parental Rights Is Without Merit.

- 1. Services ordered under RCW 13.34.130 were expressly and understandably offered or provided and all necessary services, reasonably available, capable of correcting parental deficiencies within the foreseeable future have been expressly and understandably offered or provided.**

The State has an affirmative duty to offer or provide reasonably available services that are capable of correcting identified parental deficiencies within the foreseeable future. In re Hall, 99 Wn.2d 842, 850, P.2d 1245 (1983); In re P.D., 58 Wn. App. 18, 26, 792 P.2d 159 (1990), review denied, 115 Wn.2d 1019 (1990). A parent's unwillingness or inability to make use of the services offered by DSHS excuses the State from offering additional services that might have been helpful. In re A.M., 106 Wn. App. 123, 136, 22 P.3d 828 (2001).

In addition, where a parent claims he or she received insufficient services, he or she must point to evidence demonstrating how the service if offered would have corrected parental deficiencies. In re T.R., 108 Wn. App. 149, 163, 29 P.3d 1275 (2001). In other words, "even if the State inexcusably fails to offer a service to a willing parent, which is not the case here, termination is appropriate if the service would not have remedied the parent's deficiencies in the foreseeable future, which

depends on the age of the child.” Id. at 164 (citing, In re Hall, 99 Wn.2d 842, 850-51, 850, P.2d 1245 (1983)). DSHS has clearly discharged its duty with respect to this father.

The father completed a parenting assessment, parenting classes and participated in over two years of intensive parent education. 1RP 87. Although, the father made improvement in his parenting skills, the parent educator, Steve Bergland, still had concerns about the lack of a positive father-child attachment and relationship, in spite of the two years he had worked with the father and provided visitation. 1RP 110; 1RP 117.

The father visited with the child from June 2003 through the conclusion of the termination trial—more than two years. His visitation started at three times per week. 2RP 216; 2RP 222. It was reduced to once per week in 2004 based upon the distress and traumatic impact on the child. 2RP 238-39; 2RP 280. In 2005 after he re-located to Nevada, visitation was provided to him twice every other weekend. 7RP 1162; Exs. 38-53. The focus of the visitation was always to assist the father with having a positive interaction with the child so that a positive relationship and attachment could be developed. 3RP 515.

DSHS complied with the orders entered by the juvenile court commissioner regarding the frequency and structure of visitation and who was to be present at the visitation. In spite of the best efforts made by

several professionals working with the father in his visitation, DSHS was never successful in completely removing the placement or placement's mother, who the child viewed as her grandmother, from the visit without causing extreme anxiety and stress to the child. 1RP 117; 2RP 238-39; 6RP 987; 7RP 1164-65. In fact the juvenile court commissioner also never ordered that visit happen without the placement's mother. 2RP 238-39.

Counseling for the father and child was recommended in July 2003, when the child was 21 months old, by the parent educator that completed the initial parenting assessment, Andres Soto. 2RP 316-17; 3RP 334; Ex. 14. The social worker did not recommend counseling and it was not ordered by the juvenile court commissioner at the next review hearing in October 2003. 2RP 356. Prior to this review hearing, the visitation between the father and child was improving and the social worker felt an attachment was developing. 2RP 220; 2RP 228. In fact, the social worker was working on a transition plan to increase visitation, move to unsupervised visitation, with a possible placement in the father's home. 2RP 229. This plan was halted because the father was arrested for assault and incarcerated for approximately three months, which resulted in a lapse in visitation for approximately four months. 2RP 231-32.

Following the father's release, the juvenile court ordered an assessment on the child and father to determine the impact on her of visitation and how it should be structured. 2RP 236. Tawnya Wright completed this assessment in January and February 2005 and a visitation schedule resumed. 1RP 153, 1RP 154; 2RP 239. Ms. Wright did not recommend counseling for the child and father. None of these juvenile court orders were appealed or challenged by the father through the revision process outlined in RCW 2.24.050 or any other appellate process.

Subsequently, in September 2005, Martha Burns also evaluated the child and did not recommend counseling for the child and father as she felt the child would be unable to benefit from it. 6RP 952-53; 6RP 973. The guardian ad litem, Keith Gilbertson, also did not feel further therapy was needed. 5RP 782.

The father seems to argue that lack of a relationship or attachment with his child is not a parental deficiency. Brief of Appellant at 48. How can it not be a "deficiency" since his lack of a relationship or attachment to the child clearly interferes with his ability on a day-to-day basis to provide care for his child? She cannot be left alone with him without the child experiencing significant anxiety and trauma. How is he to parent if the child will not allow him to even pick her up or touch her for any extended timeframe?

Every effort was made to give the father an opportunity to overcome the barriers and establish a relationship and attachment with his child to no avail. Progress seemed to be made when the father was visiting regularly and consistently in the summer and fall of 2003, but then he made choices which resulted in him being arrested and incarcerated for three months. The consequence of this was that he was not available to continue to visit the child and continue to improve upon the relationship and attachment he was developing. After the lapse in visitation, the child's relationship and interaction with the father changed. This lapse caused her to not "trust" the father. 2RP 247-51; 7RP 1161-62. This lapse in visitation was solely caused by the father's choices and actions—not by any fault or inaction by DSHS.

A second lapse in visitation occurred the following year in early 2005 when the father chose to leave suddenly to return to Nevada without any transition with the child. Again, the father was absent from visitation for three months. 7RP 1162. Again, this lapse in visitation was solely caused by the father's choices and actions—not by any fault or inaction by DSHS.

The father was assessed as needing a 20-week domestic violence program. 1RP 24. Part way through that program, at week 10, the father admitted to being involved with two separate domestic violence incidents

with his wife, Ms. Scott, in July 2004. 1RP 28, 1RP 36. Based upon his self-report, the program was extended to a 52-week program. 1RP 30; 1RP 32. The father did not complete this program. 1RP 32. Instead, he relocated to Nevada in March 2005. 1RP 34, 1RP 41.

In July 2005, the father obtained a new domestic violence assessment in Nevada (without sharing much information about his previous involvement in Washington State), which recommended a 26-week batterer's program. 6RP 1029-30; Ex. 64. In spite of the two separate domestic violence assessments, the father felt he did not need any domestic violence treatment and had not completed a program in Washington or Nevada. CP 89 (FOF 1.21).

Based upon the above, the challenged findings of fact are supported by substantial evidence. DSHS did not fail to offer all reasonably available services as required by RCW 13.34.180(1)(d).

2. **There was substantial evidence presented at trial to establish by clear, cogent and convincing evidence that there was little likelihood conditions will be remedied so the child could be returned to the father in the near future.**

The focus of this factor is "whether parental deficiencies have been corrected." In re Dependency of K.R., 128 Wn.2d 129, 144, 904 P.2d 1132 (1995). Although the near future is not explicitly defined in the statute, it is clear that permanency must be established at the earliest possible date.

Adoption and Safe Families Act (“ASFA”), Pub. L. No. 105-89, 111 Stat. 2115 (1997); RCW 13.34.145. Additionally, the court may find that RCW 13.34.180(1)(e) has been established if services have been offered and parental deficiencies remain uncorrected twelve months after the dispositional order. RCW 13.34.180(1)(e); In re Ramquist, 52 Wn. App. 854, 765 P.2d 30 (1988).

The time frame which constitutes the near future must be determined by looking at the child’s point of view. In re Hall, 99 Wn.2d 842, 664 P.2d 1245 (1983); In re Dependency of T.R., 108 Wn. App. 149, 166, 29 P.3d 1275 (2001). The court may examine the entire parenting history of the parent. In re Dependency of J.C., 130 Wn.2d 418, 428, 924 P.2d 21 (1996).

When terminating parental rights, the “dominant consideration is the moral, intellectual, and material welfare of the child. . . . What is perhaps eventually possible for the parent 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). Even if a parent may eventually be capable of correcting parental deficiencies, termination is still appropriate where such deficiencies will not be corrected within the “foreseeable future” as viewed from the child’s point of view. See, In re Dependency of A.W., 53 Wn. App. 22, 32, 765 P.2d 307 (1988).

The professionals who worked directly with the child all testified it would take too long for the father to develop the type of relationship and attachment he would need to safely parent this child. 1RP 117; 2RP 284-85; 5RP 784; &RP 1162-64.. It was take at least one year or more and this deficiency could possibly not be remedied at all. 1RP 117. Little overall progress had been made in the last two years of visitation and services (parent education and domestic violence). 1RP 117; 2RP 284; 2RP 286; 7RP 1162-64. The father had not completed a domestic violence program in spite of having separate assessments in both Washington and Nevada. He also did not believe he needed an assessment, even though he continued to maintain contact with Christina Scott and allowed her to stay in his family's home in Nevada in between the two phases of the termination trial.

The father's plan for reunification in the near future it not really a reunification plan. Ex. 59. Rather, it is a plan to change placement from one relative (maternal cousin in Washington) to another (paternal grandparents in Nevada). His plan is to have the child reside at his house in Nevada, but it is really the home of his mother and step-father. Jack Cathey assessed and approved his parent's home as suitable for placement of the child. Ex. 57. Moreover, the father works full time, including overtime, and his plan is for his mother to care for the child. (In fact, the

grandmother has already become the primary caretaker of his other children residing in their home. 3RP 547; 4RP 665). This is not a “return home” as contemplated by the statute and would only serve to disrupt the only home the child has ever known. There is no credible evidence that the father will be able to remedy his deficiencies in the near future from this child’s perspective.

Based upon the above, the challenged findings of fact are supported by substantial evidence. DSHS did not fail to establish there is little likelihood the father’s deficiencies will be remedied in the near future, from the child’s perspective as required by RCW 13.34.180(1)(e).

3. **There was substantial evidence presented at trial to establish by clear, cogent and convincing evidence that continuation of the parent-child relationship clearly diminished the child’s prospects for early integration into a stable and permanent home.**

RCW 13.34.180(1)(f) emphasizes a limited time frame for establishing permanency for a child by use of the phrase “**early integration**” into a stable and permanent home. The focus of this element “...is the parent/child relationship and whether it impedes the child’s prospects for integration, not what constitutes a stable and permanent home.” In re Dependency of K.S.C., 137 Wn.2d 918, 976 P.2d 113 (1999). In In re A.C., 123 Wn. App. 244, 98 P.3d 89 (2004) the court stated “... this factor is mainly concerned with the legal relationship between parent and child,

as an obstacle to adoption; it is especially of concern where children have potential adoption resources". *Id.* at 250. *See also In re Esgate*, 99 Wn.2d 210, 214, 660 P.2d 758 (1983); *In re D.A.*, 124 Wn. App. 644, 102 P.3d 847 (2004); *In re T.R.*, 108 Wn. App. 149, 29 P.3d 1275 (2001).

Further, a finding that continuation of the parent-child relationship diminishes the child's prospects for early integration into a stable and permanent home necessarily follows from an adequate showing that there is little likelihood that conditions will be remedied so that the child can be returned home in the near future. *In re Dependency of J.C.*, 130 Wn.2d 418, 924 P.2d 21 (1996).

In this case, the father asserts that there is no interference with placement of the child in a permanent home since she can either be placed with him or remain in her current placement. Appellant's Brief at 46-47. But the standard as noted above is not the imminence of a placement. In fact, placement has nothing to do with this element. *In re Dependency of K.S.C.*, 137 Wn.2d 918, 976 P.2d 113 (1999).

Keeping the legal relationship between the father and this child is an obstacle to permanency for the child. It would keep her in limbo and prevent her from ever achieving permanency and stability. 7RP 1170-74. As long as the father maintains his legal relationship to the child, he and his family will continue to "fight" for this child and will challenge the

“legitimacy” of the child’s placement, which will result in constant disruption and turmoil in the child’s life. 5RP 787, 5RP 788; 5RP 793; The child’s prospects for permanency could only be diminished by maintaining the legal rights of this father. 2RP 286-87; 2RP 288-89; 2RP 363-64; 7RP 1170-74. There is no other option.

The existence of potential relative placements does not legally defeat termination and neither placement nor the quality of the child’s current placement is before the court. In re K.S.C., 137 Wn.2d 918, 976 P.2d 113 (1999); In re A.V.D., 53 Wn. App. 22, 765 P.2d 277 (1991). Established case law directs that instead of focusing on the child’s placement or relationship with extended family, the proper focus at termination is on the *parents’* fitness and whether continuing the relationship impedes early permanence.

Based upon the above, the challenged findings of fact are supported by substantial evidence. DSHS did not fail to establish the continuation of the parent-child relationship interferes with the child’s ability to integrate in to a stable and permanent home as required by RCW 13.34.180(1)(f).

4. Termination of the father's parental rights is in the best interests of the child.

Once the trial court finds that each allegation provided in RCW 13.34.180 has been proven by clear, cogent and convincing evidence, it must then decide whether, by a preponderance of the evidence, termination is in the best interests of the child under RCW 13.34.190(2). In re Welfare of A.J.R., 78 Wn. App. 222, 228, 896 P.2d 1298, review denied, 127 Wn.2d 1025 (1995). A trial court's finding that all services have been offered and that there is little likelihood of return home can be considered in determining the best interest of a child. In re Dependency of K.S.C., 137 Wn.2d 918, 925, 976 P.2d 113 (1999).

In parental termination proceedings, the paramount consideration is the welfare of the child. In re Russell, 70 Wn.2d 451, 423 P.2d 640 (1967); In re Dependency of K.S.C., 137 Wn.2d 918, 925, 976 P.2d 113 (1999). When a parent has been unable to progress over a lengthy period of time, a court is "fully justified" in finding termination is in the best interests of the child rather than "leaving [the child] in limbo of foster care for an indefinite period while [the parent] sought to rehabilitate himself." In re Dependency of T.R., 108 Wn. App. 149, 167, 29 P.3d 1275 (2001) (*quoting* In re Dependency of A.W., 53 Wn. App. 22, 33, 765 P.2d 307 (1988), review denied, 112 Wn.2d 1017 (1989)).

The father argues that termination is not in the best interest of the child and that the father's lack of relationship and attachment with the child is due DSHS' failure to provide visitation or services. Brief of Appellant at 48. He is mistaken. The social worker, parent educator, and others testified to the extensive visitation and parent education provided in an effort to remedy the father's deficiencies. 1RP 92-114; 2RP 216-223; 2RP 230. The social worker believes adoption is in the best interest of the child. Guardian ad litem Keith Gilbertson agreed. 2RP 288-89; 5RP 790; 7RP 1161.

As previously discussed, DSHS did offer visitation and services to the father. The father is not currently fit to parent because he has not remedied his domestic violence issues nor his lack of bonding and attachment with the child. See supra, Section III.D.1. It is not premature to consider the child's best interests.

It is not likely that the father will be able to provide permanency and stability to the child in the near future. See supra, Section III.D.2. In addition, the factual basis that supports the findings that all services were offered or provided, that there is little likelihood of returning home, and that continuation of the father's parental relationship with the child

interferes with her achievement of permanency, demonstrate that termination is in the child's best interest. See supra, Section III.D.

This child has waited a long time for her father to address his parental deficiencies and establish a relationship with her. This has not happened in the past four years. This child deserves permanency and the opportunity to solidify her bond in a permanent home. RCW 13.34.020 states “[w]hen the rights of basic nurture, physical and mental health, and safety of the child and the legal rights of the parents are in conflict, the rights and safety of the child should prevail. . . . The right of a child to basic nurturing includes the right to a safe, stable, and permanent home and a speedy resolution of any proceeding under this chapter.” Moreover, “permanency planning goals should be achieved at the earliest possible date, preferably before the child has been in out-of-home care for fifteen months.” RCW 13.34.145(1)(c). This child deserves to have permanency and is long overdue.

Based upon the above, the challenged findings of fact are supported by substantial evidence. It is in the best interests of the child to terminate the father's parental rights as required by RCW 13.34.190(2).

IV. CONCLUSION

DSHS has proven by clear, cogent, and convincing evidence all elements necessary under RCW 13.34.180 to terminate the father's parental rights. DSHS has also proven by a preponderance of the evidence that termination of the father's parental rights is in the best interests of the child, as required under RCW 13.34.190(2). The child suffers from anxiety that appears to be directly related to her visitation with her father. She requires a caregiver capable of providing her with consistency, security and stability. She has waited four years for her father to become fit to parent her. She should not be asked to wait any longer. For the reasons set forth in the foregoing argument and in the interests of this child, Respondent respectfully requests that the trial court's order be affirmed in its entirety.

RESPECTFULLY SUBMITTED this 26th day of December, 2006.

ROB MCKENNA
Attorney General


KIMBERLY A. LORANZ
Assistant Attorney General
WSBA No. 17430
1433 Lakeside Court, No. 102
Yakima, Washington 98902
(509) 575-2468