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**SUPREME COURT OF THE STATE OF WASHINGTON**

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IN RE THE WELFARE OF:

C.S.,

A Minor Child.

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**SUPPLEMENTAL BRIEF OF DSHS**

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ORIGINAL

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## I. INTRODUCTION

C.S. is now nine years old. He has been in foster care for nearly seven years. This child is extremely intelligent, but he suffers from both physical and mental health problems that require a skilled parent who can provide stability, flexibility, structure and consistency. His mother is unable to provide the level of parenting that he needs.<sup>1</sup>

During the five years leading up to the termination trial the Department offered the mother extensive services—including no less than seven drug treatment programs—and although she made some progress in battling her drug addiction and addressing her mental health and other problems, she was not ready to parent this child at the time of trial. She argues that she needed more time, perhaps another two years or longer. However, it was uncertain that she would ever be capable of meeting his needs.

The trial court appropriately found that this child had waited in foster care long enough, that the Department proved all elements of the termination statute, and that termination is in the child's best interests, and it properly terminated mother's rights. The only issue before the Court is whether the court of appeals properly found that the termination order is supported by sufficient evidence.

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<sup>1</sup> In deference to the mother's right to confidentiality, the Department refers to her in this brief as "the mother." No disrespect is intended.

## II. STATEMENT OF THE CASE

C.S. was born October 5, 1999. RP at 12. His mother was 18 years old and had been abusing drugs and alcohol for nearly a decade. RP at 43, 315. The mother testified that she drank “quite a bit” and used methamphetamines in the early months of her pregnancy with C.S., but stopped using everything except cigarettes when she learned she was pregnant. RP at 329. She reportedly stayed clean and sober for 18 months before relapsing with alcohol, then meth, then heroin. RP at 329-30.

The Department’s Child Protective Services became involved with the family in July 2001. RP at 10. The CPS investigator identified the mother’s problems as drug abuse, domestic violence and mental health issues and attempted to provide services to address these problems. RP at 10. In November 2001, the Department arranged for the mother to receive inpatient treatment at Isabella House, a drug and alcohol treatment facility in Spokane, that would accept both the mother and her young son. RP at 17, 33. The mother failed to comply with the rules at that facility and was asked to leave. RP at 17, 315.

On the encouragement of her social worker, the mother then entered Pioneer Center North, another drug treatment program, in Sedro-Woolley, in December of 2001. RP at 17-18, 191. She completed the 90-day treatment program, but began using again a short time later. RP at 18.

Due to the mother's continued drug abuse and its effect on her young son, the Department filed a dependency petition and C.S. was taken into protective custody on September 5, 2002. CP at 39. Two months later, he was found dependent on the basis that he had been abused or neglected. CP at 2, 39. C.S. was initially placed with his maternal grandmother and her boyfriend. RP at 14. However, the boyfriend worked nights and it was too stressful for the couple to continue to care for C.S., given the boyfriend's work schedule. RP at 14, 147. After about three months, the grandmother asked that C.S. be moved. RP at 334-35. The boyfriend's sister, who C.S. calls "Aunt" Arlette, had cared for C.S. many times when he was just an infant and his mother was using, and also had provided respite care when the child was living with his grandmother. RP at 12, 42, 340. She became licensed so that she could be his foster mother and she cared for C.S. throughout the dependency proceeding. RP at 15. She testified at trial that she hoped to adopt him. RP at 115-16.

Also in the fall of 2002, the mother became involved with Bob A. In October of that year, she was arrested for domestic violence against Bob. RP at 15, 332-33. The mother's drug counselor at the time, Steve Bradburn, recommended she again try inpatient treatment, but she refused. RP at 15-16. An alternative three-pronged outpatient program was developed to assist her in working on domestic violence, mental health

and drug abuse issues, but she did not readily engage in the program and disclosed to her treatment provider that she was using alcohol and that her boyfriend Bob, who also had been through drug treatment, was abusing pain medications. RP at 15-16, 19, 23.

In January 2003, the Department social worker Paul Thurik learned the mother was pregnant. RP at 16. His primary concern at the time was for the unborn child and his focus was to get the mother into inpatient treatment. RP at 18. The Department arranged for treatment at Evergreen Manor in Everett. RP at 18. The mother had a "bed date" of February 28, 2003, but she did not make it, as she and Bob were stopped by law enforcement on their way there and Bob was arrested for driving without a license and for possession of marijuana. RP at 19-20.

The mother eventually entered treatment at Evergreen Manor in March 2003. RP at 20. She did well there and successfully completed the six-month inpatient treatment program. RP at 38, 316. At the end of August 2003, she entered the facility's sister program, Tree of Life, also in Everett, which includes transition housing. RP at 38. Tree of Life provides "wrap around services" for the various mental health, family preservation, parenting education, and drug and alcohol treatment needs of recovering addicts. RP at 38-39. The mother spent nearly 15 months in these two

related programs. RP at 51-52. She gave birth to her son, D.A., while she was at Evergreen. RP at 39.

In July 2003, shortly before D.A. was born, social worker Edith Vance was assigned to the case. RP at 38. Ms. Vance visited the mother at Evergreen in the summer of 2003 and was committed to reuniting C.S. with her. RP at 39-40. The social worker told the mother that "because of her delay in seeking treatment, the clock was ticking" and, because of the dependency statute's time lines, the mother "would have one chance of getting [C.S.] back and this was going to be it," but that Ms. Vance was going to go to bat for her. RP at 41.

Regular visits between C.S. and his mother resumed when the mother moved to Tree of Life. RP at 41. She had had regular and consistent visits with C.S. whenever she was in Ferry County, but visits were infrequent after the mother entered inpatient treatment in Everett. RP at 31, 40. There are only two social workers in Ferry County and, coupled with Evergreen Manor's restrictions on visits during inpatient treatment, visits were logistically very difficult and infrequent while the mother was at Evergreen. RP at 38, 40-41. Once the mother moved to Tree of Life, visits started again with an overnight visit and progressed to two-day, then weeklong and two-week visits. RP at 41. The social worker transported the child across the state, between Republic and Everett, for the visits. RP

at 41, 46. C.S. was four years old at the time and had been in foster care for more than one year. RP at 42.

In February 2004, Ms. Vance believed the mother was finally stable enough in her recovery to have a valid psychological evaluation. RP at 50-51. The mother previously had been diagnosed as having symptoms congruent with histrionic personality disorder and depressive disorder. RP at 221. Dr. Gwen A. Lewis conducted the evaluation in February 2004. She reported that the mother “was overwhelmed by the complexity of circumstances,” had difficulty thinking flexibly, making reasoned decisions and responding to new or novel situations or tasks. *See* RP at 221. She also stated that the mother has a hard time shifting from one thing to the next, can’t focus on more than one thing at a time, and is not capable of multi-tasking. RP at 56-57. She concluded that the mother is easily frustrated and does not have a high level of patience. RP at 57.

In the spring of 2004, social worker Vance noticed signs of trouble in the mother’s household. The mother seemed to be on edge; she reported having “relationship problems” with Bob; C.S. was “out of sorts” and reported that Bob had yelled at his mother; the house was “pretty messy” and this was unusual for this mother. RP at 46-47. In May 2004, Ms. Vance learned that the mother had relapsed. RP at 47. The mother later disclosed that she had been using crack cocaine since February 2004.

RP at 48. The use began during a Valentine's Day outing with Bob, and the social worker believed that Bob played an active role in the relapse. RP at 50-51. Due to the relapse and its effect on the couple's baby, D.A. was taken into protective custody and placed in foster care with C.S. in Arlette's home. RP at 48-49, 169.

Tree of Life recommended the mother enter a 28-day inpatient treatment program at Prosperity House. RP at 49. The mother started in that program on June 4, 2004, but aborted treatment within 24 hours. RP at 49. She told Ms. Vance that she wanted to go back to Evergreen Manor. RP at 49. Ms. Vance reminded the mother that when she tried to reunite C.S. with her that she had one shot and they now needed to explore a permanent plan for him. RP at 49. The mother understood and wanted to know what she needed to do to get D.A. back. RP at 49.

The social worker arranged for treatment at Evergreen beginning June 26, 2004. RP at 51. In the meantime, the mother was required to participate in outpatient services. She failed to comply with that requirement. RP at 51. She also failed to show up at Evergreen because she was arrested for assaulting Bob while he was driving a car. RP at 52. She was given an extension at Evergreen and was admitted on July 3. However, she aborted treatment the following day and returned to Republic where she began using "pretty heavily." RP at 52-53, 56.

The mother later told Ms. Vance that one of the things that led to her relapse at Tree of Life was that it was too much for her to have to care for both children—even though C.S. had only been there for two weeks. RP at 56, 72-73. According to Bob, it was during a visit with C.S. in May 2004 that another incident of domestic violence occurred. He told the social worker that the mother was high and the baby's diaper needed changing. Bob told the mother to change D.A.'s diaper and she "threw the baby on the bed." RP at 86. When she did that, Bob pushed her away from the baby. She responded by hitting Bob on the head with a lamp and the glass lampshade shattered, its pieces falling onto both D.A. and C.S. RP at 86.

In November 2004 the mother entered another 28-day inpatient treatment program. RP at 55, 317-18. She followed that with outpatient treatment at Ferry County Counseling and had been clean and sober for about 20 months at the time of the termination trial. RP at 56, 294. She was in Phase 3B, the final phase, of her treatment program. RP at 182, 321. She had not yet completed the 12-step program. RP at 295. She testified that she attended Alcoholics Anonymous and Narcotics Anonymous meetings two or three times a week, as well as a weekly Al-Anon meeting. RP at 325. She had sessions with mental health professionals three or four times a month, attended a women's support

group, and took medication for depression and anxiety. RP at 216, 240, 325-26. Her mental health diagnosis was that she suffered from Post Traumatic Stress Disorder, borderline personality disorder, depression and anxiety. RP at 252, 320, 326.

At the time of the termination trial, Bob and the mother were living together with D.A. Bob was 43 years old and had been an alcoholic since age 12. RP at 196. He testified he “had a long history of experimental drug use. Very long history.” RP at 196. In July 2006, when the termination trial occurred, Bob was participating in the Ferry County Counseling outpatient program and was only in Phase 1. RP at 180-81. Random drug tests showed that he had relapsed twice in the first four months of 2006. RP at 179. His potential for relapse was described as moderate by his chemical dependency counselor. RP at 181. The chemical dependency professionals testified that living with someone who is using can pose a risk of relapse to a recovering addict, “putting their recovery in danger.” RP at 188-89, 280.

As C.S. developed he began to exhibit mental health problems. He is a “very high maintenance” child who has a need for structure and routine. RP at 113. When he was just five years old he was diagnosed with Oppositional Defiant Disorder, elements of Obsessive Compulsive Disorder, Sensory Integration Disorder, and Attention Deficit

Hyperactivity Disorder (ADHD). RP at 54, 96-97, 100. The two child day care providers in Republic, the city where C.S. lives, refused to have him in their care. RP at 160, 172. Although the day care providers initially tried to work with him, he was too defiant and aggressive—even to the point of kicking, hitting, and injuring the providers. RP at 172-73. He also suffers from asthma. RP at 103, 167.

The Department provided mental health treatment for C.S. with psychotherapist Kenneth Ray. RP at 96-97. Much of the work Mr. Ray did was with the foster mother, Arlette, helping her learn and apply behavior management techniques. RP at 97. Arlette was trained how to not reinforce the behaviors and not overreact to misconduct. RP at 98. Mr. Ray testified that the relationship between the child and his caregiver was important for treatment, as that person was the one who would be facilitating his mental health treatment. RP at 99. He stated that stability is probably the most important thing for C.S. and that his attachment to his caregiver is very important to stability. RP at 101. He explained that C.S.'s behaviors were challenging for any parent, and it could be overwhelming for one who has difficulty controlling her own emotional state when making decisions. RP at 109.

In fact, caring for C.S. was overwhelming for the mother. RP at 56-57, 72, 77. *See also* RP at 79 (the mother told the social worker that

she sometimes gets stressed and overwhelmed taking care of just D.A.). Bob agreed that caring for C.S. in Everett caused a “pretty high stress level” for the mother and that she got more frustrated with C.S. than with D.A. RP at 57, 206. Her case manager, Ronald Casebeer, testified that she continued to be overwhelmed when dealing in areas in which she was not familiar or for which she was unprepared. RP at 224.

The mother’s family counselor, Kenneth Hickey, testified that he believed she has the ability to parent C.S., but he admitted that he had only seen the child in passing at the child’s therapist’s office and had no direct knowledge of C.S.’s diagnoses or treatment needs. RP at 243-44, 250. The mother’s mental health therapist, Marty King, testified that she still had many problems, but was getting better. RP at 261-65. Ms. King also had never seen the mother interact with C.S. RP at 263. Her drug counselor, Steve Bradburn, testified that he believed she could be trained to care for C.S., but that “it’s hard to train somebody who is just recently gotten off of drugs and alcohol to do something different.” RP at 185. He testified that such individuals need time, usually “at least a year, a couple of years or longer.” RP at 185. Social worker Vance testified that in her opinion there was no amount of training that would give the mother the strength needed to cope with C.S.’s behavior. RP at 64.

In February 2005, the mother agreed that the permanent plan for C.S. should be third party custody with Arlette. RP at 57-60. Then in May or June 2005, she changed her mind about the custody action. RP at 61. She testified at trial that she was not yet sober in February 2005—even though her sobriety reportedly began in November 2004—and did not have the ability to make the custody decision until late spring 2005. RP at 323. The Department filed a termination petition in December 2005. CP at 1.

At the close of trial in July 2006, the court acknowledged the progress the mother had made, including her parenting of D.A. and her sobriety of 20 months. RP at 364-66. It also recognized that C.S. is a high needs child who needs routine, structure and continuity, exactly what had been set up for him in his home with Arlette. RP at 366. The trial court found the “key variable in the possible return of [C.S.] is allowing [the mother] time to process strategies.” CP at 42. At that point the mother had not shown “the patience, presence of mind, skills, experience, time in a day, and availability to care for [C.S.]—given his special needs. Further, the mother has not shown her household and lifestyle have the stability and predictability required for [C.S.’s] well-being.” CP at 47. The court concluded the only alternative to termination was prolonging C.S.’s stay in foster care. CP at 47. This it refused to do.

The mother appealed and the court of appeals affirmed in an unpublished opinion. *In re the Welfare of C.S.* (No. 25502-6-III).

### III. ARGUMENT

#### A. **The Law Protects The Rights of Both Parents And Children; Where Those Rights Conflict, The Rights Of The Child Prevail**

A parent's interest in the care and custody of her children is generally protected by the Due Process Clause of the Fourteenth Amendment to the federal constitution. *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982); *In re Welfare of Sumey*, 94 Wn.2d 757, 762, 621 P.2d 108 (1980). However, a parent's right to custody is not absolute and must be weighed against the responsibilities of the state to protect the child and the child's rights to safety and well-being. *See, e.g., Lehr v. Robertson*, 463 U.S. 248, 103 S. Ct. 2985, 77 L. Ed. 2d 614 (1983); *In re Sumey*, 94 Wn.2d at 762.

In juvenile dependency and termination actions, the child's rights are defined by statute and take priority over conflicting rights of the parent. RCW 13.34.020; *In re Dependency of J.B.S.*, 123 Wn.2d 1, 8-9, 863 P.2d 1344 (1993). The statute recognizes the important rights of parents, but ultimately focuses on the welfare of the child. It provides that the rights of dependent children include the rights to physical and mental health, safety, and basic nurture, which includes the right to a safe, stable, and permanent home and a speedy resolution of the dependency and

termination proceedings. RCW 13.34.020; *In re Dependency of C.R.B.*, 62 Wn. App. 608, 615, 814 P.2d 1197 (1991).<sup>2</sup>

The statute protects the rights of both parents and children in at least three important ways. First, it requires reasonable efforts be made to help the parent correct parenting deficiencies so that, if possible, the child can be returned home. RCW 13.34.136(1). Second, it limits the time a parent has to correct her deficiencies so that the child does not spend the whole of his childhood in foster care. RCW 13.34.145. Third, it mandates that any conflict between the rights of the child and the rights of the parent be resolved in favor of the child. RCW 13.34.020; *In re Dependency of K.R.*, 128 Wn.2d 129, 146, 904 P.2d 1132 (1995).

Thus, although services must be provided to help the parent overcome parenting deficiencies, the parent does not have unlimited time to correct her deficiencies. The law creates a sense of urgency by requiring that a petition for termination of parental rights be filed whenever a child has been in foster care for 15 of the past 22 months, absent compelling

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<sup>2</sup> Until 1997, when Congress passed the Adoption and Safe Families Act of 1997 (ASFA), Pub. L. No. 105-89, 111 Stat. 2115 (1997), the focus of juvenile dependency proceedings was on the parent, family preservation and reunification, not primarily on the child. ASFA "revolutionized" dependency law by mandating that the safety and well-being of children be the paramount consideration of the juvenile court in making decisions regarding dependent children. Cindy S. Lederman and Joy D. Osofsky, *Infant Mental Health Interventions in Juvenile Court: Ameliorating the Effects of Maltreatment and Deprivation*, 10 Psychol. Pub. Pol'y & L. 162, 164 (2004). See, also, 42 U.S.C. §§ 671(a)(15), 675. RCW 13.34.020 was amended in 1998 to be consistent with ASFA. Laws of 1998, ch. 314 § 1.

reasons to excuse the requirement. RCW 13.34.145(1)(c).<sup>3</sup> The law's focus on permanency reflects the importance of security and stability in a child's life, as well as a child's need for continuity and permanency in relationships. *See, e.g.,* Joseph Goldstein, Anna Freud & Albert Solnit, *Beyond the Best Interests of the Child* (2d ed. 1979).

Additionally, the law views the passage of time from the child's perspective—not the parent's. *In re Welfare of Hall*, 99 Wn.2d 842, 851, 664 P.2d 1245 (1983) (foreseeable future depends in part on age of child); *In re Dependency of T.R.*, 108 Wn. App. 149, 164-65, 29 P.3d 1275 (2001) (one year is not in the foreseeable future of a six-year-old child).

#### **B. Standard Of Review And Deference Afforded Trial Court**

Before a trial court may terminate the parent-child relationship, the state must prove the six elements of RCW 13.34.180(1) by clear, cogent and convincing evidence and additionally prove that termination is in the best interests of the child.<sup>4</sup> RCW 13.34.190; *In re Dependency of K.S.C.*, 137 Wn.2d 918, 925, 976 P.2d 113 (1999). Clear, cogent and convincing

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<sup>3</sup> Washington law parallels ASFA requirements in this regard. 42 U.S.C. § 675(5)(E). The legislature recently reinforced this requirement by amending RCW 13.34.136 and .145 to *require* the juvenile court to order that the Department file a petition for termination, if the child has been in out-of-home care for 15 of the last 22 months, unless the court makes a good cause exception. Laws of 2008, ch. 152 §§ 2, 3. The legislature intended “to encourage a greater focus on children’s developmental needs and to promote closer adherence to timeliness standards in the resolution of dependency cases.” Laws of 2008, ch. 152 § 1.

<sup>4</sup>The statute is set out in full in the Appendix.

evidence exists when the ultimate fact in issue is shown by the evidence to be “highly probable.” *In re K.R.*, 128 Wn.2d at 141.

Because deference to the trial court is “particularly important in deprivation proceedings,” its factual findings must be upheld if they are supported by evidence from which a rational trier of fact could find the necessary facts by clear, cogent and convincing evidence. *In re K.R.*, 128 Wn.2d at 144; *In re K.S.C.*, 137 Wn.2d at 925. 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 Welfare of Sego*, 82 Wn.2d 736, 739-40, 513 P.2d 831 (1973).

The mother challenges the sufficiency of the evidence on three of the six factors required for termination, as well as the trial court’s finding that termination is in C.S.’s best interest. Pet. at 1-3.

**C. Substantial Evidence Supports The Trial Court’s Determination That All Reasonably Available And Necessary Services Were Offered Or Provided**

The mother first argues that the trial court erred in finding that court-ordered services and all other services capable of correcting her parenting deficiencies were offered or provided by the Department. She claims she should have been offered (1) family preservation services, (2) more consistent visitation-related services, and (3) an earlier psychological evaluation. Pet. at 10-12; Br. Appellant at 17-20.

RCW 13.34.180(1)(d) requires the Department prove that the services ordered in the dependency action, under RCW 13.34.136, were expressly and understandably offered or provided to the parent and all necessary services, reasonably available, capable of correcting the parental deficiencies within the foreseeable future have been expressly and understandably offered or provided.

The remedial services required under RCW 13.34.136(2)(b)(vi) include “all reasonable services that are available within the agency, or within the community, or those services which the department has existing contracts to purchase.” The services are further defined as being the services listed in the federal adoption and safe families act as “time-limited family reunification services,” which include: “individual, group, and family counseling; substance abuse treatment services; mental health services; assistance to address domestic violence; services designed to provide temporary child care and therapeutic services for families; and transportation to or from any of the above services and activities.” RCW 13.34.025(2)(a).

The Department is excused from offering services even to a willing parent if the services would not have remedied the parent’s deficiencies within the foreseeable future of the child. *In re T.R.*, 108 Wn. App. at 164. As the court of appeals noted, “Where the record establishes that the offer

of services would be futile, the trial court can make a finding that the State has offered all reasonable services.” Slip Op. at 12. *See also In re Welfare of M.R.H.*, 145 Wn. App. 10, 25, 188 P.3d 510, *review denied sub nom.*, *In re Welfare of Hurd*, 165 Wn.2d 1009 (2008).

**1. Family Preservation Services Were Not Reasonable Or Available In This Case**

The mother incorrectly states that family preservation services were the key to resolving her inability to care for C.S. Pet. at 12. Her argument is not supported by the record. Moreover, these services were neither available nor appropriate for this mother.

Family preservation services are offered to families in two situations: (1) when children are at risk of being removed from the home and (2) when children who have been removed will be reunited with their parents within 30 days—*e.g.*, when reunification is imminent. RP at 28-29. Neither of these situations was present in this case.

C.S. had been removed from the home in 2002 and there was never a time during this dependency action that reunification was imminent. Each time the mother completed or came close to completing her drug treatment, she had a relapse that prevented the return of C.S. to her care. By the time of the termination trial, she was still in treatment, and family preservation services—even if they had been available, which they were

not<sup>5</sup>—would not have provided her with the skills she needed to care for C.S. and could not have assisted her in correcting her parenting deficiencies. RP at 28, 32.

**2. A Psychological Evaluation Was Provided To The Mother At The Earliest Reasonable Opportunity**

The mother argues that a psychological evaluation early in the case might have remedied her parenting deficiencies. Pet. at 11. The dependency court ordered that the mother have a psychological assessment and a parenting assessment once she was “chemically free.” RP at 67.

A psychological evaluation was provided in February 2004, when reunification was still the plan for the child, and when the Department believed the mother was finally clean and sober enough to benefit from the evaluation.<sup>6</sup> RP at 50. The mother’s own expert, therapist Marty King, testified that there is no clear support for proceeding with a psychological evaluation while an individual is using. RP at 267-68. Here, Ms. King believed the evaluation completed by Dr. Lewis was no longer completely accurate, once the mother was clean and sober. RP at 260-62. She had had inpatient mental health treatment in 1995, CP at 41, and had previously

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<sup>5</sup> Family preservation services are community-based and are only provided if they are “available in the community where the family resides,” RCW 74.14C.042(2)(a), and when funding for the services is available. RCW 74.14C.005. Here the social worker testified that these services were not available in Republic at that time. RP at 27.

<sup>6</sup> The Department was not aware that the mother had already relapsed by the time of the evaluation. RP at 50, 67.

been diagnosed in May 2001 with symptoms congruent with histrionic personality disorder and depressive disorder. RP at 220-21. There is nothing in the record to suggest that an additional psychological evaluation early in the dependency would have had provided any different diagnoses or had any effect on the mother's ability to correct her parental deficiencies.

Despite the fact that she was not able to take advantage of a psychological evaluation and parenting assessment until she was clean and sober, the mother was provided mental health services, anger management and parenting classes through her treatment programs throughout the dependency. *See, e.g.*, RP at 38-39, 316. The evaluation and the related mental health services were reasonably provided by the Department, and in accord with the dependency court's order.

### **3. Visitation-Related Services Were Reasonably Provided**

The mother also claims that she was not provided consistent visitation services. Br. Appellant at 17-18.<sup>7</sup> Visitation, itself, is not a remedial service. RCW 13.34.025(2)(a); *In re Dependency of T.H.*, 139 Wn. App. 784, 162 P.3d 1141, *review denied*, 162 Wn.2d 1001 (2007). However, related services, such as transportation and supervision, may be

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<sup>7</sup> The mother's Petition for Review does not argue that visitation-related services were not provided. Pet. at 10-12.

considered remedial services. *See, e.g., In re Precious J.*, 42 Cal. App. 4th 1463, 50 Cal. Rptr. 2d 385 (1996).

This mother had the opportunity for consistent and regular visits with C.S. for the majority of the dependency. Visits were interrupted or infrequent only when the mother was participating in a six-month inpatient treatment program in Everett. The treatment facility—not the Department—placed limits on the visits. RP at 40. That, plus the small staff available for transporting the child across the state, made visits logistically very difficult during the time the mother was at Evergreen Manor. RP at 40. Even so, the foster mother brought the child for visits during that six-month period. RP at 40. Once the mother moved to the outpatient program and was able to visit with C.S. without restriction, the social worker began regular and lengthy visits. RP at 41.

The only complaints regarding visits were made not by the mother, but by Jacquelyn Michaelson, the visitation supervisor, who also is the mother's AA sponsor, and Sarah Bradburn, one of the mother's drug counselors. RP at 271-72, 285-87. Ms. Michaelson testified that she contracted with the Department to provide transportation and supervision for parent-child visits. She supervised visits between the mother and C.S. and his brother. She testified that there were a couple of times when she was sick that the visits did not occur and that visits also did not occur if

the visitation day fell on a holiday. RP at 285. During this time, Ms. Bradburn wrote to the Department expressing her concern that three of the mother's visits with the children were cancelled. RP at 271-72. The reasons for the cancelled visits were the transportation problems Ms. Michaelson mentioned and a positive UA for opiates by Bob. RP at 272.

Some visits were missed when the mother was actively using, RP at 87, and the visits were once reduced at the mother's request. RP at 306. In response to questions from the guardian ad litem, Ms. Michaelson testified that that at one point, in the fall of 2004, the mother asked that her visits be reduced from two hours twice a week to one hour per visit because they were "too boring." RP at 306-07.

The evidence was that throughout this 46-month dependency, the visits were frequent and consistent and generally went well. RP at 76-77. The mother missed three visits due to cancellation and other visits when the mother's treatment program and location made regular visits difficult because of the treatment facility's rules. Nothing in the record suggests that the mother did not receive all reasonably available and necessary visitation-related services, or that additional services would have helped this mother correct her parenting deficiencies.

The trial court's conclusion that the Department provided all necessary services, reasonably available, capable of correcting the mother's parental deficiencies within the foreseeable future is supported by substantial evidence.

**D. Substantial Evidence Supports The Trial Court's Determination That There Is Little Likelihood That Conditions Would Be Remedied So The Child Could Be Returned To His Mother In The Near Future**

The mother next claims that the evidence did not support the trial court's conclusion that the Department proved the allegation required under RCW 13.34.180(1)(e). That element of the statute requires the Department to prove "that there is little likelihood that conditions will be remedied so that the child can be returned to the parent in the near future."<sup>8</sup>

The focus of this factor of the termination statute is whether parental deficiencies have been corrected, not whether progress has been made. *In re K.R.*, 128 Wn.2d at 144. The evidence here clearly showed, and the trial court found, that the mother had not corrected her deficiencies and was not able to adequately care for C.S. at the time of trial:

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<sup>8</sup>The trial court ruled that the statutory presumptions applied in this case and that the mother had successfully rebutted them by showing that she had been clean and sober for more than 20 months by the time of trial and that, with the aid of proper medication, she was able to care for her youngest son. CP at 47. Even so, the Department's evidence proved this factor by clear, cogent, and convincing evidence. CP at 46-47.

The mother has not shown she has the patience, presence of mind, skills, experience, time in a day, and availability to care for [C.S.]—given his special needs. Further, the mother has not shown her household and lifestyle have the stability and predictability required for [C.S.’s] well-being. In particular, she has to devote a number of hours each week to her own counseling and self-help sessions. Further, [Bob] works full-time and his continued sobriety and reliability remains a concern.

CP at 47.

The mother asserts that her parental rights were terminated “due primarily to her lack of training in handling issues related to C.S.’s ADHD” and that she just needed more time to complete this training. Pet. at 1; Br. Appellant at 4. Her assertion is not supported by the record or the trial court’s ruling. *See* CP at 41-46.

The trial court’s conclusion that there is little likelihood conditions will be remedied so that C.S. can return home in the near future is based on a clear showing that the mother would not be able to care for both herself, her younger child and C.S. It is based on evidence that C.S. has significant needs that require a patient, stable, consistent parent who can provide structure and behavior management techniques that will help him maintain and progress. RP at 109, 113-14, 340-41. Social worker Vance testified that it would be risky to the child’s psychological, emotional and physical well-being if he were returned home and had to be removed again

because of a relapse or inability on the part of the mother to meet his needs. RP at 82.

Although the mother was doing well in treatment and had been sober for nearly 20 months, she still was at risk of relapse. She had significant periods of sobriety in the past—18 months and 11 months—before relapsing. RP at 51-52, 329. She previously relapsed when she had both children in her care for just two weeks due to the stress of parenting and admitted that even parenting her younger child, who does not have special needs, was overwhelming at times. RP at 78-79. C.S.'s difficult behaviors also were believed to have contributed to the relapse in early 2004. RP at 72. The mother was living with a man who continued to use drugs and who had been actively involved in a previous relapse of the mother. RP at 51. Consequently, although she had made admirable progress, her treatment was not completed and she remained at risk of relapse.

The mother could not provide the structure and specialized training that C.S. requires. The child's foster mother Arlette testified she has to work hard to help C.S. maintain his behaviors—or to get him back on track. RP at 114-15. To learn how to provide the parenting/treatment he needs, she received "somewhat involved and extensive" training over the year of therapy that C.S. had with Kenneth Ray. RP at 96, 98-99. In

contrast, the mother has learning difficulties that would slow her ability to learn, understand and implement the parenting skills required to care for C.S. Her social worker did not believe the mother would ever be able to learn what she needed to provide for the child. RP at 64. In fact the mother had recently applied for Social Security Supplemental Income, claiming a disability due to her inability to handle unfamiliar or unpredictable situations. RP at 223-24. She also has limited academic skills and learning disabilities. RP at 256, 264-65. Her mental health counselor of about 18 months testified that she was not working with the mother when the February 2004 psychological evaluation was completed and could not attest to its accuracy. RP at 261. She did say that the mother had progressed since the 2004 evaluation, but that she still has a way to go. RP at 262. Her family counselor also testified that she was progressing and that she has the ability to adequately parent C.S.—but he conceded on cross-examination that he had not talked with the child’s guardian at litem, therapist or social worker and was “not that familiar with C.S. and his situation.” RP at 243, 249-50. Her drug counselor, Steve Bradburn, testified that he believed all of his clients were trainable, but that it’s hard to train recovering addicts who are recently off drugs and alcohol: “You have to give them time and by time I mean usually at least a year, a couple of years or longer in some cases.” RP at 184-85.

To remedy conditions so C.S. could be returned to her care, the mother needed to complete her drug treatment and continue to focus on her mental health therapy to a point where she was able to handle day-to-day stressors, especially the stress involved in parenting a special needs child. She also needed to learn the skills required to adequately care for C.S. The earliest date suggested for the mother to learn these skills—if she were able to learn them—was “at least a year, a couple of years or longer.” RP at 185. This was not in C.S.’s “near future.” He was six years old and had already been in foster care nearly four years at the time of the termination trial.

The trial court’s determination that there was little likelihood that conditions would be remedied so the child could be returned to the mother in the near future is supported by substantial evidence.

**E. Substantial Evidence Supports The Trial Court’s Determination That Continuation Of The Parent-Child Relationship Clearly Diminishes The Child’s Prospects For Early Integration Into A Stable And Permanent Home**

The mother next challenges the trial court’s determination that the Department proved 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 conclusion necessarily follows from an adequate showing that there is little likelihood that

conditions will be remedied in the near future. *In re Dependency of J.C.*, 130 Wn.2d 418, 427, 924 P.2d 21 (1996).

By the time of trial, C.S. had lived with his Aunt Arlette for nearly four years, from age two to six. CP at 47 (FF F). She wanted to adopt him, to “give him a permanent secure place to live.” RP at 115-16. His guardian ad litem testified that he needed stability in a home where he has consistency and structure. RP at 340-41. His therapist testified that for C.S. “the big issue is stability.” RP at 342. Contrary to the mother’s assertion that the child wanted to live with her and Bob, Pet. at 15-16, the child reported to his guardian ad litem when asked about reunification that his mother “wants me to come home.” RP at 340.

C.S. could not move forward with stability and permanency unless there was a termination of parental rights. Reunification was not imminent in this case and “what is perhaps eventually possible for the parent must yield to the child’s present need for stability and permanence.” *In re T.R.*, 108 Wn. App. at 166.

Substantial evidence supports the trial court’s determination that continuation of the parent-child relationship clearly diminishes C.S.’s prospects for early integration into a stable and permanent home.

**F. Substantial Evidence Supports The Trial Court's Determination That Termination Is In C.S.'s Best Interests**

The mother also challenges the trial court's finding that termination of the parent-child relationship is in the child's best interests. Pet. at 16-17.

If each of the six factors required under RCW 13.34.180(1) is proved, the court then considers whether termination is in the child's best interests. RCW 13.34.190(2); *In re Dependency of I.J.S.*, 128 Wn. App. 108, 118, 114 P.3d 1215 (2005). The best interests determination is based on the facts and circumstances of each case. *In re Welfare of Aschauer*, 93 Wn.2d 689, 695, 611 P.2d 1245 (1980). Here the child's need for stability and specialized care—and the mother's inability to provide it—as well as the length of time the child had been in foster care support the trial court's finding that termination is in C.S.'s best interests. *In re T.R.*, 108 Wn. App. at 167 (where a parent has been unable to rehabilitate over a lengthy dependency period, a court is fully justified in finding termination in the child's best interests, rather than leaving the child in the limbo of foster care for an indefinite period).

The Department acknowledges the mother's progress in this case, but at the time of the termination trial, she had not completed her drug treatment, had applied for SSI due to her inability to cope with day-to-day stressors, admitted to sometimes being overwhelmed when caring for her

youngest son who, unlike C.S., has no special needs, and was deeply involved in addressing her own mental health and addiction issues. She was not ready to begin reunification with C.S. and, even if she were able to develop the skills needed to care for him, reunification was, at minimum, more than a year away. It simply is not in C.S.'s best interests to wait in foster care any longer.

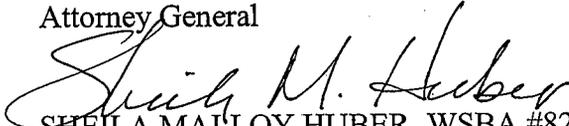
The trial court's determination that termination is in the child's best interests is supported by substantial evidence.

#### IV. CONCLUSION

The court of appeals correctly held that the trial court's findings on the statutory requirements are supported by sufficient evidence. The Department respectfully asks the Court to affirm the court of appeals decision affirming the order terminating the mother's parental rights.

RESPECTFULLY SUBMITTED this 20<sup>th</sup> day of April 2009.

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# APPENDIX

## Applicable Statutes

### **RCW 13.34.020 Legislative declaration of family unit as resource to be nurtured — Rights of child**

The legislature declares that the family unit is a fundamental resource of American life which should be nurtured. Toward the continuance of this principle, the legislature declares that the family unit should remain intact unless a child's right to conditions of basic nurture, health, or safety is jeopardized. When 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. In making reasonable efforts under this chapter, the child's health and safety shall be the paramount concern. 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.

### **RCW 13.34.180 Order terminating parent and child relationship — Petition — Filing — Allegations (Part)**

(1) A petition seeking termination of a parent and child relationship may be filed in juvenile court by any party to the dependency proceedings concerning that child. Such petition shall conform to the requirements of RCW 13.34.040, shall be served upon the parties as provided in RCW 13.34.070(8), and shall allege all of the following unless subsection (2) or (3) of this section applies:

- (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. 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. In determining whether the conditions will be remedied the court may consider, but is not limited to, the following factors:

- (i) Use of intoxicating or controlled substances so as to render the parent incapable of providing proper care for the child for extended periods of time or for periods of time that present a risk of imminent harm to the child, and documented unwillingness of the parent to

receive and complete treatment or documented multiple failed treatment attempts; or

(ii) Psychological incapacity or mental deficiency of the parent that is so severe and chronic as to render the parent incapable of providing proper care for the child for extended periods of time or for periods of time that present a risk of imminent harm to the child, and documented unwillingness of the parent to receive and complete treatment or documentation that there is no treatment that can render the parent capable of providing proper care for the child 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 Order terminating parent and child relationship — Findings (Part)**

After hearings pursuant to RCW 13.34.110 or 13.34.130, the court may enter an order terminating all parental rights to a child only if the court finds that:

(1)(a) The allegations contained in the petition as provided in RCW 13.34.180(1) are established by clear, cogent, and convincing evidence; . . . and

(2) Such an order is in the best interests of the child.

#### **RCW 74.14C.005 [Family Preservation Services] Findings and intent**

(1) The legislature believes that protecting the health and safety of children is paramount. The legislature recognizes that the number of children entering out-of-home care is increasing and that a number of children receive long-term foster care protection. Reasonable efforts by the department to shorten out-of-home placement or avoid it altogether should be a major focus of the child welfare system. It is intended that providing up-front services decrease the number of children entering out-of-home care and have the effect of eventually lowering foster care expenditures and strengthening the family unit.

Within available funds, the legislature directs the department to focus child welfare services on protecting the child, strengthening families and, to the extent possible, providing necessary services in the family setting, while drawing upon the strengths of the family. The legislature intends services be locally based and offered as early as possible to avoid disruption to the family, out-of-home placement of the child, and entry into the dependency system. The legislature also intends that these services be used for those families whose children are returning to the home from out-of-home care. These services are known as family preservation services and intensive family preservation services and are characterized by the following values, beliefs, and goals:

(a) Safety of the child is always the first concern;

(b) Children need their families and should be raised by their own families whenever possible;

(c) Interventions should focus on family strengths and be responsive to the individual family's cultural values and needs;

(d) Participation should be voluntary; and

(e) Improvement of family functioning is essential in order to promote the child's health, safety, and welfare and thereby allow the family to remain intact and allow children to remain at

home.

(2) Subject to the availability of funds for such purposes, the legislature intends for these services to be made available to all eligible families on a statewide basis through a phased-in process. Except as otherwise specified by statute, the department of social and health services shall have the authority and discretion to implement and expand these services as provided in this chapter. The department shall consult with the community public health and safety networks when assessing a community's resources and need for services.

(3) It is the legislature's intent that, within available funds, the department develop services in accordance with this chapter.

(4) Nothing in this chapter shall be construed to create an entitlement to services nor to create judicial authority to order the provision of preservation services to any person or family if the services are unavailable or unsuitable or that the child or family are not eligible for such services.

#### **RCW 74.14C.042 Family preservation services — Eligibility criteria**

(1) Family preservation services may be provided to children and their families only when the department has determined that without intervention, the child faces a substantial likelihood of out-of-home placement due to:

- (a) Child abuse or neglect;
- (b) A serious threat of substantial harm to the child's health, safety, or welfare; or
- (c) Family conflict.

(2) The department need not refer otherwise eligible families and family preservation services need not be provided, if:

- (a) The services are not available in the community in which the family resides;
- (b) The services cannot be provided because the program is filled to capacity;
- (c) The family refuses the services; or
- (d) The department or the service provider determines that the safety of a child, a family member, or persons providing the services would be unduly threatened.

(3) Nothing in this chapter shall prevent provision of family preservation services to nonfamily members when the department or the service provider deems it necessary or appropriate to do so in order to assist the family or the child.