

Supreme Court No. 84458-5

**SUPREME COURT
OF THE STATE OF WASHINGTON**

In re the Welfare of P.P.T., J.J.I., O.L.T., minor children,

**STATE OF WASHINGTON
DEPARTMENT OF SOCIAL AND HEALTH SERVICES**

Respondent,

v.

PETER TSIMBALYUK

Petitioner.

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STATE OF WASHINGTON

CASA ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

After his children were out of his care for years, the State filed a petition to terminate the parental rights of Peter Tsimbalyuk. The Superior Court found that Mr. Tsimbalyuk *could not* parent and *would not* be able to remedy his parental deficiencies in the near future. The Superior Court, however, denied the petition for termination solely to facilitate ongoing contact between the father and children, stating guardianship would be a better solution, despite the fact that no party had filed a petition for guardianship. The result of the Superior Court's decision was to leave three young children in ongoing dependency. In light of this extraordinary decision, the State of Washington Department of Social and Health Services (the "Department" or "State") and the Court Appointed Special Advocate Lori Reynolds (the "CASA" or "Ms. Reynolds") moved for discretionary review.

The Court of Appeals granted discretionary review, reversed the legal error committed by the Superior Court, and remanded for further proceedings. Mr. Tsimbalyuk now seeks review by this Court.¹ Since the time of filing his motion, however, Mr. Tsimbalyuk's parental rights have been terminated as a result of a second termination trial. His motion is therefore moot, and should be denied. Even if his motion is not moot, this

¹ Mr. Tsimbalyuk originally filed a "Motion for Discretionary Review" pursuant to RAP 13.5A. On April 21, 2010, the Court redesignated Mr. Tsimbalyuk's motion as a petition for review pursuant to RAP 13.3(d) and directed the parties to file an answer to the petition.

Court should deny his motion because the Court of Appeals correctly applied this Court's precedent.

II. IDENTITY OF RESPONDENTS AND DECISION BELOW

Respondents, the State and the CASA, ask this Court to deny review of the Court of Appeals' decision, entered February 16, 2010, reversing the Superior Court's order and remanding for further proceedings.

III. ISSUES PRESENTED FOR REVIEW

1. Should the motion be denied because the case is moot, given that Mr. Tsimbalyuk's parental rights were terminated in a second termination trial decided on March 22, 2010?

2. Should the motion be denied because the Court of Appeals correctly found that the Superior Court committed obvious error in finding that the State had not proven RCW 13.34.180(1)(f) and correctly remanded for a new trial as to whether termination was in the best interests of the children?

IV. STATEMENT OF THE CASE

A. Factual Background

P.P.T, J.J.I. and O.L.T, ages 8, 4, and 2 at the time of trial, have been dependents of the State and have lived outside of Mr. Tsimbalyuk's care for most of their lives.² Ms. Reynolds has served as the CASA to the three children in this case since February 2007. 6RP 794:10. The State

² The parental rights of the children's mothers were terminated prior to trial.

filed a motion to terminate Mr. Tsimbalyuk's parental rights as to all three children, and trial was held in February 2009. The CASA supported this motion and, at trial, testified that termination would be in the best interests of the children. 7RP 878:6-7; 874:25.

The Superior Court found that Mr. Tsimbalyuk has significant parenting deficiencies and is incapable of caring for his children. Findings of Fact 1.21. Mr. Tsimbalyuk has maintained a long standing and dangerous relationship with the mother of his two youngest sons. CP 269, 273, Findings of Fact, 1.7, 1.8, 1.21. Their mother has chronic mental health and substance abuse issues and is incapable of caring for her children. CP 268, Findings of Fact 1.5. Mr. Tsimbalyuk has assaulted her on at least two occasions, first hitting her with a belt for approximately five or six minutes, and then, in a more severe assault in 2006, punching her in the face, head, chest, back, neck, and abdomen. CP 269, Findings of Fact 1.7, 1.8.

The Superior Court found that Mr. Tsimbalyuk's testimony that he is capable of resolving his parenting deficiencies in order to resume caring for his children is "not credible." CP 270, Findings of Fact 1.10. In fact, the Superior Court found that "Mr. Tsimbalyuk's credibility is puzzlingly questionable." CP 270, Findings of Fact 1.11. For example, Mr. Tsimbalyuk characterized his assault on the mother as a "slap." Judge Kessler found that "the court does not believe that Mr. Tsimbalyuk merely slapped Ms. Irby. He beat her up." *Id.*

The Superior Court found that all necessary services, reasonably available, capable of correcting parental deficiencies within the foreseeable future have been offered or provided. CP 272, Findings of Fact 1.20. Concluding that "Mr. Tsimbalyuk's perpetration of domestic violence continues to be a parental deficiency that has not been corrected and will not be corrected in the near future," CP 271, Findings of Fact 1.15, the Superior Court held that there was little likelihood that conditions would be remedied in the future. CP 273, Findings of Fact 1.21.

No party has challenged these findings of facts, which are now a verity on appeal. *State v. O'Neill*, 148 Wn.2d 564, 572, 62 P.3d 489 (2003).

The Superior Court found that all the statutory elements of RCW 13.34.180(1) had been met, except subsection (f), which requires that continuation of the parent-child relationship clearly diminish the child's prospects for early integration into a stable and permanent home. In particular, while the court found that "all three children are in need of a permanent home, given the instability they have faced in their biological home and the length of time they have spent in out-of-home care," the court nonetheless concluded that an alternative such as guardianship was in their best interest, so that ongoing contact between the father and the children was guaranteed. However, no party had filed a petition for guardianship, and no witness testified regarding the feasibility or appropriateness of a guardianship for the children. Regardless, the

Superior Court denied termination, leaving the children in an ongoing dependency.

B. Procedural Background

1. The Appeal Below

The CASA, Lori Reynolds, joined the Department in seeking discretionary review of the Superior Court's March 25, 2009 Order denying the petition for termination of the parental rights of Mr. Tsimbalyuk as to his three young boys, P.P.T., J.J.I., and O.L.T. The State and the CASA argued that the Superior Court had interpreted RCW 13.34.180(1)(f) and the standards governing what is in the children's best interest contrary to Washington law and ignored substantial factual evidence that supported termination.

The Court of Appeals reversed and held that "the superior court erred in two respects." Slip Op. at 12. First, the Superior Court "mistakenly focused on what it believed constituted a stable and permanent home for P.P.T., J.J.I., and O.L.T., rather than on the continued effect of Mr. Tsimbalyuk's legal relationship with the children on their prospects for adoption." *Id.* at 12-13. Having found that the children were in need of a permanent home given the instability of their placements and the length of time spent in out-of-home care and having found that the children had prospects for adoption with paternal relatives, the Court of Appeals determined that "these findings established that Mr. Tsimbalyuk's legal relationship posed an obstacle to the children's adoption prospects." *Id.* at 13.

Second, the Court of Appeals held that the Superior Court erred when it failed to find that the State had proved RCW 13.34.180(1)(f), given its finding under the fifth statutory element, RCW 13.34.180(1)(e), that there was little likelihood that conditions would be remedied. *Id.* at 14. Given the Superior Court's findings that Mr. Tsimbalyuk's "domestic violence issues had not been corrected and would not be corrected in the near future," and that there was little likelihood that conditions would be remedied so that the children could be returned to Mr. Tsimbalyuk, "there was more than adequate evidence support its finding under RCW 13.34.180(1)(e)" and "[t]herefore, a finding under RCW 13.34 180(1)(f) necessarily followed." *Id.* at 14 (citing *In re Dependency of J.C.*, 130 Wn.2d 418, 427, 924 P.2d 21 (1996)).

2. The Second Termination Trial

During the pendency of this appeal, the State filed a second petition for termination. *See In re Dependency of P.P.T.; J.J.I.; O.L.T.*, No. 09-7-04166-9; No. 09-7-04167-7; No. 09-7-04168-5 (March 22, 2010) (attached as Exhibit A to DSHS Answer to Petition for Discretionary Review). Following a six-day trial, King County Superior Court Judge Michael J. Fox entered findings of facts and conclusions of law terminating Mr. Tsimbalyuk's parental rights. *Id.*

V. ARGUMENT

Mr. Tsimbalyuk moves this Court for review. Because his parental rights have since been terminated, however, his motion should be denied as moot. Even if he were to prevail before this Court, the result of this

appeal would not change the fact that a subsequent petition has terminated his parental rights.

Even if his motion is not moot, it should be denied on the merits. Mr. Tsimbalyuk seeks review on two grounds. First, he argues that the Court of Appeals committed constitutional error in reversing the Superior Court's order because termination is unconstitutional unless the State proves that termination is necessary to prevent harm to the child. Second, Mr. Tsimbalyuk argues that the Court of Appeals substituted its judgment when it failed to defer to the Superior Court's observation of witness credibility, application of RCW 13.34.180(1)(f), and determinations about the best interests of the children. In order to avoid duplication, the CASA joins the State's opposition in its entirety, and focuses only on (1) mootness, and (2) whether the Court of Appeals committed error in reversing the Superior Court's conclusion that RCW 13.34.180(1) (f) had not been met and remanding for a new trial as to whether termination was in the best interests of the children.

A. This Court Should Deny Review as Moot Because Mr. Tsimbalyuk's Parental Rights Have Been Terminated

A case is considered moot if a court can no longer provide effective relief. *E.g., Orwick v. City of Seattle*, 103 Wn.2d 249, 692 P.2d 793 (184). A case is also considered moot if it "seeks to determine an abstract question which does not rest upon existing facts or rights." *State v. G.A.H.*, 133 Wn. App. 567, 137 P.3d 66 (2006) (quoting *Hansen v. W. Coast Wholesale Drug Co.*, 47 Wn.2d 825, 289 P.2d 718 (1955)).

Mr. Tsimbalyuk seeks relief from the Court of Appeals' reversal of the Superior Court's denial of termination. However, even if this Court were to uphold the Superior Court's denial of termination, Mr. Tsimbalyuk's rights were terminated on March 22, 2010 as a result of a subsequent trial. Therefore, even if Mr. Tsimbalyuk were to prevail before this Court, his rights as to his children would remain unchanged. This Court should therefore deny Mr. Tsimbalyuk's Petition for Review as moot.

B. This Court Should Deny Review Because the Court of Appeals Correctly Reversed the Legal Error Made by the Superior Court When It Found RCW 13.34.180(1)(f) Was Not Met

The Court of Appeals correctly reversed the Superior Court's legal error in finding the State had not satisfied RCW 13.34.180(1)(f). Having found the Superior Court erred, the Court of Appeals properly remanded for further inquiry about the best interests of P.P.T, J.J.I., and O.L.T.

1. The Court of Appeals Correctly Held that the State Satisfied RCW 13.34.180(1)(f)

The Superior Court denied the termination petition solely because it found that the children's prospects for early integration into a permanent home would not be diminished while they were living in long-term relative care. Instead, the Superior Court found that ongoing, state-supervised guardianship would be in the children's best interests, so that Mr. Tsimbalyuk would be guaranteed ongoing visitation rights. This decision left three young children in dependency, facing lifelong legal limbo without permanency, and is contrary to well-settled Washington

law. Therefore, the Court of Appeals correctly applied this Court's precedent to correct this obvious error.

In applying RCW 13.34.180(1)(f), this Court has held that "the main focus...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, 927, 976 P.2d 113 (1999). The Court of Appeals has further clarified that "[w]hile a detrimental personal relationship would not be irrelevant, this factor is mainly concerned with the continued effect of the legal relationship between the parent and child, as an obstacle to adoption; it is especially a concern where children have potential adoption resources." *In re Dependency of A.C.*, 123 Wn. App. 244, 250, 98 P.3d 89 (2004).

Mr. Tsimbalyuk argues that the Court of Appeals erred in substituting its own judgment for that of the Superior Court and finding that the State proved its case. On the contrary, the Court of Appeals determined that the Superior Court misapplied RCW 13.34.180(1)(f) when it "mistakenly focused on what it believed constituted a stable and permanent home for P.P.T., J.J.I., and O.L.T., rather than on the continued effect of Mr. Tsimbalyuk's legal relationship with the children on their prospects for adoption," and that "[t]his is an error of law reviewed de novo." Slip Op. at 12-13.

Contrary to Mr. Tsimbalyuk's argument, the Court of Appeals did not read RCW 13.34.180(1)(f) out of existence. The Court of Appeals followed this Court's precedent in *In re Dependency of J.C.*, 130 Wn.2d at

427 , which held that RCW 13.34.180(1)(f) "necessarily follows from an adequate showing" that there is little likelihood that conditions will be remedied so that children can be returned to the parent in the near future." The Court of Appeals recognized that there had been an adequate showing in this case that the young children were unlikely to be returned to Mr. Tsimbalyuk in the near future, and that a continued legal relationship would impede the children's prospects for permanency. The Court of Appeals therefore did not read subsection (f) out of existence; rather, it correctly applied the statute and corrected the legal error committed by the Superior Court.

2. The Court of Appeals Correctly Remanded for a New Trial as to Whether Termination Would Be in the Children's Best Interests

Mr. Tsimbalyuk also argues that there is sufficient evidence to support the Superior Court's ruling that termination was not in the best interests of the children, and that the Court of Appeals decision to remand for further findings in this area is error. However, the Court of Appeals found that the Superior Court made an error of law by failing to focus on the legal effect of a continued relationship between the children and their father. This legal error having been corrected, remand is appropriate.

Moreover, Mr. Tsimbalyuk's position that the testimony supported a finding that denial of termination was in the best interests of the children is not correct. Like he did at the Court of Appeals, Mr. Tsimbalyuk grossly distorts the testimony of the CASA and Dr. Borton to assert that they supported denial of termination. This is not the case, and in fact, the

CASA testified that termination of Mr. Tsimbalyuk's parental rights would be in the best interest of the children. 7RP 878:6-9, 881:14-15.

While the CASA did state that Mr. Tsimbalyuk has had a positive relationship with his oldest son, P.P.T., she nonetheless concluded that prolonging the temporary situation for all three boys creates additional hardship and that "it's very clear that . . . it's hard on the family having this kind of gray care-giving relationship with the kids." 7RP 875:2-23. The CASA unequivocally testified that the children had begun to show signs of improvement only *after* being removed from their father's care and placed with relatives. 6RP 849:17-25, 850:1-25. Furthermore, the CASA testified that she did not believe Mr. Tsimbalyuk is capable of providing care for the children, meeting the children's emotional or mental health needs, or protecting the children from the situations from which they were originally removed. 7RP 874:19-25, 875:1-3. Even if Mr. Tsimbalyuk were to be given an additional six months or a year to engage in services, the CASA's testified that it would not be in the children's best interest to be returned to their father's care. 7RP 874:25.

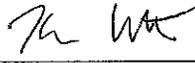
While Dr. Borton did not specifically recommend termination, he testified that Mr. Tsimbalyuk was not capable of acting as a father to the children, and could at most play the role of a "favorite uncle." 3RP 432. The Court of Appeals found that that Dr. Borton's lack of specific recommendation for termination was not relevant in light of the fact that the children were in need of a permanent home and there was little likelihood Mr. Tsimbalyuk could resume parenting. Slip Op. at 5-6.

VI. CONCLUSION

For the reasons stated above, the CASA respectfully requests that the Court deny Mr. Tsimbalyuk's Petition for Review.

RESPECTFULLY SUBMITTED this 27th day of April, 2010.

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