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COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

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

STATE OF WASHINGTON
DEPARTMENT OF SOCIAL AND HEALTH SERVICES

Appellant,

v.

PETER TSIMBALYUK

Respondent.

OPENING BRIEF OF CASA, APPELLANT

Amanda J. Beane, WSBA No. 33070
Karen R. Brunton, WSBA No. 41109
PERKINS COIE LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Telephone: 206.359.8000
Facsimile: 206.359.9000
ABeane@perkinscoie.com
KBrunton@perkinscoie.com

Attorneys for Appellant
Lori Reynolds, CASA

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I. INTRODUCTION

Petitioner, Court Appointed Special Advocate Lori Reynolds (the "CASA" or "Ms. Reynolds"), joins the State of Washington Department of Social and Health Services (the "Department" or "State") in appealing the Superior Court's Order denying the petition for termination of Peter Tsimbalyuk's parental rights with respect to his three children, P.P.T., J.J.I., and O.L.T. (the "Order")[1], the court's refusal to delay entry of the Order to consider additional evidence, and the court's refusal to hear to reopen the case for additional evidence pursuant to the Rule 60 motion brought by the Department and the CASA. The CASA joins in the Department's Brief of Appellant.

Having found that the Department offered Mr. Tsimbalyuk all necessary services and that Mr. Tsimbalyuk is incapable of caring for his children in the foreseeable future, the Superior Court denied the termination petition solely because it found, without *any* corroborating testimony, that the children's prospects for early integration into a permanent home would not be diminished. Instead, despite no party introducing the concept of guardianship, no testimony supporting the feasibility of guardianship, and no guardianship petition before the court, the Superior Court found that ongoing, state-supervised guardianship

[1] The parental rights of the children's mothers were terminated prior to trial.

would be in the children's best interests, in order to allow Mr. Tsimbalyuk visitation rights. This decision leaves three young children in lifelong legal limbo and without permanency, is contrary to well-settled Washington law, and is not supported by any evidence, much less substantial evidence. For these reasons, the CASA joins the Department's appeal and respectfully requests that the Superior Court's denial of the petition for termination be reversed.

II. ASSIGNMENTS OF ERROR

The CASA joins the Attorney General's assignments of error. In an attempt not to duplicate the arguments being presented to this Court, the CASA discusses the following assignments of error in her brief:

1. The Superior Court erred as a matter of law by interpreting RCW 13.34.180(1)(f) contrary to Washington law and holding that ongoing dependency did not clearly diminish the children's prospects for early integration into a stable and permanent home. Conclusions of Law 2.2.

2. The Superior Court's findings that ongoing dependency did not clearly diminish the children's prospects for early integration into a stable and permanent home were not supported by substantial evidence. Findings of Fact 1.22, 1.26, 1.27, 1.28, 1.29, 1.30, 1.32, 1.33, 1.34.

3. The Superior Court's findings and conclusion that guardianship, not termination, was in the best interest of the children was not supported by substantial evidence and is contrary to existing law. Conclusions of Law 2.3.

4. The Superior Court abused its discretion by denying the CASA's request to delay entry of the court's Order so that the parties could meet and present additional evidence.

III. STATEMENT OF THE CASE[2]

A. The Parties

The Appellants in this action are the State of Washington Department of Social and Health Services and the CASA, Lori Reynolds. Appellants seek reversal of the Superior Court's March 25, 2009 Order denying the petition for termination of the parental rights of Peter Tsimbalyuk as to his three young boys, P.P.T., J.J.I., and O.L.T. Appellants also seek review of the denial by the Superior Court of the CASA's motion to delay entry of the Order in order to present additional evidence regarding guardianship and the subsequent denial by the

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[2] There are eight volumes of transcripts in this case. For ease of reference, 1RP will refer to the transcript of February 10, 2009; 2RP will refer to the transcript of February 11, 2009, 3RP will refer to the transcript of February 12, 2009, 4RP will refer to the transcript of February 19, 2009, 5RP will refer to the transcript of February 23, 2009, 6RP will refer to the transcript of February 24, 2009, 7RP will refer to the transcript of February 25, 2009, and 8RP will refer to the transcript of March 25, 2009.

Superior Court of the Appellants' Rule 60 Motion to introduce evidence regarding the feasibility of guardianship.

Ms. Reynolds was appointed as CASA to the three children in February 2007. 6RP 794:10. As a CASA, Ms. Reynolds was tasked "to investigate and report factual information to the court concerning parenting arrangements for the child, and to represent the child's best interest." RCW 26.12.175. The CASA "may make recommendations based upon an independent investigation regarding the best interests of the child, which the court may consider and weigh in conjunction with the recommendations of all of the parties." *Id.* The CASA has the right to participate in all proceedings, to introduce exhibits, to examine witnesses, and to appeal. Guardian Ad Litem Rule 4(e), (h)(3) .

Ms. Reynolds is a long-time CASA volunteer, has extensive training in representing the best interest of children, and has served on approximately ten cases. 6RP 799:22. At trial, Ms. Reynolds 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. She testified that an alternative such as guardianship was not available for P.P.T. and that it posed the risk of interfering with the all of the children's current living situations. 7RP 881:8-9.

B. Statement of Facts

1. The Children Have Been Dependents of the State and Living Outside of Mr. Tsimbalyuk's Care for Most of Their Lives

P.P.T., the eldest son, was born in 2000, and has lived most of his life in the care of his paternal grandmother and looks to her for his basic needs. 7RP 866:23-25. P.P.T.'s mother is Veronica Haupt. Her parental rights were terminated on November 3, 2008. CP 266.

J.J.I., the middle son, was born in 2005. CP 267, Findings of Fact 1.1. The mother of J.J.I. and O.L.T. is Toby Anne Irby. *Id.* At the time of his birth, Ms. Irby was already under observation by Child Protective Services for her erratic behavior in the hospital and because of their concerns for the safety of the newborn child. 2RP 186:19-25. J.J.I. was removed at the age of less than one month and was found dependent in May 2005. CP 267, Findings of Fact 1.2. J.J.I. was returned to his parents' custody one year later but was subsequently removed again after a domestic violence incident that led to Mr. Tsimbalyuk's arrest and incarceration in late 2006. CP 269, Findings of Fact 1.6; 2RP 184:1-12. J.J.I. has spent three of his four years in foster care. 6RP 850:11. J.J.I.'s mother relinquished her parental rights on February 13, 2009.

O.L.T., the youngest son, was born August 17, 2006. O.L.T. lived with his parents for just five months until he was removed following the

previously mentioned domestic violence incident in late 2006 and was placed in foster care in January of 2007. 6RP 716:20. O.L.T. and J.J.I. currently reside together in the home of their paternal aunt and uncle. 6RP 715:24. In May 2007, P.P.T., the eldest son, and O.L.T., the youngest, were found dependent. CP 268, Findings of Fact 1.3.

2. The Termination Trial

In August 2008, the State filed a petition to terminate the parent-child relationships between Mr. Tsimbalyuk and his three sons. Mr. Tsimbalyuk opposed termination with regard to all three children. Trial before Judge Ronald Kessler, King County Superior Court, occurred on February 10, 11, 12, 19, 23, 24, and 25. CP 266. An oral decision was delivered on February 25, 2009, and a written decision was filed on March 25, 2009. CP 266.

In order to terminate parental rights, RCW 13.34.190 requires two steps. First, the State must prove by "clear, cogent, and convincing evidence" the elements under RCW 13.34.180(1)(a)-(f). RCW 13.34.190(1). Second, the State must show termination is in the best interest of the child. RCW 13.34.190(2); *In re Dependency of S.M.H.*, 128 Wn. App. 45, 53-54, 115 P.3d 990 (2005). The elements are:

> (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.
>
> (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 13.34.180(1) (emphasis added).

During the seven-day trial, the CASA and the Department presented evidence regarding Mr. Tsimbalyuk's parenting deficiencies, the services that have been offered to him, and the likelihood of

Mr. Tsimbalyuk's being able to resume parenting in the future. *See, e.g.*, 3RP 378-440 (testimony of Dr. Richard Borton); 7RP 873-881 (testimony of CASA); 5RP 639-668 (testimony of social worker Sandra Street). In particular, the CASA testified as to the impact of the tumultuous family history on the children and her belief that adoption would be in the best interest of the children. 7RP 881:14-17. No party argued for guardianship as an alternative, no witness testified in support of the possibility of a guardianship, and no one filed a petition for guardianship with the court. CP 274, Findings of Fact 1.31. The Superior Court concluded that the State had proven by clear, cogent, and convincing evidence the elements required for a finding of termination, RCW 13.34.180(1)(a)-(e), except that it determined that the last element, subsection (f), had not been met because the Department had not proved that the current homes were "not stable and permanent short of termination and adoption," CP 275, Conclusions of Law 2.2, and because dependency guardianship was in the children's "best interest." CP 275-276, Conclusions of Law 2.3.

a. The court found Mr. Tsimbalyuk not capable of caring for his children, and there was little likelihood he would be able to resume parenting, regardless of the services offered to him.

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 second assault caused severe injuries to her midsection (after a recent caesarian), which resulted in her throwing up blood, bleeding from her rectum, bruising, and eventually blacking out. *Id.* P.P.T., who was six years old at the time, was in the house when the assault occurred and within hearing distance. *Id.*

Additionally, Mr. Tsimbalyuk testified that he has been arrested approximately 25 times and has been in jail approximately ten times for committing various crimes, including drug possession, burglary, and vehicle prowl. 1RP 54:2-25, 55:1-18. While he was in prison serving his current sentence, Mr. Tsimbalyuk admitted that he had a conversation with the youngest children's mother, in violation of a no-contact order. 1 RP 67:12-19. The Superior Court found that it was clear from jail tape recordings that Mr. Tsimbalyuk was aware he was violating the no-contact order. CP 269, Findings of Fact 1.9. During the conversations,

Mr. Tsimbalyuk instructed the mother to lie to the court and the Department about the 2006 assault. *Id.* Mr. Tsimbalyuk threatened to tell the Department about her substance use if she told the truth about the assault. *Id.*

Moreover, 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. Despite warnings from a social worker and the CASA that it would hurt his chances of getting his children back, Mr. Tsimbalyuk continued to have a relationship with the mother of J.J.I. and O.L.T. and married her in September 2008. CP 269, 1RP 103:1-14; Findings of Fact 1.10. Because of his apparent disregard of these warnings, the Superior Court found that Mr. Tsimbalyuk's testimony that he would be willing to separate from her was not credible. CP 269-270, 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 conditions will be remedied in the future. CP 273, Findings of Fact 1.21. Because he continued to violate the no-contact order with the younger children's mother, because his testimony to the contrary was not credible, and because the court did not believe that Mr. Tsimbalyuk would separate from the mother, the Superior Court found that there "is little likelihood that . . . the children could be returned to the father's care in the near future." CP 272-273, Findings of Fact 1.20.

b. The CASA reported on the children's prospects for early integration into a permanent home and recommended termination.

The CASA was appointed to this case in early 2007 and has observed the children for nearly two and a half years. 6RP 794:10. Based on her experience, her observations of the children, and her inquiries into the father's parenting abilities, the CASA has concluded that, absent termination, the children's prospects for integration into a stable and permanent home would be diminished. 7RP 873:13-20.

In her investigation, the CASA reviewed the children's extensive case files and met with the social workers, the mothers and the father (and their attorneys), the children, and their caregivers. 6RP 799:1-10. The CASA testified that she talked with Mr. Tsimbalyuk about his parenting issues, his relationship with the mother of the two youngest children, and the steps he would need to take and services he would need to participate in, in order to get his children back. *See, e.g.*, 6RP 808:1-5, 824:11-16. Despite these discussions, the CASA testified that Mr. Tsimbalyuk did not take steps to improve his parenting issues and that she still had concerns about the domestic violence issues because "nothing's changed." 6RP 846:11-16.

At trial, the CASA testified that she had been concerned about the impact on the children of multiple moves and lack of permanency, but that each child had shown signs of improvement in their current home situations. 6RP 849:17-25, 850:1-25. The middle son, J.J.I., was of particular concern for the CASA. The CASA testified that he had been placed in five or six different foster care arrangements and had been moved around eight times in the past three years. 6RP 849:11. She stated, "J.J.I. was such a fragile little guy when I met him . . . . I still remember meeting him for the first time. I had never seen a depressed two-year-old before . . . he just really didn't act like a two-year-old . . . . He had no

confidence. He seemed very – just very unsure." 6RP 850:23-25, 6RP 851:1. The CASA testified to J.J.I.'s progress by the time of trial: he "is not the same at all"; rather, "he's very confident and playful and engaging . . . and just movementwise, he's active . . . [and has made] quite a steady progress over the last two years." 6RP 851:16-23. The court agreed that "when [J.J.I.] was placed in parental care, he suffered developmentally. Since he has been placed out of parental care, he has made developmental strides." CP 273, Finding of Fact 1.23. Nonetheless, the CASA believes J.J.I. is very fragile as a result of "the instability, the lack of nurturing," and that he "doesn't have another move, another big change in him." 7RP 891:14-18.

Similarly, the CASA testified that she initially had concerns about the youngest child, O.L.T., particularly regarding his motor skills and emotional development, but that most of these developmental issues are not current sources of concern. 6RP 853:12-16. The two younger children, O.L.T. and J.J.I., have been moved to several different placements, with both relatives and non-relative foster parents. 6RP 715:1-15. The two currently live together with their paternal aunt and uncle. 6RP 715:24. The CASA testified that the two boys have both made developmental and emotional improvements, in part because they "are calling other people mom and dad." 7RP 877:1-4.

The CASA testified that the oldest son, P.P.T., has spent most of his life in the care of his paternal grandmother. 6RP 856:1-14. P.P.T. has been receiving mental health services since he started attending school. 6RP 858:8-10. "He needs stability, consistency, permanency," she stated. 7RP 892:3-4. The CASA testified that P.P.T. looks to his grandmother for his basic needs and regards her as his parent. 7RP 867:1-4.

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, 7RP 875:1-3. Further, the CASA testified that she believed that continuation of the relationship between Mr. Tsimbalyuk and the children would diminish the children's prospects for a safe, stable and permanent home. 7RP 874, 1-19. Even if Mr. Tsimbalyuk were to be given an additional six months or a year to engage in services, the CASA's firm belief is that it would not be in the children's best interest to be returned to their father's care. 7RP 874:25. She testified that "there's more than six months of work that has to be done . . . . I think that it's long-term issues we're talking about that are going to take long-term treatment." *Id.* Furthermore, with regard to potential alternatives, the CASA stated that "it took quite a bit of effort" and that relatives were "reluctant . . . to get

involved, for the children to be placed with them, until they were legally free." 7RP 875:10.

The CASA testified that prolonging the current temporary situation creates additional hardship: "it's very clear that . . . it's hard on the family having this kind of gray care-giving relationship with the kids. They love their brother and they want to take care and provide permanency for these kids, and it's a pretty delicate situation." 7RP 875:2-23. The social worker testified that the paternal aunt and uncle have expressed their interest in being able to set boundaries for the children, 6RP 720:1-5, and the grandmother has stated that she wants to adopt P.P.T., 6RP 720:12-15.

For these reasons, the CASA testified that she recommended Mr. Tsimbalyuk's parental rights be terminated. 7RP 878:6-7.

While Mr. Tsimbalyuk opposed termination, he did not present any witnesses or argument supporting guardianship or evidence that it would be in the children's best interests, and he did not petition for guardianship. CP 274, Findings of Fact 1.31.

3. The Court's Order Denying Termination

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, despite no testimony being presented regarding the feasibility or appropriateness of a guardianship for these children. The court stated:

> The court is persuaded that a continued relationship with Mr. Tsimbalyuk while in the custody of relatives is in the children's best interests.
>
> While families, and particularly these families, would prefer to live without the oversight of the Department and the court, the law provides that there are permanent plans other than adoption . . . .
>
> While there is evidence that the children's caregivers were willing and able to adopt the children, the court is not persuaded that the caregivers would terminate their relationship with the children if adoption was not the sole option.

CP 274, Findings of Fact 1.27, 1.28, 1.30.

The Superior Court concluded that dependency guardianship or long-term relative care would be in the "best interests" of the children because "it would allow for Mr. Tsimbalyuk to maintain the right to see his children." CP 274, Findings of Fact 1.32. The court noted the lack of testimony on the issue, stating "while the court recognizes that it is awkward for the petitioner to call caregivers at a termination trial, the

court suggests that narrow inquiry might be elucidating to the court without treading upon the prohibited area of comparative fitness." CP 274, Findings of Fact 1.26.

After the court's oral ruling, the CASA requested that the court delay entry of the Order so that the parties could meet and discuss alternatives such as guardianship. 8RP 3-5. The court denied the request and entered the Order. 8RP 8:1-17.

4. The Appellants' Rule 60(b)(1)(3) Motion

On May 8, 2009, the Department and the CASA filed a joint motion to vacate and reopen the case for additional evidence under CR 60(b)(1)(3) (the "Rule 60 Motion"). The Department and the CASA sought to show that the court's denial of termination was based on an incorrect assumption that the father would work cooperatively with the relatives in providing the children a permanent home, and that the lack of realistic alternatives for the children sentenced them to a lifetime of legal limbo in foster care.

In support of the Rule 60 Motion, the CASA submitted a declaration detailing her meetings with the parties to discuss the Superior Court's suggested alternative permanent plan of guardianship. CP 274, Findings of Fact 1.29. Based on her meetings, the CASA learned that Mr. Tsimbalyuk might consider adoption with respect to P.P.T., the eldest

child who is placed with his paternal grandmother, with whom the father has an easy relationship. CP 343-344. However, he rejected guardianship or adoption with respect to J.J.I. or O.L.T., who are currently living with the paternal aunt and uncle with whom the father has a strained relationship. CP 344. In the midst of the parties' discussions, the CASA stated that Mr. Tsimbalyuk "abruptly announced he wanted the younger kids to be placed with his sister in Tennessee." *Id.* Both the CASA and the social worker, Sandra Street, stated that a move to Tennessee would be incredibly disruptive. *Id.*; CP 349. Finally, it became clear that the court's finding that relatives would accept care of the children in any legal structure was in error and that all caretakers expressed strong desire for adoption. CP 343, 344, 346. The CASA concluded that "it puts families in unreasonable conflict to <u>require</u> that relatives testify about what sort of custodial arrangement they would be willing to agree to . . . . [Caregivers] should not be required to force rifts in their families in order to nurture these young boys." CP 346.

On May 11, 2009, the Superior Court denied the request to set a show cause hearing on the Rule 60 Motion and on May 13, 2009, the Court denied the Rule 60 Motion.

IV. ARGUMENT

A. The Superior Court Interpreted RCW 13.34.180(1)(f) Contrary to Washington Law, Leaving the Children Indefinite Dependents of the State and Without a Permanent Home

The Superior Court concluded that the State had proved the elements of RCW 13.34.180(1)(a)-(e) by clear, cogent, and convincing evidence. Conclusions of Law 2.1. Nonetheless, the court held that RCW 13.34.180(1)(f), which requires a court to find that "continuation of the parent and child relationship clearly diminishes the child's prospects for early integration into a stable and permanent home," was not met because "ongoing dependency and placement in relative care would be sufficiently stable and permanent without adoption." CP 274, Findings of Fact 1.29. The Superior Court, erred as a matter of law when it interpreted RCW 13.34.180(1)(f) and left the children dependents of the State, without prospects for a stable or permanent home.

The standard of review for interpretation of a statute is de novo. *In re Welfare of A.T.*, 109 Wn. App. 709, 34 P.3d 1246 (2001); *State v. Karp*, 69 Wn. App. 369, 372, 848 P.2d 1304 (1993).

1. The Superior Court erred when it denied termination on grounds that an alternative such as guardianship existed, where no party petitioned for guardianship and no facts at trial supported a guardianship

The Superior Court erred because it concluded that subsection (f) was not met based on the theoretical possibility that the parties would

agree to a dependency guardianship, even though the court did not have the power to create a guardianship as no petition for guardianship was before the court.

Where, as here, no party has petitioned for a dependency guardianship, the court is not required to consider guardianship—nor should it absent any evidence that the alternative is possible. *In re K.S.C.*, 137 Wn.2d at 930, 976 P.2d 113 (1999). Rather, "when faced solely with a petition for termination of parental rights, the court's inquiry is whether the allegations in RCW 13.34.180 are proved by clear, cogent and convincing evidence and whether termination is in the best interest of the child." *Id. See also In re Dependency of I.J.S.*, 128 Wn. App. 108, 114, 114 P.3d 1215 (2005) (where both dependency guardianship and a termination petition are filed, the court considers guardianship as an alternative to termination).

Here, the *only* options before the court were: (1) termination or (2) ongoing, indefinite dependency. The Superior Court could not force the parties to accept a dependency guardianship because no party had petitioned for a guardianship; even if it could, such a result would not be in the interest of these children absent *any* evidence whatsoever before the court that dependency guardianship was appropriate for these boys. Instead, as in *K.S.C.*, when faced solely with a petition for termination, the

court inquires into whether the statutory elements of RCW 13.34.180 are met by clear, cogent, and convincing evidence. The court erred because it focused on the theoretical possibility that parties might eventually agree to a guardianship, and blatantly ignored this court's tenet that "no child should languish for years in foster care." *In re Welfare of H.S.*, 94 Wn. App. at 529.

Moreover, this Court, in a case involving a four-year-old and two-year-old, has held that termination, rather than ongoing dependency, is appropriate for children who "have lived in limbo their entire lives and deserve permanency and stability." *In re Dependency of S.M.H.*, 128 Wn. App. 45, 60, 115 P.3d 990, 998 (2005); *see also In re Welfare of H.S.*, 94 Wn. App. at 530 ("No child should languish for years in foster care."); *In re Dependency Ramquist*, 52 Wn. App. 854, 862-63, 765 P.2d 30 (1988) (termination necessary to allow integration of child into stable and permanent home of foster family with whom child had lived for several years). In *In re S.M.H.*, 128 Wn. App. at 59, this Court distinguished *In re Welfare of S.V.B.*, 75 Wn. App. 762, 880 P.2d 80 (1994) where the court found that the parent-child relationship did not diminish prospects for early integration because the child lived with his paternal grandmother under a court-established guardianship; but the Court stated "here, unlike

S.V.B., no dependency guardianship was requested or established." *Id.* at 59.

There is no question that the children need and deserve a permanent home and that Mr. Tsimbalyuk is not capable of providing it. With no guardianship petition pending before the Court, the Superior Court's ruling leaves the children in an indefinite limbo, with no possibility of adoption and no real permanency or stability. For these reasons, the Superior Court's Order should be reversed.

2. The Superior Court erred when it focused on the children's placement with relatives

The Superior Court also erred as a matter of law because it improperly focused on the nature of children's current placement, instead of addressing whether their prospects for integration into a permanent home were diminished by an ongoing legal relationship with Mr. Tsimbalyuk. In particular, the Superior Court concluded that RCW13.34.180(1)(f) was not met because the State did not prove that "current homes are not stable and permanent short of termination" and because "the court is not persuaded that the [relative] caregivers would terminate their relationship with the children if adoption was not the sole option." CP 274, Findings of Fact 1.30.

The Washington Supreme Court has stated that the main focus of RCW 13.34.180(1)(f) is "whether [the parent-child relationship] 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 State does not have to prove that a stable and permanent home is available at the time of termination. *Id.*; *In re Esgate*, 99 Wn.2d 210, 214, 660 P.2d 758 (1983) (this element of the statute should not be interpreted as allowing termination only when the child is going to be adopted).

This Court has also stated that RCW 13.34.180(1)(f) "is mainly concerned with the continued effect of the *legal* relationship between 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).

Given the focus on the legal relationship between parent and child and whether continuation of that relationship impedes prospects for integration into a permanent home, in *In re Dependency of J.C.*, a termination case involving four young children, ages nine, eight, five, and four, the Washington Supreme Court concluded that, because there was little likelihood that the mother would resolve her substance abuse problems in the near future, it "necessarily follows" that the three children's prospects for early integration into a stable and permanent home were diminished unless the relationship between the mother and her

children was terminated. *In re Dependency of J.C.*, 130 Wn.2d 418, 426-27, 924 P.2d 21 (1996). This Court applied *In re Dependency of J.C.* in *In re Dependency S.M.H.*, 128 Wn. App. at 59, where a two-and-a-half year old had been in foster care her entire life and a four-year-old had lived in foster care for all but six months. Because the children "have lived in limbo their entire lives and deserve permanency" and because there was little likelihood the mother would be able to care for them in the near future, it "necessarily follows" that their prospects for early integration were clearly diminished by continuation of the relationship with the mother. *Id.* at 59-60; *In re Dependency of D.A.*, 124 Wn. App. 644, 657, 102 P.3d 847, 854 (2004) ("Because the Department met its burden of proving there is little likelihood C.A. can parent D.A. in the near future, it follows that her parental relationship interferes with D.A.'s integration into a stable and permanent home").

Here, when the only petition before the court was for termination, the finding that Mr. Tsimbalyuk would not able to care for his two, four, and eight year old boys at *any* time in the near future,[3] should have

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[3] Washington courts have noted that the "near future" is a shorter standard where, as here, the court considers placement of young children and that "a matter of months . . . is not within the foreseeable future to determine if there is sufficient time for a parent to remedy his or her parental deficiency" prior to termination of parental rights. *In re Welfare of M.R.H.*, 145 Wn. App. 10, 28, 188 P.3d 510 (2008), *review denied*, 165 Wn.2d 1009, 198 P.3d 512 (2008), *cert. denied*, 129 S. Ct. 1682 (2009); *see also In re Welfare of Hall*, 99 Wn.2d 842, 844, 850-51, 664 P.2d 1245 (1983) (eight months not in

resulted in a finding that a continued legal relationship with them would have impeded their prospects for integration into a permanent home. There is no dispute that these 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." CP 274, Findings of Fact 1.25. The fact that the children are placed with relatives should have been irrelevant, as evidence of stable placement with relative caregivers "does not undercut the trial court's determination that continuing [a parent's] parental rights inhibits [a child's] ability to be integrated . . . into that home." *In re A.V.D.*, 62 Wn. App. 562, 569-70, 815 P.2d 277 (1991). In *A.V.D.*, this Court held that the child's long-term placement with her grandmother did not preclude it from finding that the child's prospects for integration were diminished, where the father admitted that he was unlikely to be able to care for the child and the only alternative before the Court was to continue the State-supervised dependency indefinitely and to leave the child in "limbo" by postponing her integration into a "*permanent*" home. *Id.* at 570 (emphasis in original); *see also In re Welfare of H.S.*, 94 Wn. App. 511, 529, 973 P.2d 474 (1999) (termination affirmed where prospects for integration diminished for a child who had

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foreseeable future of four-year-old); *In re Dependency of P.A.D.*, 58 Wn. App. 18, 27, 792 P.2d 159 (1990) (six months not in the near future of 15-month-old); *In re Dependency of A.W.*, 53 Wn. App. 22, 31-32, 765 P.2d 307 (1988) (one year not in the foreseeable future of three-year-old).

been in foster care since she was three months old, and was then six years old, despite anticipated permanent placement with the father's relatives), *In re Welfare of C.B.*, 134 Wn. App. 336, 349, 139 P.3d 1119 (2006) (continuation of parent and child relationship may still diminish prospects for integration into stable and permanent home, even if child is settled in a stable foster care placement).

Accordingly, the Superior Court should not have considered the fact that relatives cared for the children and assumed that the relatives would continue to do so absent termination—particularly when the only evidence before the Superior Court was that the relatives preferred adoption. CP 274, Findings of Fact 1.30. The court's proper inquiry, according to settled precedent, is to consider whether the children's prospects for integration into a *permanent* home were impeded absent termination of the legal relationship with the parent. *In re Dependency of K.S.C.*, 137 Wn.2d at 927, 976 P.2d 113. Otherwise, under the Superior Court's reasoning, children in "stable," relative placements at the time of termination would be less likely to achieve a *permanent* home than children living in, for example, foster care with non-relatives, who might not be assumed by a court to be willing to continue to care for children in a dependency situation, without any stability or permanency. This is contrary to the intent of the termination statute and Washington law

interpreting that statute. *See* RCW 13.34.136(3) (declaring children should have permanence "at the earliest possible date.").

Moreover, it was error for the Superior Court to suggest that the relative caregivers should have been called at trial to testify. CP 274, Findings of Fact 1.26. While the Superior Court recognized in its Order that it is "awkward for the petitioner to call caregivers at a termination trial, the court suggests that narrow inquiry might be elucidating to the court without treading upon the prohibited area of comparative fitness." *Id.* Even a narrow line of inquiry into this matter is an error of law, as the Superior Court should have focused on the children's prospects for integration into a permanent home, not the nature of the home itself. *In re Dependency of K.S.C.,* 137 Wn.2d at 927, 976 P.2d 113. Even if the court were properly able to consider the children's current placement, the court itself found that the relative caregivers were "willing and able to adopt the children." CP 274, Findings of Fact 1.30.

By focusing on the fact that the children lived with relatives and thus finding termination would not diminish the children's prospects for integration into a permanent home, the Superior Court erred as a matter of law and condemned these children to a life time of dependency and foster care. The Order denying termination should be reversed.

B. There Is Substantial Evidence That the Children's Prospects for Early Integration into a Permanent Home Are Diminished by Continuation of the Parent-Child Relationship

This Court reviews the Superior Court's findings in a termination trial for substantial evidence. *Welfare of S.V.B.*, 75 Wn. App. at 768 (substantial evidence supports a finding for termination if the State has proved the required elements by clear, cogent, and convincing evidence). Even if this court concludes that the Superior Court did not err in applying the statute, there is substantial evidence to support a conclusion that subsection (f) was met.

The Superior Court's findings of fact support a conclusion that subsection (f) was established. The Court found: (1) that Mr. Tsimbalyuk is not capable of correcting his parental deficiencies in the near future, CP 271, Findings of Fact 1.15; (2) that the children are young, vulnerable, and have experienced significant upheaval, CP 274, Findings of Fact 1.25, but have found stability with relative caregivers and look to relatives as their primary caregivers, CP, 273, Findings of Fact 1.23, 1.24; (3) that the children should remain in long-term placement with caregivers and not be returned to the primary care of the father, CP 272, 274, Findings of Fact 1.17, 1.27; (4) that these caregivers prefer to live without State involvement in a permanent situation such as adoption, CP 274, Findings of Fact 1.28, 1.30; and (5) that no party asked for a guardianship and that

there was no evidence regarding the feasibility of a guardianship or opportunity at trial to discuss guardianship, CP 274, Findings of Fact 1.31. These unchallenged findings are verities on appeal, and alone establish that (f) was met. *In the Interest of J.F.*, 109 Wn. App. 718, 37 P.3d 1227 (2001).

Furthermore, the CASA testified that continuation of the parent-child relationship diminished the children's prospect s for a "safe, stable, and permanent home." 7RP 874:12-14. She stated that Mr. Tsimbalyuk is not capable of providing care for the children, meeting the children's emotional mental health needs, or protecting the children from the situations from with they were originally removed. 7RP 873:19-25, 874:1-12. The CASA testified that the current situation for the family is "delicate" and that continuation of indefinite dependency may be harmful for the caregivers and the children. 7RP 875-877.

Accordingly, there is more than substantial evidence supports a finding that subsection (f) was met by clear, cogent, and convincing evidence and the Superior Court's Order is in error. The children's only chance for early integration into a stable and *permanent* home is for Mr. Tsimbalyuk's parental rights to be terminated. The Superior Court's Order should therefore be reversed.

C. The Court's Conclusion That Ongoing Dependency Is in the Best Interest of the Children Is Not Supported by Substantial Evidence and Is Contrary to Existing Law

After it determined that the statutory elements of RCW 13.34.180(1) were met, the Superior Court should have found that termination was in the children's best interest. RCW 13.34.190; *In re Dependency of A.M.*, 106 Wn. App. 123, 130, 22 P.3d 828 (2001). This Court reviews the Superior Court's findings of fact regarding the children's best interest for a preponderance of the evidence. *Dependency of Ramquist*, 52 Wn. App. at 860. This Court reviews the conclusions of law de novo. Here, the Department showed by a preponderance of the evidence that termination was in the best interest of the children and the Superior Court's conclusion that dependency guardianship is in the children's best interest is in error. RCW 13.34.190, CP 275-276, Conclusion of Law 2.3.

In determining what is in the best interest of the children, a court does not evaluate specific factors, but instead views each case in light of its unique facts. *In re A.V.D.*, 62 Wn. App. at 572.

The Superior Court erred as a matter of law by considering that dependency "would allow Mr. Tsimbalyuk to maintain the right to see his children." CP 273, Findings of Fact 1.32. By so doing, the Superior Court put Mr. Tsimbalyuk's needs *above* the children's. However, "[t]he

dominant consideration in determining the best interests of a child is the child's welfare, and the parental relationship must be subordinate to this consideration." *Dependency of S.M.H.*, 128 Wn. App. at 60 (termination affirmed because child has a right to safe, stable, and permanent home and speedy resolution, and parent did not address deficiencies over lengthy dependency). In determining whether to terminate parental rights, a court may not "accommodate the parents' rights when to do so would ignore the basic needs of the child." *In re Welfare of H.S.*, 94 Wn. App. at 530 (termination affirmed where trial court acknowledged "some contact between the child and her biological parents may be in her interest," and child lived with relatives, but evidence supported finding termination in the best interest of the child).

A child's right to basic nurturing includes "the right to a safe, stable, and permanent home and a speedy resolution of [dependency] proceeding[s]." *Id.* (quoting RCW 13.34.020). "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 while [the parent] sought to rehabilitate himself." *In re Dependency of T.R.*, 108 Wn. App. 149, 167, 29 P.3d 1275 (2001) (internal quotations and citation omitted); *Dependency of S.M.H.*, 128 Wn. App. at 60; *In re Dependency of*

A.W., 53 Wn. App. at 33. Here, Mr. Tsimbalyuk made no effort to resolve the issue that made him unable to parent his children, yet the Superior Court erroneously accommodated his rights to visitation of the three children, instead of focusing on the interest of the three young boys in having safe, stable, and permanent homes and a speedy resolution to the proceedings. RCW 13.34.020. The court erred in placing the interest of the parent ahead of the basic rights of the child, in violation of Washington's dependency statute and settled precedent.

Moreover, the substantial evidence at trial supports the conclusion that termination is in the children's best interest, not a lifelong dependency or guardianship simply to facilitate contact with Mr. Tsimbalyuk. The court itself found that Mr. Tsimbalyuk has been unable to rehabilitate over a lengthy period, CP 272-273, Findings of Fact 1.20, that he would not be able resume parenting in the foreseeable future, and that placement "in the custody of relatives is in the children's best interest." Even where a trial court finds that some continued contact between child and parent may be in the child's interest, where a court has already decided that the child should not be returned to the parent's care—now or in the future—termination is in the child's best interest. *See In re A.V.D.*, 62 Wn. App. at 572. Similarly, here, while there was testimony at trial that limited visitation with the father may be in the children's interest, the CASA,

social worker, and counselor agreed that the children's need for permanence outweighed this potential interest. 6RP 688:5-11, 7RP 869-70, 891, 892, Findings of Fact 1.17. The Superior Court itself concluded that "someone else should be the children's primary parent." CP 272, Findings of Fact 1.17.

Given the young age of the children, their need for early integration into a safe, stable, and permanent home, the inherently temporary nature of guardianship, and the father's parenting deficiencies that will likely not be cured in the near future, the substantial evidence supported a finding that termination is in the children's best interest. Since all the elements of the termination statute were satisfied and termination is in the children's best interest, the Superior Court's Order should be reversed.

D. The Superior Court Erred by Refusing to Delay Entry of the Order Pending Evidence on Guardianship

The CASA also seeks review of the trial court's refusal to delay entry of the Order, which is reviewed for abuse of discretion. *Nw. Land & Inv., Inc. v. New W. Fed. Sav. & Loan Ass'n*, 64 Wn. App. 938, 942, 827 P.2d 334 (1992). Abuse of discretion means that the trial court exercised its discretion on untenable grounds or for untenable reasons, or that the discretionary act was manifestly unreasonable. *In re Estate of Stevens*, 94 Wn. App. 20, 29, 971 P.2d 58, 63 (1999).

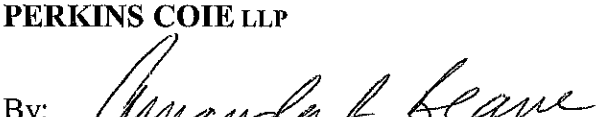
The Superior Court abused its discretion when it refused to delay entry of its Order. In finding that "it is awkward for petitioners to call caregivers at a termination trial, [but] a narrow inquiry might be elucidating to the court without treading upon the prohibited area of comparative fitness," the court implicitly requested additional evidence from the caregivers regarding ongoing dependency and relative placement. CP 274, Finding of Fact 1.26. By refusing to consider the CASA's request to introduce evidence regarding the appropriateness of guardianship before denying a termination in favor a theoretical guardianship, the court abused its discretion.

V. CONCLUSION

For the reasons set forth above, the CASA urges this Court to reverse the Superior Court's Order and to enter an order terminating the father's parental rights to these children.

RESPECTFULLY SUBMITTED this 6th day of August, 2009.

PERKINS COIE LLP

By: 
Amanda J. Beane, WSBA No. 33070
Karen R. Brunton, WSBA No. 41109
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Telephone: 206.359.8000
ABeane@perkinscoie.com
KBrunton@perkinscoie.com

Attorneys for Appellant
Lori Reynolds, CASA

DECLARATION OF SERVICE

I, Amanda J. Beane, declare under penalty of perjury under the laws of the State of Washington that on August 6, 2009, I caused to be delivered a copy of the *Opening Brief of CASA, Appellant* in the above-captioned proceedings to the following counsel by the methods indicated:

By Hand Delivery:

Nicole E. Hecklinger
SCRAP
1401 E. Jefferson Street, Suite 200
Seattle, WA 98122

Attorneys for Father

By First-Class U.S. Mail:

Trisha L. McArdle
Office of the Attorney General
800 Fifth Avenue, Suite 2000
Seattle, WA 98104

Attorneys for DSHS

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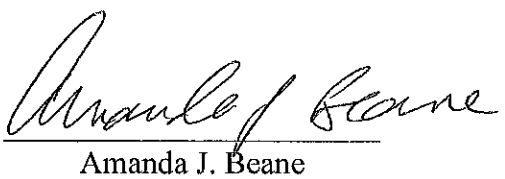

Amanda J. Beane