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NO. 31514-2-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION THREE

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In re Dependency of A.W., and M.W., Minors

STATE OF WASHINGTON, DSHS,

Respondent,

v.

T.P.,

Appellant.

**FILED**

Sep 24, 2013

Court of Appeals  
Division III  
State of Washington

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR BENTON COUNTY

The Honorable Joseph Schneider, Judge

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BRIEF IN SUPPORT OF MOTION FOR ACCELERATED REVIEW

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*(Appellant's Brief)*

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A. ASSIGNMENTS OF ERROR

1. The court erred in granting the guardianship petition.
2. Application of the preponderance of the evidence standard under the new guardianship statute violated appellant's right to due process.
3. The court erred in finding that a guardianship was in the children's best interests.
4. The court erred in finding that appellant's parental deficiencies could not be remedied within the near future to allow the children's return.
5. The court erred in entering: findings of fact 2.7; 2.7 E); 2.7 E) v.; 2.7 E) vii.; 2.7 E) viii.; 2.7 E) ix.; 2.7 E) xvi.; 2.7 E) xviii; and 2.8(e). CP 99-103.<sup>1</sup>

Issues Pertaining to Assignments of Error

1. Where the new guardianship statute is more akin to termination of a parent's rights than was the case under the old guardianship statute, does application of the preponderance of the evidence standard no longer adequately protect the parent's substantial liberty interest to the care and custody of his or her child?

2. Whether the court erred in finding that it was in the children's best interests to establish a guardianship rather than continue reunification efforts with appellant, where: the children were 10 and 12 years old at the time of the guardianship trial, clearly bonded to their mother and favored reunification; the state's own expert testified appellant had turned a corner and was on the right track towards correcting her primary parental deficiencies; and appellant anticipated she could resume parenting within three months of the guardianship trial?

3. Whether the court erred in finding appellant would not be capable of adequately caring for her children within the near future, where: appellant was in compliance with substance abuse treatment; making noticeable strides in mental health treatment, through therapy and the assistance of previously unavailable medication management; and appellant had obtained stable housing, financial assistance and needed only a short period of time to cement her recent progress and ongoing recovery?

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<sup>1</sup> The court's findings of fact and conclusions of law are attached as an appendix. CP 98-113.

B. STATEMENT OF THE CASE<sup>2</sup>

1. Historical Facts and Services<sup>3</sup>

Appellant T.P. is appealing from the orders granting the petitions for guardianship of her two sons, A.W. and M.W.<sup>4</sup> CP 115-131. At the time of the guardianship trial, A.W. (born 12/6/02) and M.W. (born 10/21/00) were approximately 10 and 12 years old, respectively.<sup>5</sup> CP 1, 3.

No one doubted T.P.'s love for her children. See e.g. CP 88; RP 184, 275, 368, 382, 386, 392. In fact, the assigned social worker Misty Ovens described T.P.'s affection for A.W. and M.W. as "a very fierce love for them." RP 275. Ovens also conceded that at times, T.P. "can be appropriate with them, that she can, you know, basically parent them[.]" RP 276.

A.W. and M.W. love their mother in return. RP 291, 387. At trial, A.W. expressed his desire to reunify with his mother. RP 291,

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<sup>2</sup> "RP" refers to the verbatim report of proceedings for the guardianship trial held November 28-30, 2012, which is contained in three bound volumes, consecutively paginated.

<sup>3</sup> Because the facts pertaining to the psychological evaluations did not fit neatly into the historical facts, they are set forth separately.

<sup>4</sup> T.P. is the mother of six children, but only the youngest two, A.W. and M.W., are involved in these proceedings. CP 115-131.

<sup>5</sup> The petitions were granted by default as to the boys' father, as his location was unknown at the time of trial. CP 88; RP 10.

387. In the past, M.W. had also expressed his desire to reunify, but made no statement either way at trial; Owens testified M.W. “waivers, depending upon circumstances and how he’s feeling that day[.]” RP 291.

According to Owens, however, T.P. was not able to adequately care for her sons consistently. RP 276. The main barriers impeding T.P.’s ability to consistently parent her children revolved around substance abuse and mental health issues. Admittedly, T.P. struggled with these issues throughout most of the dependency. But by the time of trial, her therapist – who had treated her intermittently during the dependency – believed T.P. was “on the right track.” RP 369.

The children came to the department’s attention in September 2009, when T.P.’s daughter C.W. disclosed her older brother W.W. had sexually abused her.<sup>6</sup> RP 261. In the ensuing investigation, it was discovered W.W. also abused his younger brothers, A.W. and M.W. RP 261.

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<sup>6</sup> The department had prior involvement with the family, but it was nearly ten years earlier, when M.W. was born. RP 12. M.W. tested positive for methamphetamine at birth and a dependency was established as a result. RP 258. M.W. was returned home in October 2001, however, and the dependency was dismissed in April 2002. RP 260. During this time, T.P. voluntarily relinquished custody of C.W. and W.W. to her mother. RP 258. T.P.’s mother is now C.W.’s legal guardian. RP 285, 305.

Ovens testified that initially, the department attempted to implement a safety plan that would allow A.W. and M.W. to remain home with T.P. However, on September 17, 2009, the department removed the children and agreed orders of dependency were entered. RP 13, 261.

As part of the dependency, the department identified the following parental deficiencies: inadequate parenting skills; lack of awareness of sexual abuse issues related to the children; possible substance abuse; and mental health issues. RP 262. Regarding services, the department provided: a referral for a substance abuse evaluation; a referral for a parenting evaluation; individual counseling services; and a parenting awareness class through the sexual assault resource center (SARC). RP 262.

As recommended, T.P. completed the parenting awareness class through SARC, as well as a Parenting with Dignity class through a local church. RP 38-39, 54.

When T.P. initially underwent the drug and alcohol evaluation, no treatment was recommended. RP 269. Because T.P.'s behavior seemed peculiar to Ovens, however, Ovens eventually implemented random urinalysis testing. RP 270. The first test indicated a "substitute specimen." RP 270. Ovens

referred T.P. to a new evaluation at Somerset Counseling Center in Richland, which recommended intensive outpatient treatment (IOP). RP 270. Inpatient was recommended thereafter when T.P. tested positive for methamphetamine. RP 270.

It was not until December 2011 that T.P. underwent and completed inpatient treatment at Sundown Ranch. RP 19, 139, 146, 154. As soon as T.P. completed inpatient, she enrolled in IOP with Somerset. RP 20.

Meanwhile, however, in March 2010, the department recommended, and the court agreed, to return A.W. and M.W. home pursuant to an in-home dependency. RP 263; see also RP 95. Around this same time, Tammy Tanninen had submitted a favorable parenting capability assessment.<sup>7</sup> RP 94, 199.

In preparation of the in-home dependency, the department made a referral to mental health counselor Michelle Leifheit to provide family preservation services (FPS). RP 115, 263. T.P., Leifheit and Ovens also formulated a safety plan to limit the

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<sup>7</sup> Later, between February and July 2011, T.P. also participated in Tanninen's women's empowerment group. RP 197. To Tanninen, it appeared T.P. enjoyed the women's group and got "quite a bit out of that from the other women." RP 204. T.P. also underwent individual counseling with Tanninen in 2011-2012. RP 197.

children's exposure to individuals who had not been approved by the department. RP 121, 263.

In particular, the department had concerns about T.P.'s boyfriend at the time, S.B., who did not pass a background check, due to prior criminal history. RP 263. According to Ovens, she made it clear T.P. was not to leave the children unsupervised with S.B. until the department obtained an "administrative waiver" of the background requirement. RP 264. Ovens claimed she requested the waiver, based on representations made at the time, that S.B. was a positive support for the family. RP 264.

On May 25, 2010, Ovens conducted an unannounced visit at the home. RP 264. According to her, S.B. was home alone with A.W. and M.W., the home was in disarray and M.W. was outside in T.P.'s truck with the keys in the ignition. RP 264. Ovens immediately requested a meeting between the department and T.P. RP 265.

At the meeting on May 27, 2010, T.P. indicated some confusion about the safety plan. RP 265. The parties, together with Leifheit, formulated a new safety plan. RP 265. T.P. was informed that any violation would result in A.W. and M.W.'s removal. RP 265.

Leifheit worked with T.P. on parenting education, stabilizing the home environment and awareness of sexual abuse issues. RP 116-117. According to Leifheit, T.P. participated in services, but the chaotic home environment continued and frequently required "crisis management." RP 120, 123. Due to the limited availability of FPS, the service naturally ended in July 2010. RP 119.

Towards the end of September 2010, a referral was made to Leifheit under a separate contract and she resumed work with the family until the end of the year. RP 127. Leifheit described T.P.'s compliance as good, although her chaotic lifestyle continued.<sup>8</sup> RP 127, 129. In Leifheit's opinion, T.P.'s biggest obstacle was her inability to obtain medical services and treatment of her mental health issues. RP 129. From the first few months of working with T.P., it was apparent to Leifheit T.P. suffered from depression and attention deficit hyperactivity disorder (ADHD). RP 363.

Leifheit questioned how different circumstances might be for T.P. if she were properly medicated. RP 129. But it was not part of Leifheit's contract to provide that type of assistance. RP 129.

In December 2010, A.W. and M.W. were removed and placed in foster care. RP 265. According to Ovens, service

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<sup>8</sup> For instance, Leifheit described outstanding warrants and evictions. RP 133.

providers indicated the boys had missed appointments and school. RP 265. While awaiting a "child protection team staffing," Owens conducted her regular health and safety check, visiting the boys at school. RP 266. According to Owens, A.W. disclosed that W.W. had been visiting at the house frequently, which was a violation of the safety plan.<sup>9</sup> RP 266. The department removed the children immediately. RP 266.

As indicated, T.P. struggled with drugs and mental health issues. Perhaps a symptom of such struggles, T.P. was arrested on a number of occasions throughout the dependency. RP 273. T.P. acknowledged her struggles and concomitant arrests. At trial in November 2012, she acknowledged she is a methamphetamine addict, albeit in recovery. RP 46, 58.

But T.P. also explained that a number of her arrests were the result of being unable to pay court-ordered legal financial obligations (LFOs). See e.g. RP 13-15. In that vein, Owens testified she sent letters to several different courts asking for a reduction in T.P.'s fines instead of jail time. RP 267.

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<sup>9</sup> For the first year of the dependency, W.W. was incarcerated with the juvenile rehabilitation administration (JRA). RP 282. He was returned to JRA for probation violations around the same time the department removed A.W. and M.W. from T.P.'s care. RP 283.

Although T.P. completed inpatient treatment at Sundown Ranch in December 2011, and enrolled in Somerset IOP thereafter, her struggles with substance abuse continued intermittently, which her counselor at Sundown Ranch testified is not unusual. RP 154-55.

On January 24, 2012, a Benton County Sheriff's deputy went to T.P.'s home to arrest her on a number of warrants, which T.P. indicated were related to LFOs and a restitution order she was unable to pay. RP 229, 132-33, 354. When T.P. was taken into custody, the deputy found a glass pipe in her coat pocket. RP 16, 230. Residue in the pipe tested positive for methamphetamine. RP 16, 231.

It was after this incident, in February 2012, A.W. and M.W.'s foster parents filed a petition for guardianship of the boys. CP 3-7. T.P. opposed the guardianship. CP 27.

Unfortunately, however, T.P.'s struggles continued. In May 2012, she was arrested for an incident that happened while on work crew. As part of the program, random urinalysis was customary. RP 237-38. When T.P. was tested on May 15, 2012, the sample tested positive for methamphetamine. RP 17, 241. When she was searched at the time of arrest, police also located a bottle of

Adderall in her possession, without a verifiable prescription. RP 225.

Significantly, T.P. had been under mounting pressure. Ovens acknowledged the services T.P. was ordered to complete as part of the dependency totaled 10-15 hours a week. RP 296; see also RP 214 (Tanninen). At one time, T.P. ran her own business providing pallets to truck drivers. RP 296. The business had enjoyed a measure of success in the past (RP 199), but the intensity of dependency services greatly impacted T.P.'s ability to work. RP 214. Because truckers would contact her for pallets on an as-needed basis, T.P.'s hours were unpredictable and difficult to plan for in advance. RP 296. T.P.'s stress level increased as she attempted to juggle work, corresponding financial issues, services and drug treatment. RP 28-29, 214-15, 297.

In addition, at some point after A.W. and M.W.'s removal, W.W. was placed with T.P., despite her protestations. RP 282-83. Apparently, when W.W. was released from JRA, JRA considered T.P. to be an appropriate placement, and Ovens testified the department decided not to intervene. RP 283. Ovens acknowledged the stress it caused T.P., as she knew it meant A.W. and M.W. could not return home. RP 294. In fact, T.P. frequently

requested the department place W.W. in foster care, so there would be at least a possibility for A.W. and M.W. to return home. RP 33, 294-295. It was not until after T.P. was incarcerated in May 2012, following the work crew incident, that a separate dependency was established for W.W.<sup>10</sup> RP 13, 284.

In addition to these stressors, T.P.'s father died in September 2012, after a prolonged illness. RP 29. T.P.'s relationship with S.B. also fell apart. RP 30, 293. According to Ovens, T.P. disclosed she had obtained a restraining order against S.B., after he assaulted her. RP 293; see also RP 17.<sup>11</sup>

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<sup>10</sup> At the time of the guardianship trial, T.P. had monitored visits with 17-year-old W.W. RP 285.

<sup>11</sup> Despite this, T.P. acknowledged an incident shortly before the guardianship trial (on November 19, 2012) where she was found riding in S.B.'s car. RP 18. It appears this contact was the result of transportation issues and not a romantic involvement. See e.g. RP 213.

## 2. Evaluations

Psychologist Naughne Lavaughn Boyd evaluated T.P. in March 2011. RP 91. During the course of the interview portion of the evaluation, T.P. indicated she had focused more on pleasing her children than in setting appropriate boundaries, which she recognized as a disservice to them. RP 97. At the time of the testing, however, T.P. indicated she was more focused on building responsibility in her children. RP 98.

While one of the tests administered by Boyd proved inconclusive, Boyd opined it could be the result of attention deficit hyperactivity disorder (ADHD). RP 98. Other personality inventory tests revealed elevated levels of anxiety, depression, drug dependence and personality patterns consistent with antisocial and compulsive traits. RP 98. Nonetheless, Boyd did not see impaired intellectual functioning. RP 101. In other words, T.P. was intellectually capable of understanding what was required of her to be a good parent, but had not been able to put that knowledge into effect. RP 102.

Boyd opined T.P.'s sobriety would be critical for her to provide the consistency required. RP 103. At the time of the evaluation, Boyd characterized T.P.'s prognosis as fair. RP 107.

The department also provided evaluations for A.W. and M.W. Psychologist Peter Stewart evaluated M.W. in July 2011. RP 64. Stewart described M.W. as a cooperative young man, although a little guarded. RP 65-66. Stewart diagnosed M.W. with an unspecified mood disorder and oppositional defiant disorder. RP 66. Stewart recommended continued counseling to help build coping skills, as well as behavioral management training. RP 67. In Stewart's opinion, M.W. would do best in an environment with calm and nurturing caregivers. RP 68-69.

Stewart also evaluated A.W. RP 71. A.W. was also cooperative. Stewart assessed A.W. as having borderline cognitive abilities, potentially due to an accident when he was two years old. RP 72. A coffee pot full of boiling water fell on his head, causing severe burns and an infection. RP 72. Stewart opined A.W. also suffered from adjustment disorder, due to outside stressors such as residence changes. RP 74, 78. Stewart recommended tutoring, continued counseling and a structured but nurturing environment. RP 75-78.

### 3. Visitation

In addition to services, T.P. was also provided visitation, which she attended regularly. RP 304. Although she was

sometimes tardy, T.P. visited A.W. and M.W. twice a week for a total of six hours each week. RP 276, 296, 302.

Visit supervisor Vicki Roeder complained T.P. sometimes brought inappropriate snacks, like chips,<sup>12</sup> left the children with Roeder while T.P. went to the bathroom or retrieved something from the car and failed to corral the children in the same place on the playground. RP 177-77; see also RP 279. T.P. disputed the truth of these criticisms. RP 336-338.

Ovens was not concerned with snacks, but shared Roeder's concern about certain conversations, as they concerned the dependency. But as both Roeder and Ovens acknowledged, it was the boys themselves that initiated many of these conversations. RP 181, 303; see also RP 23. T.P. acknowledged she sometimes answered the boys' questions as it was clear they were anxious and needed answers. RP 23, 32, 338. But Roeder acknowledged T.P. also redirected them, suggesting they talk to their attorneys or social worker Ovens. RP 181.

#### 4. Circumstances at the Time of the Guardianship Trial

At the time of trial in November 2012, T.P. had two criminal charges pending, from the incidents in January and May 2012. CP

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<sup>12</sup> Roeder acknowledged T.P. also brought fruit and vegetables. RP 187.

89; RP 15-16. Despite this, T.P. was beginning to turn her life around for the better. For instance, T.P. was waitlisted for drug court and anticipated admission shortly, as soon as the next person graduated and a spot opened up. RP 15-16, 297. T.P. was diligently keeping her place in line by attending drug court every Wednesday. RP 15-16, 60, 342. Moreover, T.P. welcomed the level of accountability that would be required in drug court. RP 45.

The past year had been difficult, but T.P. had since overcome an important obstacle – admitting to her addictions as well as mental health issues. RP 27.

At the time of trial, T.P. was considered to be in compliance with treatment at Somerset. RP 36, 167, 169. In September 2012, she graduated from IOP to outpatient treatment, which meets weekly. RP 21-22. T.P. testified she also attends alcoholics anonymous and celebrate recovery groups. RP 37.

At the time of trial, T.P. was undergoing individual counseling twice a week with Michelle Leifheit. RP 36, 133. The focus was not on parenting this time, but T.P.'s individual issues. RP 133. T.P. testified she engaged in full disclosure with Leifheit, and that as a result, the two had “opened a lot of doors.” RP 46.

T.P. looked forward to her sessions with Leifheit, which she found tremendously helpful. RP 46.

Leifheit testified similarly, noting: "I have seen a big difference with Teresa this time, under this contract[.]" RP 136. Leifheit attributed T.P.'s behavioral change in part to medication management, which T.P. had been unable to afford until recently.<sup>13</sup> RP 136-37. At the time of trial, T.P. was taking an antidepressant and medication to manage her ADHD. RP 332.

Despite struggles balancing work with services and recovery, T.P. had improved her financial situation by qualifying for social security income benefits (SSI) and Veteran's Administration (VA) benefits. RP 40, 301, 333. She had also found a stable living situation. When her father passed away, she inherited her father's trailer and had since moved into a trailer park in West Richland. RP 11, 25, 41, 326. Although the title still belonged to T.P.'s mother, T.P.'s mother intended to transfer title to T.P. RP 25, 41, 327.

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<sup>13</sup> While Owens was no longer the assigned social worker at the time of trial, she testified that in the past, she offered to help T.P. obtain medical coverage. RP 268. Owens claimed that when she would check on T.P.'s status with the welfare office, the office typically indicated they were missing a form of some sort, which prevented T.P. from obtaining coverage. RP 268. When Owens followed up with T.P., T.P. reportedly said she already submitted it and the agency lost it. RP 268.

T.P. opposed the guardianship, because she believes A.W. and M.W. need to be raised by their family. RP 26, 48. T.P. testified the bond between her and A.W. and M.M. is "tight." RP 26. She explained there is a great love between them, and that the boys mean the world to her. RP 26.

In T.P.'s opinion, the boys did not have sufficient contact with their sister C.W., as well as other extended family members, including their grandfather, who had since passed. RP 26-27, 343. Despite T.P. and her mother's efforts, arranging for the boys to visit their grandfather had been difficult. RP 27. The lack of contact was a shame, especially for A.W. who shared a special bond with his grandfather. RP 27.

T.P. welcomed the opportunity to resume parenting of A.W. and M.W. RP 46, 48-49. However, she acknowledged she needed some additional time for her continued recovery, to learn about her mental health issues and adjust to her medications. RP 46, 334. T.P. anticipated she would be ready to parent A.W. and M.W. within the next three months. RP 46, 355. According to T.P., the wait would be short and within the children's best interest:

I know I've made a lot of bad decisions in my time. Umm, but knowing is half the battle and I feel

like I'm learning a lot now. And back then, I didn't even begin to know.

I love my children very deeply and they love me. And through this whole time of dependency, they have never deferred from wanting to come home. And they understand and they're willing to wait, if that's what it means to come home. They say, that's okay, mamma, as long as we get to come home.

RP 49-50.

C. ARGUMENT

THE COURT ERRED IN GRANTING THE GUARDIANSHIP PETITIONS.

In support of granting the guardianship petitions, the court entered findings that guardianship – as opposed to continuing reunification efforts with T.P. – was in the children's best interests. The court also found there was little likelihood that conditions would be remedied so that A.W. and M.W. could be returned to T.P. within the near future. In making these findings, the court expressly applied the preponderance of evidence standard, as required under the new guardianship statute.

When considering the old guardianship statute – RCW 13.34.231 – Division One of this Court held this standard provided adequate constitutional protection to the parent. In re Dependency of F.S., 81 Wn. App. 264, 913 P.2d 844, review denied, 130 Wn.2d 1002 (1996). The new guardianship statute – RCW 13.36.040 – is

considerably different than the old statute, however, and serves to more permanently deprive parents of their rights to the care and custody of their children. In light of these differences, the preponderance of the evidence standard does not provide the necessary process parents are due. Because the guardianships were entered in violation of T.P.'s due process rights, they should be reversed.

Assuming this Court disagrees, however, the guardianships should be reversed because the state failed to prove – even by a preponderance of the evidence – that guardianships – as opposed to continued reunification efforts – were in the children's best interests, and that conditions would not be remedied within the near future to allow for the return of the children to T.P.

Preservation of the family unit is a fundamental constitutional right protected by the federal and Washington constitutions. U.S. Const. amends. V, XIV; Wash. Const. art. I, § 3; Quilloin v. Walcott, 434 U.S. 246, 98 S. Ct. 549, 54 L.Ed.2d 511 (1978); In re Custody of Smith, 137 Wn.2d 1, 15, 969 P.2d 21 (1998). Parents have a fundamental liberty interest in the care, custody, and management of their children. Santosky v. Kramer, 455 U. S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982). This right does not evaporate

simply because they have not been model parents or have lost temporary custody of their child to the State. Id.

As a fundamental right, a parent's right to custody of her children may not be interfered with without the complete protection of due process safeguards. Halsted v. Sallee, 31 Wn. App. 193, 639 P.2d 877 (1982). Thus, parental fitness proceedings are accorded strict due process. Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972); Santosky v. Kramer, 455 U.S. at 754; In re Darrow, 32 Wn. App. 803, 806, 649 P.2d 858 (1982).

In 2010, the Washington legislature created a new chapter under entitled "Guardianship." Laws of 2010, chapter 272; Chapter 13.36 RCW. Under this chapter, any party to a dependency proceeding may petition for establishment of a guardianship. RCW 13.36.030(1). That petition shall be granted only if:

(iv) The court finds by a preponderance of the evidence that it is in the child's best interests to establish a guardianship, rather than to terminate the parent-child relationship and proceed with adoption, or to continue efforts to return custody of the child to the parent; and

(b) All parties agree to entry of the guardianship order and the proposed guardian is qualified, appropriate, and capable of performing the duties of guardian under RCW 13.36.050; or

(i) The child has been found to be a dependent child under RCW 13.34.030;

(ii) A dispositional order has been entered pursuant to RCW 13.34.130;

(iii) At the time of the hearing on the guardianship petition, the child has or will have been removed from the custody of the parent for at least six consecutive months following a finding of dependency under RCW 13.34.030;

(iv) The services ordered under RCW 13.34.130 and 13.34.136 have been offered or provided and all necessary services, reasonably available, capable of correcting the parental deficiencies within the foreseeable future have been offered or provided;

(v) There is little likelihood that conditions will be remedied so that the child can be returned to the parent in the near future; and

(vi) The proposed guardian has signed a statement acknowledging the guardian's rights and responsibilities toward the child and affirming the guardian's understanding and acceptance that the guardianship is a commitment to provide care for the child until the child reaches age eighteen.

RCW 13.36.040(2).<sup>14</sup>

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<sup>14</sup> These are very similar to the allegations the Department must prove to terminate parental rights:

- (a) That the child has been found to be a dependent child;
- (b) That the court has entered a dispositional order pursuant to RCW 13.34.130;
- (c) That the child has been removed or will, at the time of the hearing, have been removed from the custody of the parent for a period of at least six months pursuant to a finding of dependency;

The primary intent behind this guardianship statute is to create a separate guardianship chapter to establish permanency for children in foster care through the appointment of a guardian and dismissal of the dependency. RCW 13.36.010. It does so by permanently stripping parents of most of the bundle of parental rights (care, custody, management). RCW 13.36.070. Indeed, as happened here, a parent may be left with only the right to occasional visits. CP 123. And this likely will remain the status quo regardless of whether the parent is later able to improve her parental abilities such that she becomes a fit parent.<sup>15</sup>

Given the permanency imbedded in Washington's new guardianship scheme, the parental rights at stake in a guardianship

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(d) That the services ordered under RCW 13.34.136 have been expressly and understandably offered or provided and all necessary services, reasonably available, capable of correcting the parental deficiencies within the foreseeable future have been expressly and understandably offered or provided;

(e) That there is little likelihood that conditions will be remedied so that the child can be returned to the parent in the near future. . . . and

(f) That continuation of the parent and child relationship clearly diminishes the child's prospects for early integration into a stable and permanent home.

RCW 13.34.180(1). If these six factors are proved, the Department must also prove termination of the parent-child relationship is in the child's best interests. RCW 13.34.190(2).

<sup>15</sup> The Legislature has directed:

[T]he court shall not terminate a guardianship unless it finds that a substantial change has occurred in the circumstances of the child or the guardian and that termination of the guardianship is necessary to serve the best interests of the child.

RCW 13.36.070(2).

proceeding under RCW 13.36.040 are quite similar to those at stake in a termination trial. As such, parents contesting a guardianship petition brought forth under RCW 13.36.040 must be afforded the same constitutional safeguards and strict adherence to due process that is provided in termination proceedings. E.g., Santosky, 455 U.S. at 753-54; In re Pawling, 101 Wn.2d 392, 399, 679 P.2d 916 (1984). As shown below, this did not happen here.

1. Establishment of the Guardianships based on a Preponderance of the Evidence Violated Appellant's Due Process Rights.

The fundamental fairness test is used to determine the nature of process required in proceedings affecting a parent/child relationship. Under this test, the court balances three factors: (1) the private interests affected by the proceeding; (2) the risk of error created by the state's chosen procedure; and (3) the countervailing government interest supporting use of the challenged procedure. Santosky v. Kramer, 455 U.S. at 754; In re Key, 119 Wn.2d 600, 610-611, 836 P.2d 200 (1992), cert. denied, 507 U.S. 927 (1993); see also Matthews v. Eldridge, 424 U.S. 319, 333, 96 S. Ct. 893, 47 L.Ed.2d 18 (1976).

In Santosky, the Court held that orders which completely and irrevocably terminate parental rights in a child must be supported

by clear, cogent and convincing evidence, rather than the preponderance of the evidence standard provided for in the New York termination statute. In reaching this decision, the Court found the private interest of parent and child in their relationship “commanding” because termination irreversibly severs the parent’s right to communicate with, visit and pursue custody of the child. Santosky, 455 U.S. at 758-61.

The Court also found a “significant prospect” of error due to the adversarial nature of the termination proceeding, the vast difference in litigation resources available to the state and the parent, and the imprecise statutory standards for termination that leave termination decisions open to a judge’s subjective values and cultural or class bias. Santosky, 455 U.S. at 761-64.

As for the countervailing state interests, the Court found that the state’s *parens patriae* interest in a child’s welfare, which encompasses the aim of preserving the family, was well served by a standard stricter than a preponderance of the evidence. The Court further anticipated that no significant impact on the speed, form, or cost of fact-finding proceedings would result from application of a higher standard. Santosky, 455 U.S. at 766-68.

Applying the test set forth in Santosky, Division One of this Court held that due process is not offended in dependency proceedings by application of the preponderance of the evidence standard. In re Dependency of Chubb, 46 Wn. App. 530, 536-37, 731 P.2d 537 (1987). The primary reason the court held the constitution allows a lesser standard in dependency actions is that the potential impact on the parent and child's interest in their relationship is much less intrusive than in termination proceedings. Although an order of dependency may disrupt that relationship, it results in neither an irreversible decision nor complete severance of the parent's contact with the child. Chubb, 46 Wn. App. at 536.

In addition, the procedural safeguards inherent in dependency proceedings raise fewer concerns for risk of error. An order of dependency is reversible, is subject to review every six months, and cannot automatically ripen into an order of termination. Chubb, 46 Wn. App. at 536.

The court also found the governmental interest more weighty in dependency proceedings than in termination proceedings. The court noted that a lower standard of proof provides the necessary flexibility to the state in its attempts both to protect the child and to preserve the family within the framework of the dispositional

remedies and social services available once the dependency has been established. Chubb, 46 Wn. App. at 536-37.

In light of these authorities, Division One in In re Dependency of F.S., 81 Wn. App. 264, considered whether the preponderance of the evidence standard satisfied due process in the context of dependency guardianships. The guardianship statute in effect at the time authorized the court to order a guardianship upon a showing, by a preponderance of the evidence, of the following elements:

(1) The child has been found to be a dependent child under RCW 13.34.030(2);

(2) A dispositional order has been entered pursuant to RCW 13.34.130;

(3) The child has been removed ... from the custody of the parent for a period of at least six months pursuant to a finding of dependency under RCW 13.34.030(2);

(4) The services ordered under RCW 13.34.130 have been offered or provided and all necessary services, reasonably available, capable of correcting the parental deficiencies within the foreseeable future have been offered or provided;

(5) There is little likelihood that conditions will be remedied so that the child can be returned to the parent in the near future; and

(6) A guardianship rather than termination of the parent-child relationship or continuation of the

child's current dependent status would be in the best interest of the family.

Former RCW 13.34.231 (1992).

Division One concluded that the preponderance of the evidence standard provided adequate due process, primarily because a dependency guardianship provided for an "inherently temporary situation." In re F.S., 81 Wn. App. at 269. Of significance to the court's finding in this respect was the fact that *the child remained dependent and that the parents could seek to terminate the guardianship and have the children returned:*

Contrary to appellants' assertion, the impact of guardianship on the parent/child relationship is not tantamount to termination. Guardianship is not permanent, not is it irreversible, and it does not sever all rights of the parent in the child. **When a guardianship is established under RCW 13.34.231, the child remains dependent.** RCW 13.34.232(4); Washington State Bar Ass'n, *Family Law Deskbook* § 50.9, at 50-23 (1989). The court appoints a person or agency as guardian and (1) defines the guardian's rights and responsibilities concerning the care, custody, and control of the child, (2) sets an "appropriate frequency of visitation" between parent and child, and (3) specifies the nature of involvement, if any, of the supervising state agency. RCW 13.34.232(1). A guardianship remains in effect only until the sooner of the child reaching the age of eighteen or termination of the guardianship by the court. RCW 13.34.232(5) (as amended in 1994). **The parent may seek at any time to modify the guardianship or to terminate it and request the return of the child.** RCW 13.34.233(1) (as amended

in 1994); In re A.V.D., 62 Wn. App. 562, 570, 815 P.2d 277 (1991) (quoting Washington State Bar Ass'n, *Family Law Deskbook* § 50.9, at 50-23 (1989)). Guardianship is therefore an "inherently temporary situation." In re A.V.D., at 570, 815 P.2d 277. Termination, in contrast, severs "all rights, powers, privileges, immunities, duties, and obligations, including any rights to custody, control, visitation, or support existing between the child and parent[.]" RCW 13.34.200(2).

In re F.S., 81 Wn. App. at 269 (emphasis in bold added).

For similar reasons, the court found the risk of error not as great as in termination proceedings:

The risk of error is similarly not as great in guardianship proceedings as in termination proceedings. **Guardianship is reviewable at any time upon a petition, filed by the parent or any other party to modify or terminate.** As with dependency, guardianship cannot automatically ripen into termination, nor does it inevitably lead to that result.

In re F.S., 81 Wn. App. at 270 (emphasis in bold added).

As for the governmental interest at stake, the court likened it to that in dependencies, requiring a similar level of flexibility to provide for "secure placement of the child while authorizing both visitation between parent and child **and continuing involvement by state agencies.**" In re F.S., 81 Wn. App. at 270 (emphasis added). The court therefore concluded that considering the decreased invasion of private interests at state, the lesser

consequence of error and the heightened governmental interest, the lower standard of proof adequately provided due process under the former guardianship proceedings. Id.

The new guardianship statute is different in three important respects. First and foremost, once the guardianship is established, the dependency is dismissed. RCW 13.36.010; see also CP 107, 112. Second, once the dependency is dismissed, there is no continuing agency involvement. RCW 13.34.050(5).<sup>16</sup>

Third, and perhaps most importantly, the circumstances under which a parent can petition to terminate a guardianship have been drastically narrowed under the new statute. As relied upon by the court and set forth above, the former dependency guardianship scheme allowed the parent to seek to modify or terminate the guardianship based solely on a change of circumstances:

(2) The guardianship may be modified or terminated upon the motion of any party, the department, or the supervising agency if the court finds by a preponderance of the evidence that there has been a substantial change of circumstances subsequent to the establishment of the guardianship and that it is in the child's best interest to modify or terminate the guardianship. The court shall hold a

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<sup>16</sup> RCW 13.36.050(5) provides: "Once the dependency has been dismissed pursuant to RCW 13.36.070, the court shall not order the department or other supervising agency to supervise or provide case management services to the guardian or the child as part of the guardianship order."

hearing on the motion before modifying or terminating a guardianship.

RCW 13.34.233(2) (2009).

This is no longer the case, however. Under RCW 13.36.070:

(1) Any party to a guardianship proceeding may request termination of the guardianship by filing a petition and supporting affidavit alleging a **substantial change has occurred in the circumstances of the child or the guardian** and that the termination is necessary to serve the best interests of the child. The petition and affidavit must be served on the department or supervising agency and all parties to the guardianship.

(2) Except as provided in subsection (3) of this section, **the court shall not terminate a guardianship** unless it finds, upon the basis of facts that have arisen since the guardianship was established or that were unknown to the court at the time the guardianship was established, that a substantial change has occurred in the circumstances of the child or the guardian and that termination of the guardianship is necessary to serve the best interests of the child. The effect of a guardian's duties while serving in the military potentially impacting guardianship functions shall not, by itself, be a substantial change of circumstances justifying termination of a guardianship.

(3) The court may terminate a guardianship **on the agreement of the guardian, the child, if the child is age twelve years or older, and a parent seeking to regain custody of the child** if the court finds by a preponderance of the evidence and on the basis of facts that have arisen since the guardianship was established that:

(a) The parent has successfully corrected the parenting deficiencies identified by the court in the dependency action, and the circumstances of the parent have changed to such a degree that returning the child to the custody of the parent no longer creates a risk of harm to the child's health, welfare, and safety;

(b) The child, if age twelve years or older, agrees to termination of the guardianship and the return of custody to the parent; and

(c) Termination of the guardianship and return of custody of the child to the parent is in the child's best interests.

RCW 13.36.070 (emphasis added in bold).

Thus, under the new statute, there is a presumption in favor of guardianship (subsection 2), termination generally requires a change in circumstances of the child or guardian (subsection 1); and where the change in circumstances involves the parent, the guardian and child, if age 12, must agree to termination of the guardianship (subsection 3). There was no such agreement required under the dependency guardianship statute.

As a result of these differences, the guardianship statute no longer provides for an "inherently temporary situation." As a result of these differences, the interests at stake have changed. The private interest of parent and child in their relationship is more weighty under the new statute, because the guardianship is not

subject to review at regular intervals. Nor is it as easily reversible, especially for the parent. For this same reason, the risk of error is greater.

On the other side of the scale, the governmental interest at stake is less, as the dependency is dismissed and there is no longer any state interference. Accordingly, there is not the same state interest in flexibility as existed under the former guardianship statute.

For all these reasons, the preponderance of the evidence standard no longer passes constitutional muster. Because the guardianships were based on facts found by a mere preponderance of the evidence, they were entered in violation of T.P.'s constitutional right to due process and should be reversed.

2. The State Failed to Prove Guardianships Served the Children's Best Interests and that Conditions Would Not Be Remedied within the Near Future.

Assuming this Court disagrees the preponderance standard is constitutionally infirm, this Court should nevertheless reverse the guardianships because the state failed to prove – under any standard – that guardianship as opposed to continued reunification efforts were in the children's best interests, and that there was little

likelihood conditions would not be remedied to allow for the children's return to T.P. within the near future.

There appears to be no cases as yet interpreting the "best interests" of the children under the new guardianship statute. In the termination context, however, Washington courts have held that the factors involved in determining the "best interests" of a child are not capable of specification; rather, each case must be decided on its own facts and circumstances. In re Aschauer, 93 Wash.2d 689, 695, 611 P.2d 1245 (1980).

In the former dependency guardianship context, Division One of this Court nonetheless articulated some important considerations:

To summarize, in addition to the qualification of the proposed guardian, considerations should include the strength and nature of the parent-child bond; the benefit of continued contact with the parent or the extended family; the need for continued state involvement and services; the likelihood the child would be adopted if parental rights were terminated, and any other case-specific factors relevant to the best interests of the child.

A.C., 123 Wn. App. 244.

Clearly, not all of these factors are relevant here, but they do provide a baseline of considerations that might be appropriate for the court to consider. Here, however, the court did not indicate its

reasoning behind its "best interests" finding. See e.g. CP 86-88, 100. Nonetheless, a review of the evidence admitted at trial indicates the guardianship was not in the children's best interests.

First and foremost, the evidence was undisputed that T.P. and her children love each other dearly. There was no dispute that A.W. and M.W. are bonded to their mother and have enjoyed a caring and familial relationship with her for 10 and 12 years, respectively. At trial, A.W. expressed his desire for reunification. M.W. had also expressed that desire in the past.

Significantly, the state presented no evidence as to the children's current placement or why it would be in the children's best interest to enter into a guardianship with their placement. Rather, the state appeared to focus solely on its theory that T.P. would be unable to care for the children within the near future.

But the evidence at trial was to the contrary. At the time of trial, T.P. was in the process of turning her life around. She was in compliance with drug treatment, was in line for admission to drug court, and making strides in mental health treatment with Leifheit, including medication management, which previously had been unavailable to T.P. Leifheit testified she had never before seen this level of insight and compliance in T.P. in the previous years:

She's been almost 100 percent compliant, making her appointments on time. She is verbalizing insight that she was not able to do before. And she is verbalizing a desire to continue engaging in services so that she can become a better parent and have better functioning in her life.

RP 367.

And contrary to when Leifheit previously worked with T.P., there was no longer any need for "crisis management." RP 368. Rather, as Leifheit described: "She has been more consistent than I've ever seen her before in following through and taking care of business, taking care of the things that she needs to in life." RP 368. In short, Leifheit believed T.P. "is on the right track now." RP 369.

Accordingly, the state failed to prove that guardianship was in the children's best interests or that conditions would not be remedied to allow for the children's return within the near future. In finding otherwise, the court wrongly focused on antiquated facts instead of those existing at the time of the guardianship trial. As set forth above, T.P. had rectified many of the circumstances impeding her ability to resume custody of her children. A trial court's erroneous determination of facts, unsupported by substantial

evidence, is not be binding on appeal. State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994).

Contrary to the trial court's determination, it was in the children's best interest to allow T.P. to continue "on the right track" while the state continued reunification efforts to allow for the children's return within the next three months.

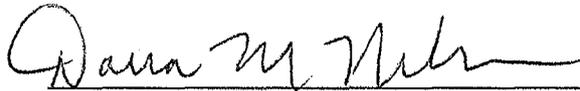
D. CONCLUSION

For all the reasons stated above, the guardianships should be reversed.

Dated this 23<sup>rd</sup> day of September, 2013

Respectfully submitted

NIELSEN, BROMAN & KOCH



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Office ID No. 91051  
Attorneys for Appellant

JOSIE DELVIN  
BENTON COUNTY CLERK

MAR 18 2013

FILED

SUPERIOR COURT OF WASHINGTON COUNTY OF BENTON JUVENILE COURT	
Guardianship of:	No: 12-7-00093-5
M [REDACTED] W [REDACTED]	Findings and Conclusions re Petition for Order Appointing Title 13 RCW Guardian (FNFLC)
DOB: 10/21/2000	Clerk's Action Required 2.13

I. Basis

- 1.1 **Petition:** Misty Ovens filed a petition seeking appointment of a guardian(s) in this case.
- 1.2 **Appearance:** The following persons appeared at the hearing:
- |  |   |
|--|---|
| <input type="checkbox"/> Child   | <input checked="" type="checkbox"/> Child's Lawyer                  |
| <input checked="" type="checkbox"/> Mother   | <input checked="" type="checkbox"/> Mother's Lawyer                 |
| <input type="checkbox"/> Father  | <input type="checkbox"/> Father's Lawyer                            |
| <input type="checkbox"/> Guardian or Legal Custodian   | <input type="checkbox"/> Guardian's or Legal Custodian's Lawyer     |
| <input type="checkbox"/> Child's GAL/CASA  | <input type="checkbox"/> GAL/CASA's Lawyer                          |
| <input checked="" type="checkbox"/> DSHS/Supervising Agency Worker                                       | <input checked="" type="checkbox"/> Agency's Lawyer                 |
| <input type="checkbox"/> Tribal Representative   | <input checked="" type="checkbox"/> Proposed Title 13 RCW Guardians |
| <input type="checkbox"/> Interpreter for <input type="checkbox"/> mother <input type="checkbox"/> father | <input type="checkbox"/>  |
- Other \_\_\_\_\_
- other \_\_\_\_\_
- the  mother  father agreed to entry of the order and waived his/her right to notice of the hearing.

1.3 **Basis:**  The court heard testimony  The parties submitted an agreed order.

II. FINDINGS OF FACT

2.1 **Notice:** The following have received adequate notice of these proceedings as required by Laws of 2010, ch. 272 § 3:

The  mother  father  guardian or legal custodian  DSHS/Supervising Agency  child  the child's lawyer or guardian ad litem  proposed Title 13 RCW guardian(s).

The child is 12 or older and was notified that he/she may request a lawyer.

F/C Re PT for OR Appointing  
Dependency Guardian (FNFLC)  
WPF JU 14.0300 (06/2010) - Laws of  
2010, ch. 272, §§ 4, 11

ATTORNEY GENERAL OF WASHINGTON  
Regional Services Division 0-000000098  
8127 W. Klamath Court, S...  
Kennewick, WA 99336-2607  
(509) 734-7285

*Handwritten initials:* LOM, AB

2.2 Child's Indian status

- The child is not a member of or eligible for membership in an Indian tribe and the Indian Child Welfare Act, 25 U.S.C. § 1901 et seq. does not apply to the proceedings.
- The child is a member of or eligible for membership in an Indian tribe and the Indian Child Welfare Act, 25 U.S.C. § 1901 et seq. does apply to the proceedings.
  - The proposed guardian(s) fall within the placement preferences specified in 25 U.S.C. 1915(b) or (c); Or
  - The proposed guardian(s) does (do) not fall within the placement preferences of 25 U.S.C. 1915, but there is good cause to continue placement with the proposed guardian(s) because \_\_\_\_\_ And
  - The child's tribe has been notified of this proceeding by registered mail received at least 15 days prior to the hearing.
  - Pursuant to 25 U.S.C. §1912(d), active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the break-up of the Indian family, and these efforts have been unsuccessful.
  - Pursuant to 25 U.S.C. §1912(f), the court finds by clear and convincing evidence, including the testimony of a qualified expert witness, that continued custody of the child by the parent(s) or Indian custodian is likely to result in serious emotional or physical damage to the child.

2.3 Service Members' Relief Acts

Mother:

- The  federal Service Members Civil Relief Act of 2003, 50 U.S.C. § 501, et seq.  the Washington Service Members Civil Relief Act, chapter 38.42 RCW does not apply to the mother in this proceeding.
- The  federal Service Members Civil Relief Act of 2003, 50 U.S.C. § 501, et seq.  the Washington Service Members Civil Relief Act, chapter 38.42 RCW does apply to the mother in this proceeding. The requirements of the act(s) have been met as follows:

Father:

- The  federal Service Members Civil Relief Act of 2003, 50 U.S.C. § 501, et seq.  the Washington Service Members Civil Relief Act, chapter 38.42 RCW does not apply to the father in this proceeding.
- The  federal Service Members Civil Relief Act of 2003, 50 U.S.C. § 501, et seq.  the Washington Service Members Civil Relief Act, chapter 38.42 RCW does apply to the father in this proceeding. The requirements of the act(s) have been met as follows:

2.4 M. [REDACTED] W. [REDACTED] was born on October 21, 2000 and is a dependent child in Benton County.

2.5 The child's mother, T. [REDACTED] P. [REDACTED], currently resides at 83206 W. Weidle Road, Space #13, West Richland, Washington 99353, Telephone No. (509) 572-6999

2.6 The child's father, T. [REDACTED] F. [REDACTED], currently resides at unknown (previously defaulted) Telephone No. unknown.

2.7 Guardianship  is  is not in the best interests of the child, rather than termination of the

parent-child relationship and proceeding with adoption, or continuation of efforts to return custody of the child to the parents based upon the following facts:

On July 30, 2012, testimony was taken of Teresa Pofahl (social worker) and the father was defaulted.

On November 28, 29, and 30, 2012, a contested guardianship trial was held as to the mother. The Department presented the following witnesses: T [REDACTED] P [REDACTED] (mother), Dr. Peter Stewart (youth psychologist), Dr. Naughne Boyd (clinical psychologist), Michellé Leifheit (mental health counselor/FPS provider), Vicki Roeder (visit supervisor), Pamela Coleman (chemical dependency professional), Dan Trapp (chemical dependency professional), Doug Doss (officer), Eman Rodrick (work crew program officer), Blanca Coleman (jail nurse), Tami Tanninen (therapist/counselor), and Misty Owens (social worker).

The mother testified on her own behalf, and presented additional testimony from Michelle Leifheit.

Exhibits 1 through 27 were admitted.

There is a preponderance of evidence to establish the allegations of the petition for guardianship and RCW 13.36.040. The findings are as follows:

- A) **The child was found to be dependent pursuant to RCW 13.34.030.**
  - i. On December 8, 2009, a fact finding order was entered as to the mother. Ex. 11. The mother stipulated to a finding of a dependency.
  - ii. The court finds and the parties agree that the testimony supports the fact that the child has been found to be dependent.
- B) **The court entered dispositional orders pursuant to RCW 13.34.130.**
  - i. On December 8, 2009, a disposition order was entered as to the mother. Ex. 12. The mother agreed to the dispositional order.
  - ii. The court finds and the parties agree that the testimony supports the fact that a dispositional order has been entered as to this child.
- C) **The child has been removed from the custody of the parents for a period of at least six consecutive months following a finding of dependency under RCW 13.34.030.**
  - i. The child has been out of the home for more than six months. Ex. 11-20.
  - ii. The mother did have placement early on in the dependency, but Review Orders dated January 24, 2011, June 21, 2011, October 11, 2011, April 2, 2012, and October 1, 2012 reflect out of home care for the child. Ex. 16-20.
  - iii. The court finds and the parties agree that the testimony supports the fact that the child has been removed from the family home for at least 6 months.
- D) **Services ordered under RCW 13.34.130 and .136 have been offered or provided and all necessary services reasonably available, capable of correcting the parental deficiencies within the foreseeable future, have been offered or provided.**
  - i. The services ordered at disposition for the mother were:
    - a. Shall engage in parenting evaluation and will follow through with recommendations.
    - b. Shall engage in mental health counseling services with 100% attendance.
      1. Shall obtain and maintain a safe and stable living environment.
      2. Once mother obtains a safe and stable living environment, Mother shall install alarms on all bedroom doors and windows of her home.
      3. Once mother obtains a safe and stable living environment and installs the necessary alarms, mother shall engage in FPS services.
    - c. Shall not reside with anybody without approval from the assigned social worker.
    - d. Shall engage in services through SARC with 100% compliance.
    - e. Shall maintain a steady and legal source of income.
    - f. Shall engage in a substance abuse assessment with 100% compliance.
    - g. Shall sign all requested released of information within 24 hours of the request.
    - h. Notify the assigned social worker of any changes in contact information (address

- and/or phone number) within 24 hours of the change.
- i. Shall submit to random UA's within 4 hours of the Department's request. Failure to submit to a UA will result in a positive result.
  - j. Shall comply with criminal obligations.
- ii. The services were discussed and reviewed at Review Hearings on March 9, 2010, July 13, 2010, September 27, 2010, January 24, 2011, June 21, 2011, October 11, 2011, April 2, 2011 and October 1, 2012. Ex. 11-20.
  - iii. On January 24, 2011, the court found that the "mother is not doing what she needs to do to parent—she is in denial of reality." Ex. 16.
  - iv. On June 21, 2011, the court found that the mother had not complied with the court ordered services or made any progress, as she notably needed to engage in individual counseling, engage in services with SARC, and comply with criminal obligations. Ex. 17.
  - v. On October 11, 2011, the court found that the mother had not complied with the court ordered services or made any progress, as she notably was not compliant with mental health counseling, had not maintained a safe and stable living environment, had not engaged in any services through SARC, had not informed the Department of where she was living, had not complied with her all her criminal obligations, had not submitted her own urine for UA's, and had not engaged in medication management. The Mother had not visited the child frequently, as she had been incarcerated for part of the review period. Ex. 18. The child was ordered to remain in foster care. Ex. 18.
  - vi. On April 2, 2012, the court found the Mother in partial compliance with the court ordered services but that she had not made any progress with her services. Ex. 19. The court noted that the "Mother needs to demonstrate that she can parent 24/7." Ex. 19. The child was ordered to remain in foster care. Ex. 19.
  - vii. On October 1, 2012, the court found the Mother in partial compliance and making partial progress. Ex. 20. The court noted that the Mother incurred new criminal charges during the review period and was not in compliance with completing her UAs. Ex. 20. The child was ordered to remain in foster care. Ex. 20.
  - viii. The mother knew that she needed to participate in services and demonstrate progress in order for the child and the child's sibling to be returned to her. The mother was aware that services were available to her if she wanted to do them. The mother knew she could initiate and/access services by contacting the social worker and she knew how to contact the social worker.
  - ix. The court finds and the parties agree that the testimony supports the fact that services have been offered or provided and all necessary services reasonably available, capable of correcting the parental deficiencies within the foreseeable future, have been offered or provided.
- E) There is little likelihood that conditions will be remedied so that the child can be returned to the parents in the near future.
- i. The mother has 6 children, none of whom are currently in her care.
  - ii. The mother previously had a dependency in 2000 due to drug usage, which was eventually dismissed. The current dependency began in 2009 when her son W sexually molested the child.
  - iii. The mother admits that her parental deficiencies have not been adequately rectified so that the child can be returned home. The mother is not capable at this time of parenting the child.
  - iv. During the dependency, the child was placed back in the mother's care only to be subsequently removed because the mother allowed contact between the child and W on multiple occasions. There was a safety plan in place, but the mother did not follow through with it and left the child in a vulnerable situation with an unapproved supervisor. The child also missed school and service appointments during the in-home period with the mother.
  - v. The child has remained in foster care due to several incarcerations of the mother for unpaid fines, drug use and possession. There is a pending felony charge for possession of methamphetamine that occurred in May 2012. She may face a lengthy period of incarceration.

- vi. The mother has had an abusive relationship with Steve Bollinger. Despite a "No Contact" order against him, she had contact with Mr. Bollinger in November 2012.
- vii. The mother has missed many substance abuse treatment sessions over the course of the dependency. See e.g. Ex. 24-25. The mother has done both in-patient and out-patient treatment for drug abuse but has difficulty maintaining her sobriety. The mother has failed to demonstrate any long term sobriety since the case began in 2009.
- viii. Counselor/Family Preservation Services Provider Michelle Leifheit testified that the mother knows what she need to do but does not follow through. Ms. Leifheit also indicated that the mother engages in "magical thinking" because she believes that merely wishing for thing to be alright, they will be. For example, the mother had her power and water shut off for non-payment, but if she had acted in a timely manner the situation could have been avoided. Ms. Leifheit also testified that the mother's inconsistency and chaotic lifestyle were barriers to the mother's success in services. At the conclusion of Ms. Leifheit's services, the issues identified at the outset of her services were not rectified.
- ix. The mother's lifestyle is chaotic. The mother has missed service appointments for herself and for the child.
- x. Counselor and Individual Parenting Instructor Tammy Tanninen testified that she identified problems with the mother and set goals to alleviate the problems, but the mother failed to follow through with the actions necessary to achieve the goals. Ms. Tanninen provided a parenting capacity assessment to the mother, Women's Empowerment group, and counseling. During Ms. Tanninen's services, the mother had a difficult time taking responsibility for her own actions. Ms. Tanninen testified that the mother withheld information during services and was not consistent in her reporting.
- xi. Officer Doug Doss testified that in January 2012 the mother was arrested on outstanding warrants. Officer Doss found a pipe on the mother person that had residue on it at the time of arrest. The residue was later determined to be methamphetamine.
- xii. Officer Eman Rodrick testified that he supervised the mother on work crew in May 2012. The mother did a "quick test" Urine Analysis that was positive for methamphetamine. The mother was found to have pills on her person. Jail Nurse Blanca Coleman testified that pills were confirmed to be a controlled substance, not available without a prescription. Ms. Coleman attempted to verify whether the mother had a valid prescription, but could not find any evidence to support that the mother had a valid prescription for the controlled substance.
- xiii. Social Worker Misty Ovens testified regarding the mother's history with the Department. The Department provided a plethora of services to the mother, including a psychological evaluation, in-patient drug/alcohol treatment, intensive out-patient treatment, parenting services, mental health services, services through SARC (sexual assault response center), urine analysis tests, family preservation services, individual counseling, bus passes and women's empowerment. Additionally, Ms. Ovens facilitated/offered the mother assistance in obtaining housing, adequate transportation and medical coverage, and addressing court fines. Ms. Ovens met in-person, called and sent letters to the mother on numerous occasions in order to encourage her participation in services. Ms. Ovens testified that over the course of the dependency the mother was arrested or put in jail approximately 10-15 times. Ms. Ovens testified that the mother is her own barrier to the child being returned to her care.
- xiv. In May 2012, W came to the Department's attention while in his mother's care. The mother was not providing adequate supervision which resulted in a dependency petition being filed. See Ex. 21. The mother agreed to a dependency as to (W) on August 29, 2012. Ex 22. The mother agreed that Billy had no parent, guardian or custodian capable of adequately caring for him, such that he was in circumstances which constituted a danger of substantial damage to his psychological or physical development. Ex. 22.
- xv. Psychologist Dr. Naughne Boyd performed a psychological evaluation on the mother in April 2011. Ex. 26. Dr. Boyd testified that the mother had demonstrated poor judgment regarding the child's safety (i.e. who could have access to the children) and did not think

about the consequences of her decisions. She testified that her prognosis for the mother would change to low/guarded if the mother had not engaged in services on a consistent basis. In her opinion, it would not be in the child's best interest to be returned to the mother's care or custody if the mother relapsed given her history.

- xvi. The mother admitted that her inability to adequately parent the child are due to many unresolved issues in her life, including her addiction to meth, mental health issues, the dependency, criminal charges, her relationship with Steve Bollinger and her son W
  - xvii. Dr. Stewart administered a psychological evaluation on the child. In his opinion, the child needs structure, consistency and routine.
  - xviii. Based upon the extensive history of the mother with substance abuse, poor judgment, incarcerations, length of time of this case, the mother's chaotic lifestyle, which continues even though multiple appropriate services have been offered and/or provided and her failure to remedy her parental deficiencies, the mother has failed to demonstrate any change in behavior or parenting ability and that behavior continues to the date of the hearing. There is little likelihood that conditions will be remedied such that this child could be safely returned to the mother's care in the near future.
- F) The proposed guardian signed a statement acknowledging the guardian's rights and responsibilities toward the child and affirming the guardian's understanding and acceptance that the guardianship is a commitment to provide care for the child until the child reaches age 18.
- i. The court finds and the parties agree that the Guardians are willing and able to care for the child

## 2.8 Basis for Establishing Guardianship

- There is no basis to establish a guardianship.
  - The dependency guardian and DSHS/Supervising Agency agree that the court should convert the dependency guardianship entered on \_\_\_\_\_ [date] in \_\_\_\_\_ [cause number] under chapter 13.34 RCW into a guardianship under Chapter 13.\_\_\_\_ RCW.
- Or
- All parties to the dependency agree to entry of the guardianship order and the proposed guardian is qualified, appropriate, and capable of performing the duties of guardian under Laws of 2010, ch. 272, §5.
- Or
- The following apply:
    - The following apply:
      - (a) The child was found to be dependent pursuant to RCW 13.34.030 on December 8, 2009 as to the mother and January 5, 2010 as to the father.  
  
All previous paragraphs are fully incorporated herein.
      - (b) The court entered dispositional orders pursuant to RCW 13.34.130 on December 8, 2009 as to the mother and January 5, 2010 as to the father in Cause No. 09-7-00446-9  
  
All previous paragraphs are fully incorporated herein.
      - (c) The child has been removed from the custody of the parents for a period of at least six consecutive months following a finding of dependency under RCW 13.34.030.  
  
All previous paragraphs are fully incorporated herein.

(d) Services ordered under RCW 13.34.130 and .136 have been offered or provided and all necessary services reasonably available, capable of correcting the parental deficiencies within the foreseeable future, have been offered or provided.

All previous paragraphs are fully incorporated herein.

(e) There is little likelihood that conditions will be remedied so that the child can be returned to the parents in the near future.  
All previous paragraphs are fully incorporated herein.

(f) The proposed guardian signed a statement acknowledging the guardian's rights and responsibilities toward the child and affirming the guardian's understanding and acceptance that the guardianship is a commitment to provide care for the child until the child reaches age 18.

All previous paragraphs are fully incorporated herein.

2.9 Exceptional Circumstances when the Child Has no Legal Parent

Does not apply.

The child has no legal parent. The following exceptional circumstances support the establishment of the guardianship:

the child has special needs and a suitable guardian is willing to accept custody and able to meet the needs of the child to an extent unlikely to be achieved through adoption.

the proposed guardian has demonstrated a commitment to provide for the long-term care of the child and:

is a relative of the child;

has been a long-term caregiver for the child and has acted as a parent figure to the child and is viewed by the child as a parent figure; or

the child's family has identified the proposed guardian as the preferred guardian, and, if the child is age 12 years or older, the child also has identified the proposed guardian as the preferred guardian.

Other: \_\_\_\_\_

2.10 Visitation

Contact between the child and  the child's mother;  the child's father;  the child's siblings, namely A [redacted] is in the

child's best interests, as follows:

**W [redacted]**: Visits at the sole discretion of the Guardians, in consultation with the child's therapist.

**A [redacted]**: Child is placed with sibling.

**Mother:**

1. If the mother is incarcerated, the following condition(s) apply:

a. The mother may submit a letter to the child one (1) time per month subject to review by

the Guardian(s). The letter shall be sent to the P.O. Box or mailing address designated by the Guardian(s). The mother shall address the envelope to the Guardian(s). The mother shall not write about the legal status of the Guardianship or make disparaging comments about the Guardian(s). If the mother fails to comply with the frequency and conditions of letter writing to the child in a month, the Guardian(s) shall be under no obligation to share the letters received in that month with the child.

b. Other contact may be added at the sole discretion of the Guardian(s).

*The child may send pictures & letters to the mother subject to review by the Guardians.*

2.. If the mother is not incarcerated, the following condition(s) apply:

- a. The mother shall have a minimum of six (6) visits per year. Each visit shall be a minimum of three hours in length. Each visit shall be subject to the following conditions:
  - i. The Guardians shall have sole discretion of the conditions under which a visit shall take place, including but not limited to the location, the need for supervision, the level of supervision, who may be present and who may transport the child to the visit.
  - ii. Each visit shall occur on the first Friday of every other month beginning in April.
  - iii. The mother must travel to the area where the child is residing. The Guardians shall be under no obligation to transport the child to the area where the mother is residing.
  - iv. If supervision is deemed appropriate by the Guardians, the Guardians have sole discretion to designate the provider for visit supervision.
  - v. All supervision costs shall be paid for by the mother.
  - vi. The mother must do a urinalysis test demonstrating she is drug and alcohol free prior to a visit. The urinalysis test shall occur within one (1) week of the scheduled visit. The results shall be provided to the Guardians prior to the visit. If the urinalysis results indicate that the mother is not clean or did not provide her own specimen (i.e. a substitute specimen), then the visit shall be cancelled and will not be made up.
  - vii. If the mother appears intoxicated or under the influence of drugs, the visit supervisor shall have the authority to end the visit. The terminated visit shall not be made up.
  - viii. If the mother engages in any inappropriate conversation with the child, including but not limited to, making disparaging remarks about the Guardian(s) and/or the legal status of the guardianship, the visit supervisor shall have the authority to end the visit. The terminated visit shall not be made up.
  - ix. The mother shall not provide any gifts to the child at the visit, unless approved by the Guardian(s) prior to the visit.
  - x. The child shall not be forced or compelled to attend a visit with the mother. If the child chooses not to attend, the visit shall not be made up.
  - xi. Additional visits and/or other contact may be added at the sole discretion of the Guardian(s).

- b. The mother must confirm each visit in writing at least two (2) weeks prior to the visit. The mother shall provide the written confirmation to the Guardians at a P.O. Box or mailing address designated by the Guardian(s).
- c. The Guardian(s) shall be under no obligation to provide further visitation, if the mother does any of the following on two (2) occasions during one (1) calendar year:
  - (i) Confirms a visit and then fails to attend a visit, or
  - (ii) Provides a dirty urinalysis or substituted specimen urinalysis, and/or
  - (iii) Otherwise fails to confirm a visit.

Contact between the child and  the child's mother;  the child's father;  the child's siblings, namely \_\_\_\_\_, is not in the child's best interests and should be restricted because:

Father: Father has not been involved with child. No visits, unless otherwise agreed to by the Guardians.

Other:

2.11 JENNIFER AND STEVEN DAVIES [name(s)] is (are) qualified, appropriate, and capable of performing the duties of guardian under Laws of 2010, ch. 272, § 5 and meet(s) the minimum requirements to care for children as established by DSHS under RCW 74.15.030.

2.12 **Need and Scope of Continued Court Oversight**

- There is no need for further court oversight.
- There is a need for continued court oversight as follows:

2.13 This guardianship will expire on its own terms on the child's 18<sup>th</sup> birthday, 10/21/2018.

### III. Conclusions of Law

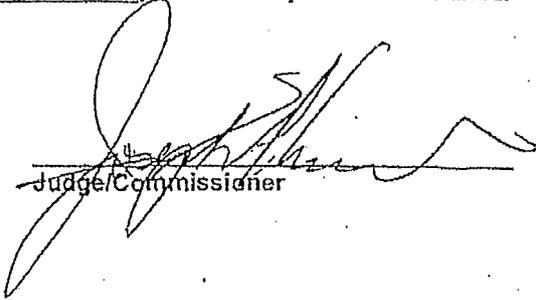
- The court has jurisdiction over the child, the parents and subject matter of this action.
- Unless otherwise indicated, the above findings have been proved by a preponderance of the evidence.

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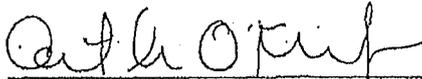
- A Title 13 RCW guardianship should not be established under Laws of 2010, ch. 272 § 5.
- A Title 13 RCW guardianship should be established under Laws of 2010, ch. 272 § 5.
- The dependency guardianship under \_\_\_\_\_ [cause number] should be converted into a guardianship under chapter 13, \_\_\_ RCW.
- The dependency in 09-7-00445-1 [cause number] should be dismissed.

Dated this 18 day of March, 2013.

  
 \_\_\_\_\_  
 Judge/Commissioner

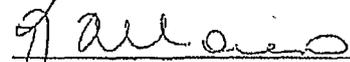
ROBERT W. FERGUSON  
 Attorney General

Presented by:

  
 \_\_\_\_\_  
 CAITLIN O'KEEFE, WSBA# 44053  
 Assistant Attorney General

Copy Received; Approved for Entry; Notice of Presentation Waived:

\_\_\_\_\_  
 M. J W  
 Child

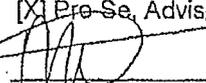
  
 \_\_\_\_\_  
 KATHLEEN MORENO, WSBA#15725  
 Attorney for Child

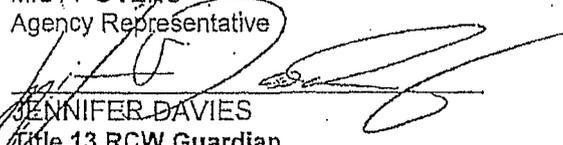
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 Pro Se, Advised of Right to Counsel

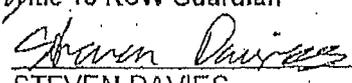
  
 \_\_\_\_\_  
 JARED PAULSEN, WSBA# 32791  
 Attorney for Mother

\_\_\_\_\_  
 T FI  
 Pro Se, Advised of Right to Counsel

\_\_\_\_\_  
 Attorney for Father

  
 \_\_\_\_\_  
 MISTY OVENS  
 Agency Representative

  
 \_\_\_\_\_  
 JENNIFER DAVIES  
 Title 13 RCW Guardian

  
 \_\_\_\_\_  
 STEVEN DAVIES  
 Title 13 RCW Guardian

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ERIC BROMAN  
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JENNIFER J. SWEIGERT  
OF COUNSEL  
K. CAROLYN RAMAMURTI  
JARED B. STEED

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In re Dependency of A. W & .M. W., Minors  
State/DSHS v. T.P.,

COA No. 31514-2-III

Certificate of Service by email

I Patrick Mayovsky, declare under penalty of perjury under the laws of the state of Washington that the following is true and correct:

That on the 24<sup>th</sup> day of September, 2013, I caused a true and correct copy of the **Brief in Support of Motion for Accelerated Review** to be served on the party / parties designated below by email per agreement of the parties pursuant to GR30(b)(4) and/or by depositing said document in the United States mail.

Caitlin O'Keefe  
Office of the Attorney General  
[rsdkenfax@atg.wa.gov](mailto:rsdkenfax@atg.wa.gov)

T.P.  
310 Totten Avenue  
Richland, WA 99354

Signed in Seattle, Washington this 24<sup>th</sup> day of September, 2013.

X *Patrick Mayovsky*

**NIELSEN, BROMAN & KOCH, PLLC**

**September 24, 2013 - 2:16 PM**

**Transmittal Letter**

Document Uploaded: 315142-Teresa Price - MAR.pdf  
Case Name: In re Dependency of A.W. and M.W. / Appellant, Teresa Price  
Court of Appeals Case Number: 31514-2  
Party Respresented:  
Is This a Personal Restraint Petition?  Yes  No  
Trial Court County: \_\_\_ - Superior Court # \_\_\_

**Type of Document being Filed:**

- Designation of Clerk's Papers
- Statement of Arrangements
- Motion: \_\_\_\_
- Response/Reply to Motion: \_\_\_\_
- Brief
- Statement of Additional Authorities
- Affidavit of Attorney Fees
- Cost Bill
- Objection to Cost Bill
- Affidavit
- Letter
- Electronic Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_  
Hearing Date(s): \_\_\_\_\_
- Personal Restraint Petition (PRP)
- Response to Personal Restraint Petition
- Reply to Response to Personal Restraint Petition
- Other: \_\_\_\_\_

**Comments:**