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SUPREME COURT
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NO. 90393-0

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SUPREME COURT OF THE STATE OF WASHINGTON

In re the Welfare of A.W. and M.W., Minor Children, State of Washington
Department of Social and Health Services,

Respondent,

v.

T.P., Mother,

Appellant.

RESPONDENT'S SUPPLEMENTAL BRIEF

ROBERT W. FERGUSON
Attorney General

ANNE E. EGELER, #20258
Deputy Solicitor General
anneel@atg.wa.gov

CARRIE HOON WAYNO, #32220
Assistant Attorney General
carrieh@atg.wa.gov

Office ID #91087
PO Box 40100
Olympia, WA 98504-0100
360-753-7085

ORIGINAL

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I. INTRODUCTION

Under the test applied by the United States Supreme Court in *Santosky v. Kramer*, due process is satisfied by use of the preponderance of the evidence standard in guardianship proceedings. The impacts on parental rights are far less significant than in a termination proceeding. In contrast to a termination of parental rights, the risk of error is reduced by the procedural protections afforded parents, including the right to request increased visitation and to move to end the guardianship. When a parent has failed to remedy her parenting deficiencies during years of dependency, the State has a compelling interest in having the flexibility to place an abused child in the stable care of a guardian, without terminating the family unit. When these factors are balanced, a preponderance of the evidence provides a fundamentally fair, constitutional procedure.

II. ISSUES PRESENTED

1. Does applying a preponderance of the evidence standard in a guardianship proceeding satisfy due process requirements, when parental rights are not terminated, parents may continue visiting their children, and parents have a right to petition to terminate the guardianship?
2. When the mother admits she cannot care for the children, and the evidence shows addiction to methamphetamine, mental health issues, and an inability to safely care for the children, does substantial evidence sup-

port the trial court's finding that there is little likelihood that the deficiencies can be remedied in the near future and that guardianship is in the children's best interest?

III. STATEMENT OF THE CASE

The Department's involvement with T.P. began when her son M.W. was born. The court removed M.W. when he tested positive at birth for methamphetamine and marijuana. RP 12, 258. The Department offered T.P. a number of services to remedy her parenting deficiencies and addiction. RP 259-60. The court returned M.W. to T.P. in October 2001, when he was nearly one year old. RP 260.

Seven years later, the court removed M.W. and his younger brother A.W. in the dependency proceedings that preceded these contested guardianship actions. In September 2009, the court removed the boys from the care of T.P. after they were sexually abused by their older brother. RP 13. After the boys were removed, the Department offered T.P. a substance abuse evaluation, a parenting evaluation, individual counseling, and parenting education. RP 262. The court returned the boys to T.P. in March 2010. The mother signed safety plans for each boy, in which she agreed to prohibit unsupervised contact with any person who was not approved by the Department. This included her boyfriend, who had a criminal history. RP 263-64. Despite this, during an unannounced home visit a social

worker found the boyfriend alone with the boys, and then nine-year-old M.W. was found in a truck with the keys in the ignition. RP at 264. The social worker met with the family and established an even clearer safety plan. RP at 265.

T.P. continued to ignore the safety plans. She allowed her older son, who had sexually abused both boys, to be in the home frequently with M.W. and A.W. RP at 265-66. The boys were missing school and appointments with social service providers. *Id.* Because of the ongoing violations, the children were removed from the home again in December 2010, and placed in foster care.

After the boys were removed, Dr. Naughne Lavaughn Boyd performed a psychological evaluation of T.P. RP 98. Dr. Boyd testified that T.P. had indicators of anxiety, depression, drug dependence, and anti-social, sadistic, and masochistic attitudes. RP 98. She also had a 25-year drug addiction with multiple relapses. RP 100. As a result, T.P. could not ensure her children's safety. RP 103, 109. Dr. Boyd recommended that T.P. attend mental health therapy, parenting education classes, a psychological diagnostic and medical consultation, and a sexual assault recovery program, and submit random urinalyses. RP 105-06.

The Department offered T.P. additional remedial services, including: family preservation services, letters requesting that her jail time be

reduced to fines and that her criminal court fines be reduced, financial assistance with unpaid bills, individual counseling, a psychological evaluation, one-on-one parenting education, a substance abuse evaluation and treatment, urinalysis testing, and assistance with reestablishing medical coverage. RP 267. T.P. was provided more services and more chances than the social worker had seen provided to any parent in her 10 years of experience. RP 288.

Unfortunately, the mother's engagement in these services was "sporadic and inconsistent." RP 276. She made no progress in remedying her parental deficiencies and tested positive for methamphetamine in May 2012. RP 16-17, 238. Her attendance at outpatient drug treatment was unreliable—she attended eight of fourteen required sessions in May 2012, and only six of fifteen required sessions in June 2012. RP 163, 165. She admitted at trial that drug-related criminal charges were pending against her. RP 15. One of these was for possession of a glass smoking device with methamphetamine residue. RP 16, 230-31. The other charges stemmed from possession of amphetamine pills without a verified prescription while she was assigned to a Benton County work crew. RP 15-17, 241, 224-26.

Because T.P. was unable to parent her sons, M.W. and A.W. had been "in limbo" for three years. RP 286. To provide stability to the boys,

the Department recommended guardianship. RP 287. Both M.W. and A.W. have special needs—both were likely exposed to drugs in utero, and they require a stable, structured and routine environment to succeed. RP 73-74, RP 66-68, RP 74-76, RP 202. M.W. has a mood disorder and oppositional defiant disorder, exhibits aggressive behavior and requires a structured and routine environment. RP at 66-67. A.W. has an IQ just above the level of intellectual disability, a cognitive disorder, and an adjustment disorder, he exhibits behavior that is inappropriate with his developmental level in response to changes in his home, and he similarly requires stability and consistency in his home. RP at 73-76.

The court granted the guardianship petitions on January 11, 2013. The judge stated that the evidence clearly showed that T.P. would not be able to correct her parental deficiencies in the near future. M.W. CP at 88-90; A.W. CP 86-88. The order provided that if the mother is not incarcerated, she is allowed at least six three-hour visits annually. M.W. CP at 105; A.W. CP at 103. The mother appealed both guardianship orders. M.W. CP at 115; A.W. CP at 113. The Court of Appeals transferred the matter to this Court. The court granted the motion to allow supplemental briefing.

IV. ARGUMENT

A. **Preponderance of the Evidence Is an Appropriate Standard for a Revocable Guardianship That Protects the Child Without Severing Parental Rights**

Due process requirements are “flexible,” requiring consideration of the level of protection a particular action demands, rather than imposition of “rigid rules.” *Wilkinson v. Austin*, 545 U.S. 209, 224, 125 S. Ct. 2384, 162 L. Ed. 2d 174 (2005). In a guardianship hearing, the preponderance of the evidence standard provides due process by providing a fundamentally fair hearing. RCW 13.36.040.

As explained below, the current guardianship statute provides greater due process protection to the parents than the prior statute provided. But whether the statute complies with due process is not determined by comparing it with an earlier version. Whether due process is satisfied is determined by balancing three factors: the private interests affected; the risk of error created by the procedure, and the probable value, if any, of additional procedural safeguards; and the countervailing governmental interest supporting use of the challenged procedure. *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976); *Santosky v. Kramer*, 455 U.S. 745, 754, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982).

A revocable guardianship’s limited impact on private rights weighs in favor of using a preponderance standard. The parent-child relationship

is not extinguished and many parental rights are preserved, including the ability to spend time with the child. The risk of error is lessened because the parent, child, or guardian can move to terminate the guardianship or jointly agree to dissolution of the guardianship. Finally, the government has a strong interest in a preponderance of the evidence standard because it affords the State the flexibility to provide stability to children without destroying their relationship with their parent.

Weighing the *Mathews v. Eldridge* factors demonstrates that RCW 13.36.040's use of a preponderance of the evidence standard complies with due process. T.P. cannot meet her burden of overcoming the presumption of constitutionality by demonstrating the statute's unconstitutionality beyond a reasonable doubt. *Belas v. Kiga*, 135 Wn.2d 913, 920, 959 P.2d 1037 (1998).

1. Pre-termination guardianship has a limited impact on a parent's rights

A guardianship hearing is a stage of the dependency proceeding. RCW 13.36.040(1). As in other dependency hearings, the private interest affected is the parent's interest in the care, custody, and management of the child. When a parent repeatedly fails to meet the conditions imposed by a dependency, the State is faced with the question of whether terminating parental rights is best for the child. Guardianship provides an alterna-

tive when a parent fails to remedy her parenting skills during the dependency. RCW 13.36.010. Rather than terminating parental rights, entering a revocable guardianship allows the court to provide a more permanent home to children who would otherwise be in temporary foster care placements, while allowing continued parent visitation and retention of many other parental rights. *Id.*; RCW 13.36.050.

T.P. incorrectly equates guardianship to termination of parental rights. As the Court of Appeals has recognized, guardianship is a “more flexible alternative to parental termination[.]” *In re Welfare of R.H.*, 176 Wn. App. 419, 423, 309 P.3d 620 (2013). It presents the option of a stable home without severing the child’s relationship with his parents. *See id.*; *In re Dependency of F.S.*, 81 Wn. App. 264, 269, 913 P.2d 844 (1996). While guardianship is “less legally secure than adoption, it is more permanent than foster care,” and retains the “indicia of parental rights.” *In re Dependency of A.C.*, 123 Wn. App. 244, 253, 98 P.3d 89 (2004) (quoting *CASA v. Dep’t of Serv. for Children, Youth and their Families*, 834 A.2d 63, 67 (Del. 2003)).

A guardianship cannot ripen into a termination of parental rights, and expires when the child turns 18 or the court terminates the guardianship, whichever occurs sooner. RCW 13.36.050(4). In sharp contrast, termination of parental rights completely and irreversibly severs all paren-

tal rights. As the Supreme Court recognized in *Santosky*, “[w]hen the State initiates a parental rights termination proceeding, it seeks not merely to infringe that fundamental liberty interest, but to end it.” *Santosky*, 455 U.S. at 759. This is consistent with Washington law, which states that in a termination, all rights, powers and privileges are “severed and terminated,” including rights to visit the child and provide support. RCW 13.34.200(1). In a proceeding to terminate parental rights, Washington law complies with *Santosky* by requiring the State to prove parental unfitness by clear, cogent, and convincing evidence. *See, e.g., In re Dependency of K.N.J.*, 171 Wn.2d 568, 577, 257 P.3d 522 (2011).

Unlike a termination of parental rights, a guardianship enables the court to maintain contact between the parent and child by awarding visitation. RCW 13.36.050(1)(d). There is no limitation on the judge’s ability to allow overnight visits or on the number of days the judge can allow the parent and child to be together. *See* RCW 13.36.060. Nor is visitation restricted by State oversight, since the State is not a party to the guardianship. RCW 13.36.050.

Parents also have a procedural right to seek an increase or other changes to the visitation awarded. RCW 13.36.060. To bring the motion, parents only need to show “adequate cause.” T.P. implies that this offers little hope, because a showing of adequate cause requires a substantial

change in the parent's circumstances. Reply Br. of Pet. at 10. In reality, RCW 13.36 does not define the term adequate cause. In the context of dissolution, courts have held that adequate cause means "'evidence sufficient to support a finding on each fact that the movant must prove in order to modify.'" *E.g., Link v. Link*, 165 Wn. App. 268, 275, 268 P.3d 963 (2011) (quoting *In re Marriage of Lemke*, 120 Wn. App. 536, 540, 85 P.3d 966 (2004), *rev. denied*, 152 Wn.2d 1025, 101 P.2d 421 (2004)). However, unlike a motion to modify a parenting plan entered in a divorce, or the modification of a dependency, a request for increased visitation during a guardianship does not require the parent to show a change in circumstances. *Compare* RCW 13.36.060 *with* RCW 26.09.260(1) and RCW 13.34.150.

In addition to allowing the parent to continue to spend time with the child, guardianship leaves many important parental rights unaltered. The parents' right to provide financial, medical, and other support is not impacted. Parents retain other rights as well, including the right to consent to adoption, the right to consent to the child's marriage, the right to leave an inheritance to the child, and the right to access to the child's records. Finally, parents retain the right to seek to terminate the guardianship. RCW 13.36.070; RCW 13.34.090(4); *In re Dependency of F.S.*, 81 Wn.

App. at 269. With a termination of parental rights, all of these rights would be irrevocably extinguished.

2. The risk of erroneous deprivation is reduced in a revocable guardianship

The second *Eldridge* factor requires “analysis of ‘the risk of erroneous deprivation’ of the private interest if the process were reduced and the ‘probable value, if any, of additional or substitute procedural safeguards.’” *Hamdi v. Rumsfeld*, 542 U.S. 507, 529, 124 S. Ct. 2633, 159 L. Ed. 2d 578 (2004) (quoting *Eldridge*, 424 U.S. at 335).

As in a dependency action, significant procedural protections are afforded in a guardianship hearing. Parents are entitled to notice, to be represented by counsel, to have court appointed counsel if they are indigent, to present evidence and cross-examine witnesses, to access Department and supervising agency records, and to have the case heard by an unbiased tribunal. RCW 13.36.040; RCW 13.34.090. A guardianship order cannot be entered unless there has been a judicial fact finding that the child is dependent and a dispositional order has previously been entered. RCW 13.36.040(2)(b). The hearing regarding the dispositional order also affords the parent the right to admit evidence, examine witnesses, be represented by counsel or have appointed counsel, have access to all agency

records, and be heard by an unbiased fact finder. RCW 13.34.130; RCW 13.34.090.

Unlike a termination of parental rights hearing, the risk of error in a guardianship case also is significantly decreased by the parent's ability to bring a motion to end the guardianship and return the child to the parent. RCW 13.36.070. There are two ways a parent can seek an end to the guardianship. First, RCW 13.36.070(1) allows any party to the guardianship to file a petition to terminate the guardianship. The parent does not have to demonstrate a change in her circumstances, or that she has met the requirements imposed during the prior dependency, before bringing the motion to terminate. Instead, the focus is on whether a substantial change has occurred in the circumstances of the child or the guardian, and the best interests of the child.

The second way a parent can end a guardianship is by showing that the parent, guardian, and child (if the child is at least twelve-years old) agree that returning the child to the parent no longer creates a risk of harm. RCW 13.36.070(3). This second path does require a showing that the parent corrected the parenting deficiencies identified in the prior dependency action. RCW 13.36.070(3)(a). Importantly, because the State is not a party to a hearing to consider a petition to terminate a guardianship, or a hearing to consider an agreement to end the guardianship, these hearings do

not present the disparity in litigation resources that the Supreme Court addressed in *Santosky*, 455 U.S. at 764.

Like a dependency, a guardianship order disrupts the parent-child relationship. But it is far less intrusive than termination of parental rights and poses significantly less risk of error. Parental rights are not severed and parents can move to modify or terminate the guardianship, without litigating against the State. The preponderance standard fairly allocates the risk of error between the State's interest in protecting the child from harm and a parent's interest in an unencumbered right to control the child.

3. The State has an interest in providing safety and permanence through a guardianship, rather than terminating the parent-child relationship

When a child's well being is seriously jeopardized by parental deficiencies, the State has a *parens patriae* interest in protecting the child. *E.g., In re Dependency of Schermer*, 161 Wn.2d 927, 941, 169 P.3d 452 (2007). T.P. argues that the governmental interest is diminished when the dependency is dismissed. Reply Br. of Pet. at 33. However, dismissal does not occur until the guardianship order is entered. RCW 13.36.050; RCW 13.34.145(12). If parental deficiencies are not remedied during the dependency, and the child cannot be safely returned home, the State continues to have an interest in the child's well being.

The State cannot meet a child's need for a secure home by leaving him indefinitely in temporary foster homes. If the flexible alternative of a revocable guardianship did not exist, the need to provide the child with permanence would be met through a termination of parental rights, with a showing of clear and convincing evidence. After parental rights are severed, adoption can provide a permanent home. RCW 26.33.260(1); *In re Dependency of K.S.C.*, 137 Wn.2d 918, 929 n.5, 976 P.2d 113 (1999). The preponderance of the evidence standard in a guardianship hearing provides the State the flexibility to protect the child in a physically and emotionally nurturing home, while preserving the parent-child relationship. *See* RCW 13.36.010; *In re Dep. of F.S.*, 81 Wn. App. at 270.

The State also has a procedural and financial interest in transitioning an unsuccessful dependency to a guardianship. In a dependency, the State has an obligation to coordinate the provision of remedial services and to provide funding for services if the parent is unable to pay. RCW 13.34.025. The Department and supervising agencies must meet with the children and foster care provider each month. RCW 74.13.031(6). The court is required to conduct a review hearing at least every six months. RCW 13.34.138. When the services, case worker visits, and court hearings have not resulted in an ability to reunify the family, the preponderance of the evidence standard in a guardianship hearing

aids the State in providing the children more permanence, without the need for a termination hearing.

4. Guardianship hearings under RCW 13.36.040 afford parents greater procedural protection than dependency guardianship hearings under former RCW 13.34.231

The constitutionality of RCW 13.36.040 is determined by applying the three *Mathews v. Eldridge* factors to the statute. However, because the appellate courts held that former RCW 13.34.231 (repealed by Laws of 2010, ch. 272, § 16) comported with due process, it is helpful to consider how the legislature incorporated the due process protections of the former statute in the new statute and added additional procedural safeguards.

Prior to 2010, “dependency guardianships” were entered under former RCW 13.34.231. Just as with RCW 13.36.040, a dependency guardianship required a showing of proof by a preponderance of the evidence that: 1) the child is dependent; 2) a dispositional order has been entered; 3) the child has been removed from the custody of the parent for at least 6 months; 4) there is little likelihood that the child can return to the parent in the near future; and, 5) guardianship is preferable to termination. Former RCW 13.34.231. As in a guardianship under RCW 13.36.040, dependency guardianship was inherently temporary, remaining in effect only until the sooner of the child turning 18 or the court ending the guardianship. Former RCW 13.34.232(5).

The Court of Appeals held that dependency guardianship complies with due process. *In re F.S.*, 81 Wn. App. at 269; *In re K.S.C.*, 137 Wn.2d 918, 928 n.4 (citing *In re F.S.* for holding that the preponderance standard satisfies due process in a dependency guardianship hearing). The court stressed that “the impact of guardianship on the parent/child relationship is not tantamount to termination. Guardianship is not permanent, nor is it irreversible, and it does not sever all rights of the parent in the child.” *In re F.S.*, 81 Wn. App. at 269. The court contrasted this with termination, which severs all rights, including any right to visitation or support. *Id.* The court held that “[c]onsidering the decreased invasion of the private interest involved, lesser consequence of error, and heightened governmental interest as compared with the relative weight of these factors in termination proceedings, we hold that the lower standard of proof adequately provides due process” *Id.* at 270.

The reasoning in *F.S.* applies equally to RCW 13.36.040, which also establishes a temporary guardianship, allowing a continued parent-child relationship. Under the new guardianship statutes, parents may bring a motion to modify the visitation awarded by the court, and have two means of seeking to end the guardianship. RCW 13.36.060(1); RCW 13.36.070. The most significant change is that after a guardianship is entered under RCW 13.36.040, the State is no longer a party. For the parent, this elimi-

nates the risk that visitation will be impeded by the oversight of a supervising agency. *See* RCW 13.34.232(1)(e). This is also an important enhancement to the parent's due process protections, because the State is not a party contesting motions for additional visitation or petitions to terminate the guardianship. *See Santosky*, 455 U.S. at 763 (risk of error impacted by State's greater litigation resources).

B. Substantial Evidence Supports the Finding That Guardianship Is in The Boys' Best Interest and That Conditions Would Not Be Remedied in the Near Future

Substantial evidence supports the trial court's finding that guardianship is in the boys' best interest, rather than a termination of parental rights or continued efforts to reunify the parent with the children. RCW 13.36.040. The mother's inability to complete court ordered services, chronic addiction, mental health issues, and failure to keep the children safe, prevent the boys from being returned to her in the near future. The trial court's findings of fact are presumed to be correct. *Fisher Prop. v. Arden-Mayfair*, 115 Wn.2d 364, 369, 798 P.2d 799 (1990). Given the overwhelming record, T.P. is unable to meet her burden to show that the findings are not supported by substantial evidence. *Fisher Prop.*, 115 Wn.2d at 369.

T.P.'s struggle with methamphetamine addiction, abusive relationships, mental health disorders, repeated violations of the law, and unwill-

ingness to protect the boys from a sexually abusive older sibling made it necessary to repeatedly remove them from the home. At the time the guardianship was entered, it had been years since the State had been able to return the boys home. RP 265-66.

During the years the dependencies were in place, the court strove to reunite the family by providing a wide variety of services, including a parenting evaluation and parenting classes, mental health counseling, services through the Sexual Assault Response Center, substance abuse treatment, and random urinalysis testing. RP 263, 267. Despite these opportunities, T.P. failed to comply with the court ordered services. The court frequently reviewed the case and found that T.P. “is not doing what she needs to do to parent—she is in denial of reality.” M.W. C.P. 119. Two years into the dependency, the court found that T.P. had only made minimal progress. *Id.*

T.P. admitted that she is a drug addict and has mental health issues. RP 27. At the time of the guardianship hearing, she had two felony charges pending for possession of a controlled substance. RP 15. During a search incident to arrest, a glass smoking device with methamphetamine residue was found on T.P.’s person. RP 230-31. In the months leading up to the guardianship hearing, T.P. even managed to use methamphetamines while she was on a jail work crew. RP 238. At the time of trial, T.P. was

attempting to qualify for drug court, but there is no evidence to suggest that she would have been admitted into the program. After decades of drug abuse and relapses, and a lack of compliance during the dependency process, there is reason for grave doubt that T.P. would succeed even if she were admitted into drug court. RP 298-99.

In addition to being supported by the facts, the trial court's decision is supported by the weight of the testimony provided during the hearing, including the mother's admission that she was not ready to care for the boys. RP 334. The social worker testified that T.P. was inconsistent in engaging in the court ordered services, was arrested ten to fifteen times during the dependency, and failed to show an ability to safely care for the children. RP 273, 276, 286. Similarly, Family Preservation Services provider Michelle Leifheit testified that T.P. "has a difficult time sustaining changes." RP 371. Ms. Leifheit was unable to provide an opinion regarding whether T.P. would be capable of parenting in the near future. RP 368-69. Finally, clinical psychologist Dr. Naughne Boyd concluded that given the mother's mental health disorders, drug addiction, unpredictable participation in services, and recent positive test for methamphetamines, "it would not be in the best interest of the children for them to be in her custody or care." RP 99-109.

Given the consistent testimony of the witnesses, the evidence in the record, and the mother's own admissions, substantial evidence supports the trial court finding that guardianship is in the boys' best interest and that conditions would not be remedied in the near future.

V. CONCLUSION

The Department respectfully requests that the Court uphold the constitutionality of RCW 13.36.040 and the guardianship order.

RESPECTFULLY SUBMITTED this 2nd day of September 2014.

ROBERT W. FERGUSON
Attorney General



ANNE E. EGELER, #20258
Deputy Solicitor General
anneel@atg.wa.gov

CARRIE HOON WAYNO, #32220
Assistant Attorney General
carrieh@atg.wa.gov

Office ID #91087
PO Box 40100
Olympia, WA 98504-0100
360-753-7085

CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the state of Washington, that on this date I served a true and correct copy of the foregoing document, via electronic mail, on the following:

Dana M. Nelson
Nielsen, Broman, & Koch, PLLC
1908 E. Madison Street
Seattle, WA 98122
nelsond@nwattorney.net

DATED this 2nd day of September 2014 at Olympia, Washington.


KRISTIN D. JENSEN
Legal Assistant

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Dear Clerk:

Attached for filing in matter No. 90393, *In re the Welfare of A.W. and M.W.*, please find the Respondent's Supplemental Brief.

Respectfully,
Kristin
Kristin D. Jensen, Lead
Solicitor General Division
PO Box 40100
Olympia, WA 98504-0100
(360) 753-4111
kristinj@atg.wa.gov