

No. 91757-4

No. 45809-8

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In Re the Welfare of

K.M.M.,

Minor Child,

J.M. (father)

Appellant.

Kitsap Cause No. 13-7-00084-9

The Honorable Judge Jeanette Dalton

Appellant's Reply Brief

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ARGUMENT

I. THE FATHER IS A FIT PARENT; THIS PROHIBITS TERMINATION OF HIS PARENTAL RIGHTS.

Due process bars a state from severing the parental rights of a parent who is currently fit. *In re Welfare of A.B.*, 168 Wn.2d 908, 918, 232 P.3d 1104 (2010) (citing *Santosky v. Kramer*, 455 U.S. 745, 760, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982)); U.S. Const. Amend. XIV.¹ The state must prove that the parent is currently unfit by clear, cogent, and convincing evidence. *A.B.*, 168 Wn.2d at 918.

The order terminating the father's rights must be reversed because the father is a fit parent. CP 105-14; RP 705-25. As the trial court found, the father successfully corrected all parental deficiencies. CP 107 (finding X). Any rupture in the father's relationship with his daughter was not due to any parental deficiency. CP 107-08 (Findings X, XIV). The father successfully completed all services offered to him. CP 107 (Finding X). Because the father is currently fit, the termination order violates due process. *A.B.*, 168 Wn.2d at 918.

¹ K.M.M. argues that she has a constitutional right to maintenance of her bond with her foster parents. Brief of Respondent (K.M.M.), pp. 2-3. K.M.M. does not cite to any relevant authority in support of that proposition. To the contrary, K.M.M. has a due process right the preservation of her relationship with her natural parents unless termination is absolutely necessary. *In re Dependency of M.S.R.*, 174 Wn.2d 1, 20, 271 P.3d 234 (2012), *as corrected* (May 8, 2012), *reconsideration denied* (May 9, 2012).

A. The trial court did not make an explicit finding of current parental unfitness, and such a finding cannot be implied.

Despite the absence of any evidence or findings of current unfitness, Respondents urge the court to affirm the court's termination order. According to both Respondents, the court "explicitly" or "expressly" found the father unfit by concluding that "the parent child relationship... no longer exists." Brief of Respondent (state), p. 14²; Brief of Respondent (K.M.M.), p. 6. Contrary to Respondents' position, this is not an "explicit[]" or "express[]" finding of current parental unfitness. The court did not enter any finding suggesting that the father is currently unfit. CP 105-14; RP 705-25.

Nor can this language be characterized as an implicit finding of unfitness, as both Respondents suggest. Brief of Respondent (K.M.M.), p. 5;³ Brief of Respondent (state), p. 17. An appellate court may not infer such a finding unless "all the facts and circumstances in the record... clearly demonstrate that the omitted finding was actually intended, and

² The state also points to the court's findings that "[K.M.M.'s] psyche got to the point where she would no longer tolerate or engage in visits with her biological parents," and that the child had "taken the strong position that she will not engage with her parents." Brief of Respondent (state), p. 14. But those findings focus on qualities and actions of the child, not of the father. The child's wishes are not determinative of whether a parent is fit. *See e.g. A.B.*, 168 Wn.2d 908.

³ In support of this argument, Respondent K.M.M. cites *In re Dependency of K.N.J.*, 171 Wn.2d 568, 577, 257 P.3d 522 (2011). Brief of Respondent (K.M.M.), p. 5. In *K.N.J.*, the trial court failed to enter a finding that the child had previously been found dependent. *K.N.J.*, 171 Wn.2d at 581-84. Parental fitness was not at issue in that case. *Id.*

thus made, by the court.” *A.B.*, 168 Wn.2d at 921. The *A.B.* court was unable infer such a finding because the father did not cause the problems in the relationship in that case. *Id.* at 922. The court made a similar finding in this case. CP 107 (finding X). Accordingly, a finding of current parental unfitness cannot be implied under *A.B.*⁴

The department outlines evidence which it erroneously claims *could* support a finding of parental unfitness. Brief of Respondent (state), pp. 14-19. None of the evidence stems from any deficiency on the part of the father, and thus does not establish unfitness to parent this child. Furthermore, the mere existence of some evidence – even substantial evidence—that *could* support a finding of unfitness cannot overcome a trial court’s failure to actually make an express or implied finding of parental unfitness. *A.B.*, 168 Wn.2d at 924-25.

The court did not note any parental deficiencies. CP 105-14; RP 705-25. Respondents point to no parental deficiencies, and cite to no authority suggesting that a relationship problem can amount to parental unfitness, where the problem arose despite the parent’s reasonable efforts to maintain a relationship while the child was in department custody.

⁴ K.M.M. also argues that the court intended to find the father unfit to parent because unfitness does not require a finding of “moral defects.” Brief of Respondent (K.M.M.), p. 10 (*citing Black’s Law Dictionary*). But Black’s Law Dictionary is not an authoritative source on Washington law. *See e.g. Whidbey Gen. Hosp. v. State*, 143 Wn. App. 620, 628, 180 P.3d 796 (2008). K.M.M. does not cite any case or statute indicating that a parent without deficiencies can be found unfit. Brief of Respondent (K.M.M.), p. 10.

Brief of Respondent (K.M.M.), pp. 2-11; Brief of Respondent (state), pp. 11-19.

Because the father is a fit parent, and because the trial court did not make an express or implied finding of parental unfitness, the termination cannot stand. *A.B.*, 168 Wn.2d at 924-25. The order must be reversed and the case remanded for dismissal of the termination petition. *Id.*

B. *A.B.* controls this case and requires reversal of the termination order.

Analysis of parental fitness necessarily looks to the qualities of the parent, not the preferences of the child. *See e.g. A.B.*, 168 Wn.2d at 922. For example, in *A.B.*, the Supreme Court reversed the termination despite the trial court's finding of "profound and intractable" problems in the father's relationship with his child. *Id.* The *A.B.* court held that the finding did not constitute a finding of unfitness. *Id.* Here, as in *A.B.*, there are profound and intractable problems in the relationship. These problems do not amount to unfitness, and cannot provide a reason to terminate. *Id.*

It is fundamentally unfair to burden a parent with the task of repairing damage to the parent-child attachment that develops while a child is in state care. *In re S.J.*, 162 Wn. App. 873, 884, 256 P.3d 470, 475 (2011). Even so, both Respondents argue that the deterioration of the

bond between the father and child renders him unfit to parent.⁵ Brief of Respondent (K.M.M.), pp. 6-8; Brief of Respondent (state), pp. 14-19.

Neither Respondent cites any authority suggesting that a court may find a parent unfit solely because of the absence of a bond. Brief of Respondent (K.M.M.), pp. 6-8; Brief of Respondent (state), pp. 14-19.

Where no authority is cited, counsel is presumed to have found none after diligent search. *In re Griffin*, 42012-1-II, 2014 WL 1846995 (Wash. Ct. App. May 6, 2014).

Furthermore, *A.B.* squarely addresses the issue presented in this case. The *A.B.* court held that a lack of attachment does not amount to a finding of unfitness absent some indication that the problem stems from parental unfitness. *A.B.*, 168 Wn.2d at 922. *A.B.* controls, and forecloses Respondents' argument.

K.M.M. erroneously attempts to distinguish *A.B.* on two grounds. First, K.M.M. suggests that the child in that case was able to "tolerate" contact with her father. Brief of Respondent (K.M.M.), p. 10-11. This is

⁵ Both respondents also argue at length that parental fitness is a child-specific inquiry. Brief of Respondent (K.M.M.), p. 8-10 (*citing In re Dependency of M.J.L.*, 124 Wn. App. 36, 41-42, 96 P.3d 966 (2004); *In re Interest of D.W.*, 249 Neb. 133, 138, 542 N.W.2d 407 (1996)); Brief of Respondent (state), pp. 14-16 (relying on the reference to "his daughter" in *A.B.* at 168 Wn.2d at 922 and the dissenting opinion in *A.B.*). These arguments lack merit. None of the cited authority stands for that contention, with the possible exception of the dissent in *A.B.*, which is not controlling. Additionally, the father does not argue that he is fit to parent K.M.M. because he is fit to parent her younger sister. *See generally* father's Opening Brief. Instead, he argues that the court violated his due process rights by terminating his parental rights without finding that he was unfit to parent *this child*. Respondents' arguments are therefore inapposite.

only partially correct, and does not distinguish *A.B.* As in this case, the child in *A.B.* did not show any attachment to her father and refused to interact with him during visits. *A.B.*, 168 Wn.2d at 914-15.

Second, K.M.M. erroneously suggests that *A.B.* can be distinguished by the trial court's finding in that case that continued contact remained in A.B.'s best interests. Brief of Respondent (K.M.M), pp. 10-11. This difference cannot support termination in this case. As the Supreme Court has made clear, a child's best interests only come into play *after* the trial court has found all the elements required for termination. *A.B.*, 168 Wn.2d at 925-26. This necessarily includes the finding of current parental unfitness.

Neither Respondent points to a meaningful difference between *A.B.* and this case. In fact, the father in *A.B.* was arguably *less* fit than the father in this case. A.B.'s father was arrested for an act of violence during the dependency, and he voluntarily moved out of state, leaving his child behind. *A.B.*, 168 Wn.2d at 913-15. The father in this case, on the other hand, had no domestic violence incidents, actively engaged in visits until the child refused to see him, and successfully completed every service the department offered him. RP 632-35; CP 107 (finding X).

A.B. controls this appeal. The court violated the father's right to due process by terminating his parental rights despite his current fitness as

a parent. *A.B.*, 168 Wn.2d at 918. The termination order must be reversed. *Id.*

II. THE DEPARTMENT FAILED TO OFFER COURT-ORDERED AND OTHER NECESSARY REUNIFICATION SERVICES.

Before terminating parental rights, the court must find by clear, cogent, and convincing evidence that the department offered a parent all court-ordered services, and all necessary services reasonably capable of correcting parental deficiencies. RCW 13.34.180(1)(d).

A. The department never offered the father family therapy with his daughter, which the court ordered and which experts described as necessary to reunification.

The dependency court ordered that the father participate in family therapy “to address issues with visitation.” CP 334. The CPT⁶ staffing report also recommended that the parents be integrated into the child’s therapy sessions.⁷ CP 338, 341, 355-56, 439. The father’s parenting coach also told the social worker that he would benefit from interactive therapy with K.M.M. RP 341.

The department never offered the father that service. RP 500.

⁶ Child protection team .

⁷ The department is required to follow a CPT recommendation unless otherwise ordered by the court.

The court ordered the father to participate in family therapy in December 2012.⁸ CP 324, 334. Even so, Respondents argue that family therapy was never ordered by the court.⁹ Brief of Respondent (K.M.M.), pp. 19-21; Brief of Respondent (state), pp. 22-23.¹⁰

According to K.M.M., the court order's reference to family therapy actually referred to a court-ordered assessment conducted by Tom Sherry. Brief of Respondent (K.M.M.), pp. 19-21. This is incorrect. The court ordered that assessment six months prior. CP 324. The December order found that the father had already participated in the assessment. CP 334. Contrary to K.M.M.'s argument, the court ordered family therapy in addition to an assessment. The clear language of the order, the fact that the court had separately ordered the assessment six months earlier, and the court's separate finding regarding the father's participation in the

⁸ This occurred six months after the court ordered the department to contract with Tom Sherry to provide an opinion about K.M.M.'s refusal to participate in visitation. CP 324, 334. The December 2012 order noted that the father had already met with Sherry once. CP 334.

⁹ Both respondents rely heavily testimony from Sherry and the social worker indicating that family therapy between the father and child was never intended. Brief of Respondent (K.M.M.), p. 20; Brief of Respondent (state), p. 21-24. The testimony does not change the plain language of the order. Whether Sherry or the social worker intended to provide the father and K.M.M. with family therapy does not establish the terms of the court's order.

¹⁰ The state also erroneously suggests that contact was prohibited at the time of the December order. Brief of Respondent (state), p. 23. But the reference to suspended contact was under the heading of "visitation." CP 335. The plain language of the order indicates that contact was suspended regarding visitation only and not in a manner that prohibited family therapy.

assessment remove any ambiguity. The court ordered ongoing family therapy, in addition to the one one-time assessment conducted by Sherry.

The state erroneously suggests that any family therapy ordered was not for the purpose of reunification. Instead, the department claims, the family therapy was intended to help maintain K.M.M.'s bond with her siblings. Brief of Respondent (state), pp. 22-23. This contention is likewise without merit.

The court's order states that the purpose of family therapy was to "address issues with visitation." CP 334. The plain language of the order indicates that the court intended the department to therapy focusing on K.M.M.'s refusal to attend visits. Indeed, neither Respondent explains why the father would have been involved in maintaining K.M.M.'s relationship with her sisters, especially since the siblings lived with their mother.

Finally, neither the state nor K.M.M. addresses the fact that numerous other experts – including the binding CPT report – indicated that family therapy with the father and daughter was necessary to reunify this family. Brief of Respondent (K.M.M.), pp. 19-21; Brief of Respondent (state), pp. 20-25. Even if the court did not intend to explicitly order family therapy, the department had extensive notice that family therapy was a necessary service in this case. CP 338, 341, 355-56,

439, 500. The department's failure to provide the service requires reversal regardless of whether it was explicitly court ordered. RCW 13.34.180(1)(d).

The department never offered this family court-ordered and expert-recommended interactive family therapy for the father and K.M.M. That service could have remedied the rupture in the relationship between the father and child. RP 722, CP 107 (Finding XI). The order terminating the father's parental rights is unsupported by substantial evidence and must be reversed. *S.J.*, 162 Wn. App. at 884.

B. The department failed to offer the father the bonding and attachment services that were provided to the child's foster parents.

The state does not meet its burden under RCW 13.34.180(1)(d) if the department provides foster parents with instruction that successfully permits them to care for a child but does not offer the same opportunity to the parents. *In re Welfare of C.S.*, 168 Wn.2d 51, 55-56, 225 P.3d 953 (2010).¹¹ *C.S.* precludes termination in this case.

The department provided K.M.M.'s foster parents the opportunity to participate extensively in her therapy sessions. RP 147-49, 183-88,

¹¹ K.M.M. attempts to differentiate *C.S.* by arguing that the services were not available to the father in this case. Brief of Respondent (K.M.M.), pp. 17-18. This is incorrect. As argued below, K.M.M.'s contention that the attachment services were not available to the father is inaccurate. The fact that the services were not provided to him does not mean that they were not available.

206-07. The foster parents were taught to hold her in their laps, rock her like a much younger child, and engage her in imaginative play. RP 101, 147-49, 184. These techniques allowed the foster parents to form a bond with K.M.M. RP 68.

The department never offered the father the same attachment and bonding services. *See* RP *generally*. Still, K.M.M. argues that the service was not “available” to the father because he was not the child’s primary caregiver and the child refused to visit with him. Brief of Respondent (K.M.M.), pp. 12-17.

This argument lacks merit. The department should have provided the father the same training afforded the foster parents. *C.S.*, 168 Wn.2d 51, 55-56. K.M.M. relies on the therapist’s statement that she does not generally provide attachment therapy to biological parents unless the child is preparing to return home. Brief of Respondent (K.M.M.), pp. 14-15. K.M.M. also points to Sherry’s assessment that it was too late to repair the bond between the child and her father. Brief of Respondent (K.M.M.), pp 16.

But the parent in *C.S.* was not the child’s primary caregiver either. *C.S.*, 168 Wn.2d at 53-56. That fact did not excuse the department’s failure to provide the parent with the services that helped the foster parents to care for the child. *Id.* at 55-56. Likewise, here, the fact that K.M.M.

resided elsewhere does not diminish the department's responsibility to provide the father with necessary services. The father successfully completed all services that were offered to him. He could certainly have participated in this service as well. The therapist's policy of providing such instruction only to foster parents does not relieve the state of its burden to do everything possible to reunify this family.

Likewise, Sherry's purported assessment did not reduce the state's burden to provide the father with all necessary services.¹² Sherry did not provide an opinion regarding the suitability of attachment and bonding services. RP 222-268. He recommended "natural contact" visits. RP 239-42. He also recommended that K.M.M. participate in family therapy with her parents. He wanted her to see that they had changed, and wanted to give the parents a chance to apologize. RP 263-64. Contrary to the argument in K.M.M.'s brief, Sherry in no way indicated that bonding and attachment services were "unavailable."

The child's foster parents received extensive instruction in caring for K.M.M. in a manner that improved their attachment and bonding. RP 101, 147-49, 183-88, 206-07. Nevertheless, the state argues that "there is no evidence that bonding or attachment services were provided to the

¹² From the beginning, Sherry informed the department that he was not the best person to conduct that analysis. RP 342.

child or the foster parents.” Brief of Respondent (state), p. 27. Instead, the state claims that the therapist only worked with K.M.M. on learning to rely on adults, in general. Brief of Respondent (state), p. 26. The state’s argument is directly contradicted by testimony from the child’s therapist and foster parents. RP 101, 147-49, 183-88, 206-07.

The department failed to offer the father reunification services at a critical juncture, as reflected in the court’s findings. RP 722, CP 107 (Finding XI). The type of attachment and bonding service offered to the foster parents could have prevented deterioration of the relationship between K.M.M. and her father. The court did not offer the father all necessary services. RCW 13.34.180(1)(d). The order terminating his parental rights must be reversed. *C.S.*, 168 Wn.2d at 57.

C. The department failed to facilitate the parent-child bond through regular visitation.

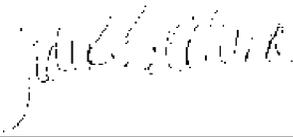
The father relies on the argument set forth in his Opening Brief.

CONCLUSION

For the reasons set forth above and in the father’s Opening Brief, this court must reverse the order terminating the father’s parental rights. The termination petition must be dismissed with prejudice.

Respectfully submitted on July 10, 2014.

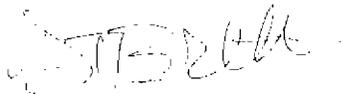
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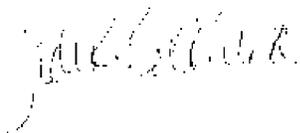
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I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING **IS** TRUE AND CORRECT.

Signed at Olympia, Washington on July 10, 2014.



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