

Nos. 91757-4 and 91925-9

Division III, No. 32437-1; Division II, No. 45809-8

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SUPREME COURT
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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE WELFARE OF K.M.M.

STATE OF WASHINGTON/DSHS,
Respondent,

v.

J.M. (Father)
Petitioner.

And

IN RE WELFARE OF B.P.

STATE OF WASHINGTON/DSHS,
Respondent,

v.

H.O. (Mother),
Petitioner.

FILED E
APR 22 2016
WASHINGTON STATE
SUPREME COURT
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BRIEF OF AMICUS CURIAE KING COUNTY DEPARTMENT OF PUBLIC DEFENSE

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I. Interest of Amicus Curiae

The Defender Association Division, SCRAP Division, Northwest Defenders Division, and ACA Division are a part of the newly chartered King County Department of Public Defense. We are appointed to provide legal representation and defense to indigent parents and children, at least 12 years of age or older, in Chapter RCW Title 13 proceedings, including dependency petitions, RCW 13.36 guardianship petitions, RCW 13.34 Termination of Parental Rights petitions, Reinstatement of Parental Rights petitions, and private termination of parental rights cases in King County. Our employees have been providing indigent defense services in these cases to parents and children in King County for over 30 years. We are particularly concerned when child welfare systems fail to provide parents due process and with appropriate services in order to prevent the termination of parental rights.

II. Summary of Argument

The United States Constitution, long-standing jurisprudence, and State policy all recognize the rights of parents to raise their children, the right of children to be in the care and comfort of their parents, and the

importance of the family unit.¹ In *In re B.P.* and *In re K.M.M.*, the Courts of Appeals departed from these firmly established principles.

First, the lower courts found that the termination of a parent-child relationship was appropriate solely because the parent and child did not have a strong relationship. Neither constitutional due process principles nor the Washington dependency statute permit the State to permanently deprive *fit* parents of the care and custody of their children simply because the State believes it may be in the best interests of the child to live with a different family to which that child has attached. Of particular concern, the Courts of Appeals considered the quality of the relationship between parent and child even when that relationship was directly and negatively impacted by the child's experience in foster care.

Second, given the lower courts' emphasis on the quality of the parent-child relationship, it is imperative that visitation be considered a "service" that the State is required to provide as a necessary predicate to termination. Under Washington State dependency law visitation is unquestionably a right of the family, and as discussed further herein, it should also be considered a service within the meaning of RCW

¹ See, e.g. *In re Luscier's Welfare*, 84 Wn.2d 135, 136, 524 P.2d 906, 907 (1974); RCW 13.34.020; *Santosky v. Kramer*, 455 U.S. 745, 102 S.Ct. 1388 (1982) ("[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents.")

13.34.180(1)(d). Accordingly, the Courts of Appeals' opinions should be reversed.

III. Issues to Addressed by Amicus

1. May a court consider the quality of a parent child relationship and the best interests of the child in determining whether to deprive otherwise fit parents of their fundamental liberty interest in raising their children?
2. Visitation is necessary to maintaining a parent child relationship. If a Court is going to consider the quality of the parent child relationship in making a termination decision, must parents be afforded with visitation services?

IV. Statement of the Case

This brief relies upon the Petitioners' Supplemental Briefs, which appear to be fully supported by the record of the proceedings below.

V. Argument

A. **The Lower Courts' Conflation of the Parental Fitness Analysis with a Best Interests of the Child Analysis Violates Parents' Due Process Rights**

1. Because Parents Have a Liberty Interest in Raising Their Children, Determinations of Parental Fitness Look Only at the Parents, Not at the Child's Best Interests.

Parents' interest in the care, custody, and control of their children is "perhaps the oldest recognized fundamental liberty interest." *Troxel v.*

Granville, 530 U.S. 57, 65, 120 S.Ct. 2054, 2060 (2000)(citing *Meyer v. Nebraska*, 262 U.S. 390, 399, 401, 43 S. Ct. 625 (1923)); *In re Parentage of C.A.M.A.*, 154 Wn.2d 52, 57, 109 P.3d 405 (2005). Due process requires that a parent be currently unfit in order for the juvenile court to terminate his or her parental rights. *In re Welfare of A.B.*, 168 Wn.2d 908, 920, 232 P.3d 1104, 1110 (2010), *as amended* (Sept. 16, 2010).²

Because courts have held that “‘the best interest of the child’ will never be a sufficient basis on which to overcome a parent’s fundamental liberty interest in her or his relationship with a child,” *In re Custody of Z.C.*, 191 Wn. App. 674, 706, 366 P.3d 439, 454 (2015), the parental fitness inquiry must focus on the *parent* and not on the child. The court can only inquire into the child’s interests after parental unfitness is proved by clear, cogent, and convincing evidence.³ As this Court has explained:

...when a Washington court applies the first step of that scheme, it is obliged to focus on the alleged unfitness of the parent, which must be proved by clear, cogent, and convincing evidence, and when it applies the second step, it focuses on the child's best interests, which need be proved by only a preponderance of the evidence. But it is ‘premature’

² See also *Santosky*, 455 U.S. at 759-60, 102 S.Ct. 1388, 1398 (1982) (noting that termination “entails a judicial determination that the parents are unfit to raise their own children; *Troxel v. Granville*, 530 U.S. at 68-69, 120 S.Ct. at 2061 (finding that “so long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.”).

³ The standard is higher in cases governed by the Indian Child Welfare Act.

for the trial court to address the second step before it has resolved the first.

In re Welfare of A.B., 168 Wn.2d 908, 925, 232 P.3d 1104, 1113 (2010).⁴

Because of this sequence, the “best interests” inquiry can only work in a parent’s favor in a termination case. Even if a parent is unfit and even if the statutory termination elements can be proven, a court may nevertheless save the parent-child relationship by finding it is not in the child’s best interests to terminate. The reverse is not true, however. If a parent is fit, the court may not extinguish the parent-child relationship based on a finding that it is in the child’s best interests to terminate her parent’s rights.

2. The Lower Courts Determined Parental Fitness Based on the Quality of the Parent-Child Relationship, in Violation of Parents’ Constitutional Rights, and Unlawfully Turned a Termination of Parental Rights Proceeding into a Custody Proceeding.

The lower courts’ decisions turned *In re Welfare of A.B.* on its head, considered the best interests of the child first, and used those best interests as a basis for termination. They did so by radically redefining “parental fitness” to include an assessment of whether the parent and child had a strong relationship. *E.g. In re Welfare of B.P.*, 188 Wn. App. 113, 132, 353 P.3d 224, 233 (2015) *review granted*, 366 P.3d 932 (Wash. 2016) (analyzing

⁴ The correct definition of parental fitness is not in question. *In re Welfare of A.B. (AB II)*, 181 Wn. App. 45, 61, 323 P.3d 1062, 1071 (2014) (finding that, “[t]o meet its burden to prove current unfitness in a termination proceeding, DSHS is required to prove that the parent’s parenting deficiencies prevent the parent from providing the child with ‘basic nurture, health, or safety’ by clear, cogent, and convincing evidence.”)(citing RCW 13.34.020).

“attachment differences” between the mother’s two children as a basis for a finding of unfitness). Due to a lack of attachment between the children and their parents, the courts held that reunification was not in the children’s best interests, and because reunification was not in the children’s best interests, the parents were unfit to parent that particular child.

The lower courts’ redefinition of parental fitness turned a proceeding about the termination of parental rights into proceedings akin to determining custody, with the courts weighing the benefits to the child of the birth family against those of the foster family. But this Court has held that foster parents do not have the same fundamental liberty interest as parents have in their own children:

The nature of foster placements under Washington statutes remains temporary and transitional. ... Washington statutes and case law make it abundantly clear that *the paramount goal of child welfare legislation is to reunite the child with his or her legal parents, if reasonably possible*. At the present time, foster parents have not been accorded a statutorily recognized expectancy in a continued relationship between themselves and their foster children, even in instances where foster parents may in fact have become the “psychological parents” of the foster children.

In re Dependency of J.H., 117 Wn.2d 460, 476, 815 P.2d 1380, 1388 (1991) (emphasis added). *See also Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 845 (1977) (emphasizing that foster parents’ claimed liberty interest in their relationship to foster children

“derives from a knowingly assumed contractual relation with the State”). Accordingly, the foster parents’ bond with a child cannot be considered in determining whether a parent—whose fundamental liberty interest is at stake—is fit. It is only after a finding that the parent is unfit that the court can consider this bond in determining whether it is in the child’s best interests to terminate her unfit parent’s rights so that she can be adopted.⁵

3. Termination Proceedings Cannot Turn on the Quality of the Care Provided by Foster Parents Because the Court Lacks information Regarding the Foster Parents and Because there is no Guarantee that the Foster Parents will Adopt the Child

During a termination trial, the court does not have sufficient information necessary to draw reliable conclusions regarding the suitability of the foster parents, making this type of custody analysis particularly dangerous. Because a termination trial is not supposed to be about the foster parents, the parties are often not permitted to litigate concerns about the care being provided in the foster home as part of the trial. Information about foster parents is routinely withheld from the other parties to a termination

⁵ Permitting courts to consider the strength of the parent child relationship in making termination decisions would encourage foster parents to vie for children’s affections and reward them for forming a stronger bond. Yet the dependency statute expects the opposite of foster parents: the assumption is that they too should be working towards reunification. RCW 13.34.260 (2) (“foster parents are encouraged to... assist the birth parents by helping them understand their child's needs and correlating appropriate parenting responses;... enter into community-building activities with birth families and other foster families;... assist children and their families in maximizing the purposefulness of family time.”).

case, including the redaction of their names and addresses in discovery. None of the statutory termination factors address the quality of the foster home. For this reason, this Court has held that the state is not required to prove that there is a safe, appropriate, permanent placement option available for the child at the termination trial. *In re Dependency of K.S.C.*, 137 Wn.2d 918, 927, 976 P.2d 113, 118 (1999)(“The State does not have to prove that a stable and permanent home is available at the time of termination.”). Therefore, by design, the termination trial court does not have very much information about the care (positive or negative) being provided in the foster home.

Moreover, there is absolutely no guarantee that the current caregivers will eventually adopt these children. *In Re Dependency of G.C.B.*, 73 Wn. App. 708, 719-721, 870 P.2d 1037, *review denied*, 124 Wn.2d 1019, 881 P.2d 254 (1994)(holding DSHS as custodian may pursue whatever placement it deems is in the child’s best interests, including withholding adoptive placements which comport to the wishes of the relinquishing birth parent). As practitioners, we routinely see cases where children are removed from their “pre-adoptive” homes following termination for a variety of reasons. According to statistics kept by the federal Administration for children and families, adoptions disrupt prior to finalization in about ten to twenty-five percent of cases. (Child Welfare Information Gateway, Adoption Disruption

and Dissolution, (available at <http://www.childwelfare.gov/pubs/s-disrup/>). Statistics show that African-American children's adoptions are more likely to disrupt than white children. *Id.* The likelihood of disruption increases by six percent for each additional year of age of the child. *Id.* Many of our clients, who are now parents in the system, are still suffering from the rejection they experienced as children in foster care who were later put out by their "adoptive" parents.⁶

Amicus is concerned that a possible consequence of the lower courts' decisions will be to inject the foster child-foster parent relationship as a central focus at the termination trial either explicitly or implicitly by condoning comparisons between foster parents and parents. Doing so will reinforce the greatest fear of parents that come in contact with the child welfare system— that they can lose their children, even if they correct their parental deficiencies, because the court believes that the foster family can provide a better home than the parents. Parent-child relationships should not be permanently severed because another caregiver may be considered "better," "smarter," "richer," or even more loving and affectionate. Similarly, children should not run the risk of becoming legal orphans with no adoptive

⁶ Recently, states have attempted to crack-down on the "underground" practice of "rehoming" adopted children. The Washington Times, August 4, 2015, "James Langevin pushes legislation to curb 'rehoming' of adopted children" ("Since rehoming is an underground practice, no one knows how many children or families have been involved in it.").

home and no ability to reunify with a fit parent because the foster family appears “better” than the birth family. Termination must remain an extreme remedy reserved for a very small subset of dependency cases— cases where parents are unfit because they are completely incapable of providing for their child’s most basic needs.

4. Denying a Petition to Terminate Does not Result in Immediate Family Reunification

If the parent is not proven to be unfit, the petition for termination must be denied. Denying a petition to terminate a parent’s rights does not automatically result in reunification of the family. *See In re B.P.*, 188 Wn. App. at 122 (conflating termination and reunification when finding that, at termination, “reunification must be balanced against the child’s right[s]...”).

The underlying dependency case does not end when a termination petition is filed. When a termination petition is denied or dismissed, the dependency proceeding continues, and the state remains charged with the duty to make efforts to reunify the family and to provide concurrent planning until an achievable permanency option that resolves the dependency case is put into place.

Reunification is one possible resolution, but even after a child is initially returned home, monitoring by the state and court oversight continue for a minimum of six months. RCW 13.34.138(2)(a). Necessary services can continue to be provided to the family to assist during the transition. Further,

if the court finds that it would be otherwise harmful for the child to return home to her fit parent, there are permanency options available to the court that do not require termination of parental rights. These other options include, but are not limited to, guardianship, or permanent legal custody. RCW 13.34.136(2)(a).

5. A Definition of Parental Fitness that Considers the Quality of the Parent Child Relationship is Too Subjective to Protect Parents' Constitutional Rights.

Decisions about the quality of the parent-child relationship are likely to turn on the testimony of DSHS-contracted evaluators or visitation supervisors and transporters. As practitioners, *amici* are particularly concerned that the providers we see in our practice are not capable of rendering high-quality, culturally informed opinions about the parent-child relationship in a reliable and consistent way.

Properly assessing the quality of a parent-child relationship requires highly skilled professionals, who offer culturally competent evaluations, are able to meet the language needs of the client, appropriately assess the parent's disabilities, and conduct an unbiased analysis of family strengths and weaknesses. However, just as one example, in the relatively cosmopolitan DSHS Region 2, where we practice, there are no Spanish-speaking DSHS-contracted psychological evaluators. In addition, case workers are so often transferred between the offices and within the agency, or removed altogether,

they sometimes lack basic information about the family, let alone the quality of the parent-child relationship. We are highly concerned that the judgments called for by the lower court rulings, which go to the heart of a parent's fundamental liberty interest, will be made by para-professionals who lack the skills to offer reliable, high-quality assessments.

That is especially troubling when we already know that poor families, in general, and families of color, in particular, are disproportionately represented in Washington's child welfare system. These families are already struggling to have their family's values and cultures recognized as strengths for their children in the dependency system. Parents have a constitutional right to raise their children. Allowing termination of this right to rest on subjective determinations of the quality of the parent-child relationship inadequately protects parents' rights.

B. The Lower Courts' Decision to Consider the Quality of the Parent Child Relationship Fails to Recognize that Parents Have Insufficient Access to Visitation, Which is Necessary to Maintaining the Parent-Child Relationship.

1. Courts Have Failed to Recognize Parents' Statutory Right to Visitation Services Prior to Termination.

Pursuant to statute, termination can only be ordered when all necessary services have been provided. RCW 13.34.180(1)(d)(requiring a termination petition to allege "[t]hat 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”). Courts below have incorrectly held that the term “services” in RCW 13.34.180(1)(d) does not include parent-child visitation. *In re Welfare of K.M.M.*, 187 Wn. App. 545, 572, 349 P.3d 929, 942 (2015) *review granted*, 184 Wn.2d 1026, 364 P.3d 119 (2016) citing *In re Dependency of T.H.*, 139 Wn. App. 784, 162 P.3d 1141 (2007).

RCW 13.34.136 defines “permanency plan of care,” which includes “what actions the department or supervising agency will take to maintain parent-child ties.” Because visitation is necessary to maintain parent-child ties, it is a service within the meaning of the statute. RCW 13.34.136(2)(b)(ii)(A) (“Early, consistent, and frequent visitation is crucial for maintaining parent-child relationships and making it possible for parents and children to safely reunify.”)⁷

2. Visitation is Vitaly Important and Yet Frequently Denied to Parents.

⁷ This definition is consistent with parent’s fundamental liberty interest in the care of her child and the legislature’s recognition that “the family unit is a fundamental resource of American life which should be nurtured.” RCW 13.34.020; *see also* RCW13.34.136 (“The planning process shall include reasonable efforts to return the child to the parent’s home.”).

Quality, frequent visitation is a necessary service in dependency cases. Research has shown that visitation “promotes healthy attachment and reduces the negative effects of separation for the child and parents.”⁸

Yet, as practitioners in dependency court, we know the state regularly fails to provide families with court-ordered visitation, citing a lack of resources as its excuse. The difficulty in securing regular visitation is a pressing issue facing the families we represent because of a chronic lack of contracted visitation supervisors and understaffed and overstretched DSHS offices. Following an emergency removal of a child from her parent, families are frequently forced to wait weeks for any visitation to be implemented as the state tries to locate a visitation provider, despite the court ordering visitation to start immediately. During the course of ongoing dependency cases, it is not unusual for visitation to stop for weeks, sometimes months, without any court authority to do so, because there are “logistical difficulties” in arranging the visitation or there is no available visitation provider.

As practitioners, we are very concerned that the lower courts’ decisions declining to view visitation as a service will make it even harder to enforce court orders requiring visitation for our clients, creating further

⁸ Smariga, Margaret. Visitation with Infants and Toddlers in Foster Care: What Judges and Attorneys Need to Know. ABA Center on Children and the Law.

damage to parent-child relationships even as parents actively remedy their identified parental deficiencies.

3. Visitation Was Improperly Denied in the Cases Below Based on Findings of Future Emotional Harm

Notwithstanding the importance of visitation, DSHS inappropriately denied visitation in the cases below based on assumptions about the possibility that the children would suffer emotional harms. Yet it is extremely difficult to assess the source of emotional harms to children. *See Nicholson v. Scoppetta*, 3 N.Y.3d 357, 370, 820 N.E.2d 840, 846, 787 N.Y.S.2d 196, 202 (2004) (finding that the New York State Legislature “recognized that the source of emotional or mental impairment—unlike physical injury—may be murky, and that it is unjust to fault a parent too readily”).

Emotional harms to children in foster care are particularly difficult to measure because children are likely to be harmed by the experience of foster care itself. Numerous aspects of foster care pose a risk of harm to children. *See Braam ex rel. Braam v. State*, 150 Wn.2d 689, 694, 81 P.3d 851, 854 (2003) (citing RCW 74.13.310) (recognizing harms experienced by foster children in state care and finding a child has a constitutional right to be free from unreasonable risks of harm as to their foster parents and a right to reasonable safety while in state care); *see also* Joseph J. Doyle, Jr., *Child Protection and Child Outcomes: Measuring the Effects of Foster Care*, 97 Am. Econ. Rev. 1583 (2007) (finding in a study of approximately 15,000 children who were either placed

in foster care or allowed to remain with their families that, controlling for levels of abuse and neglect, children placed in foster care are far more likely than other children to commit crimes, drop out of school, join welfare, experience substance abuse problems, or enter the homeless population). In addition, throughout their experience in foster care, children experience rotating professionals, including rotating DSHS social workers, therapists, and contracted visitation supervisors. *See, e.g., In re Welfare of K.M.M.*, 187 Wn. App. at 554, 559 (noting the changing social workers).

Courts and DSHS routinely fail to recognize the emotional harm a child suffers as a result of being removed from her family and the emotional and other harms the child may experience in foster care itself, instead blaming the parent for every problematic behavior the child demonstrates after she is removed. *See, e.g., In re Welfare of K.M.M.*, 187 Wn. App. at 550 (failing to inquire whether K.M.M.'s "parentified" behavior and difficulty forming attachments was a reaction to her removal from her family or caused by her treatment prior to entering foster care); *Braam v. Braam*, 150 Wn.2d 689, 698, 81 P.3d 851 (2003) (recognizing harms experienced by foster children in state care, finding a child has a constitutional right to be free from unreasonable risks of harm as to their foster parents and a right to reasonable safety while in State).

Policymakers in other states have recognized that because it is difficult to assess the cause of emotional harm to children, this emotional harm should not be the basis for a denial of visitation services. For example, in 2013, the New York City Administration for Children’s Services (ACS) adopted a policy on visitation which recognizes this difficulty:

Children’s reactions to visits are often misunderstood. When children demonstrate negative behaviors, the parents are often blamed. While agencies often respond by limiting or suspending visits, these actions can harm children. The child’s behaviors may actually be a way of expressing the desire to spend more time, not less, with the parent. For this reason, case planners and foster parents should carefully explore children’s reactions to visits. If there is reason to believe that the child’s negative behaviors are attributable to decreased contact with the parent, or that the child would benefit from increased contact, the case planner must consider increasing parent-child contact or visits.

NYC ACS, “Determining the Least Restrictive Level of Supervision During Visits For Families With Children in Foster Care,” Policy and Procedure #2013/02 at 18, p. 5.

Given the importance of visitation, and the difficulty in assessing the source of emotional harms to children in foster care, it is particularly problematic that, according to the *KMM* decision, emotional harms to the children are considered, but only as a basis to *deny* contact with parents. Children suffer profound emotional harm when they are removed from their families, but these harms are never considered when making a removal

decision. Yet these very harms are used to justify a denial of visitation and, ultimately, to support termination.

4. Failing to Treat Visitation as a Service Would Lead to Absurd Results

The courts below held that the lack of a strong attachment between parent and child was a basis for termination. Yet, during the underlying dependency case, the families were denied access to visitation and attachment services. Unless visitation is a required service, DSHS can fail to provide the family with visitation necessary to maintain their parent-child relationship, and then terminate parental rights because that the parent-child relationship is weak. The Washington State Legislature defined visitation as a “right” of the family⁹; it could not have intended such an absurd result.¹⁰

VI. Conclusion

In *In re Welfare of B.P.* and *In re Welfare of K.M.M.*, the State weakened the parent-child relationship by failing to provide services and then asked the courts to terminate the parent-child relationships because they were weak. The lower courts improperly ignored parents’ due process rights and well-

⁹ Washington’s dependency statute explicitly defines visitation as a right of the family. RCW 13.34.136(ii)(A) (“Visitation is the right of the family, including the child and the parent...”). Visitation may be limited or denied only if the court determines that such limitation or denial is necessary to protect the child’s health, safety, or welfare.” RCW 13.34.136 (2)(b)(ii)(C).

¹⁰ Courts try to avoid absurd results when interpreting statutes. *Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles*, 148 Wash.2d 224, 239, 59 P.3d 655 (2002).

settled jurisprudence and conflated a best interests determination with a parental fitness analysis when they granted the State's requests for termination.

For the foregoing reasons, *amicus* respectfully requests that this Court reverse the lower courts' orders terminating the parent rights.

Respectfully submitted this 20th day of April, 2016.

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Subject: 91925-9 In re Welfare of B.P.; 91757-4 In re Welfare of K.M.M.--Motion for Leave to File Amicus Brief and Amicus Brief

Please find attached a Motion for Leave to File an Amicus Brief and Amicus Brief in the above-references cases.

Sincerely,
Anita Khandelwal
King County - Department of Public Defense