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**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

In re the Welfare of

M.O.,

Minor Child.

**BRIEF OF RESPONDENT,
DEPARTMENT OF SOCIAL AND HEALTH SERVICES**

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I. INTRODUCTION

The father of M.O. failed to participate in court ordered services to address his substance abuse and mental health parental deficits. As a result, the Department of Social and Health Services (hereinafter Department) filed a termination petition as to the child. In response, the father filed a guardianship petition, naming the maternal grandparents as proposed guardians, and the parties held a combined trial on these two competing petitions. The trial court found that a guardianship was not in the best interests of the child, and that the maternal relatives were not suitable guardians for the child. Instead, the court found that the father was an unfit parent and that termination was in the best interests of the child.

The father appeals, arguing that the trial court erred by not deviating the required burden of proof to establish a guardianship, preponderance of the evidence, and instead should have applied a burden of proof that varied based on the identity of the petitioner and the identity of the proposed guardian. He also argues that the trial court erred in finding that all necessary services were offered/provided to him. The Department responds that the trial court properly applied binding State Supreme Court precedent on the burden of proof to establish a guardianship, and that his novel contentions on appeal violate basic principles of due process. Furthermore, substantial evidence supports the trial court's findings that all necessary

services were offered/provided to the father. As a result, the Department respectfully requests that this Court affirm the trial court's rulings.

II. RESTATEMENT OF THE ISSUES

1. **Whether the trial court erred when it applied binding State Supreme Court precedent that the burden of proof in a guardianship proceeding is by a preponderance of the evidence standard.**
2. **Whether substantial evidence supports the trial court's findings that all court ordered services, and all necessary services, were offered/provided to the father?**

III. RESTATEMENT OF THE CASE

M.P. is the father of the child, M.O. The child was born positive for drugs in 2015. RP at 334. As a result, the Department filed a dependency petition on the child. RP at 334. The father has another child, who was also previously a dependent child until the entry of a non-parental custody order with the maternal grandparents in 2013. Exs. 9-12. During the on-going dependency of M.O., the parents had yet another child, J.O, in August 2016, who is also now a dependent child. Exs. 13-17. J.O. was also born positive for methamphetamines. RP at 337.

During the dependency of M.O, a departmental social worker took the father to the Kitsap Recovery Center detox unit, where he spent one night. RP at 314, 327. The father could have entered in-patient treatment there, but he left the program. RP at 314, 327. Nicole Reed subsequently served as the social worker for the family during most of this case.

RP at 197. She set up random urinalysis (hereinafter UAs) for the father at Kitsap Recovery Center, the same facility he had attended detox at, but he failed to attend the UAs. RP at 212-13. The father did a drug and alcohol evaluation in late 2016 that recommended in-patient treatment. RP at 211, 233. This facility also offered mental health treatment, but the father failed to participate in it. RP at 213. The father himself admitted that he had had three different substance abuse evaluations during this dependency, including the most recent evaluation that recommended in-patient treatment. RP at 314-15. Instead of attending treatment, he stated that he was going to go work in Alaska. RP at 238, 316. He indicated that he had no desire to participate in in-patient treatment. RP at 238.

Ms. Reed also discussed parenting education services with the father, but he indicated that he was leaving the state instead. RP at 293. Parenting services were available to the father during the entire case, and could also have occurred at his visits with the child. RP at 214, 294. However, the father stopped attending visits and Ms. Reed then never knew if he would be present at a visit or not. RP at 214, 223. His visits with the child M.O. have been inconsistent. RP at 345. He would also fall asleep at visits. RP at 279.

The child began to react to attending visits, having stranger anxiety that is outside of a child's developmental norms. RP at 338. M.O. would

scream and cry at visits, sometimes for the entire visit. RP at 339. The Guardian ad Litem regarded the father's inconsistent visitation to be a detriment to the child, given M.O.'s adverse reaction to visits. RP at 345. The Department engaged an infant mental health specialist to try to address the child's issues. RP at 339. Outside of visitation, M.O. is a typical two year old. RP at 345. During visits, when they would occur, the child appeared to be undergoing trauma, based on her reactions to the visits, according to the child's Guardian ad Litem. RP at 346.

The Department filed a termination petition on M.O. as to the parents. CP at 1-4. In response, the father filed a guardianship petition, under RCW 13.36, asking that the maternal grandparents become the guardians for M.O. CP at 111-15. In pursuing this proposed guardianship, the father had the maternal grandparents undergo a private homestudy for purposes of establishing this guardianship. Ex. 21. The maternal grandmother speaks Tagalog primarily. RP at 148. As a result, the private homestudy provider relied on other relatives in the family home to translate for this proposed guardianship homestudy. RP at 69. The father, however, testified in English at the combined trial on the competing termination and guardianship petitions in June 2017. RP at 1, 313.

In terms of the proposed guardians, the grandmother would be the primary caretaker for the child. RP at 228. She also was the one who would

consistently attend visits with the child, as opposed to the grandfather. RP at 363. However, the grandmother was unable to recognize the process that M.O. had to go through in order to be comfortable during a visit with the relatives. RP at 365. The child does not engage with the grandmother and refuses to have any contact from her. RP at 228. The child also does not have any type of bond, attachment, or relationship with the grandparents. RP at 228.

The parents had been living in the grandparents' residence at various points during the case. RP at 172, 280, 341-42, Ex. 21, p. 16-17. The grandmother, and the child she now has legal custody of, even rode with the parents to a visit with M.O., while the parents were under the influence of methamphetamines. RP at 277, 344, Ex. 21, p. 16-17. The grandmother has demonstrated a pattern of poor judgement by just taking the parents' word for things. RP at 350. The grandmother had also committed domestic violence against the grandfather. RP at 340-41, Ex. 21, p. 17-18.

After hearing all of the evidence, the trial court found that all court ordered services, and all necessary services, were offered and provided to the father. CP at 74, Findings of Fact (FF), IV (C) and (D). The court also found that the father failed to follow through with the court ordered services, other than attending a drug/alcohol evaluation that recommended in-patient treatment and spending one night at a detox facility. CP at 74, FF IV (D).

Instead, he wanted to go to Alaska to work on fishing boats. CP at 74, FF IV (D).

The trial court found by clear, cogent, and convincing evidence that the Department had established its burden under the termination petition. CP at 79, CL III. The court also found that termination was in the best interests of the child, and that a guardianship was not in the best interests of the child. CP at 77, FF VII; CP at 78, FF VIII; CP at 80, CL IV. The court found that there is a minimal parent-child bond present and that the parents have served to destabilize the child. CP at 75, FF IV (E); CP at 76, FF VII.

With regards to the guardianship, the trial court found that the child does not have a positive relationship, and has very little bond, with the proposed guardians either. CP at 77, FF VII. The court also found that these relatives were not suitable guardians for the child. CP at 77, FF VII. The court found that the grandmother had committed domestic violence against the grandfather, and that she minimized the parents' substance abuse and mental health issues. CP at 77, FF VII. The trial court also found that there was a lack of boundaries between the parents, with their substance abuse and mental health issues, and the proposed guardians, such that the safety of the child would remain at risk. CP at 78, FF VII. The father appeals.

IV. ARGUMENT

A. **The Trial Court Properly Applied Binding State Supreme Court Precedent Concerning the Burden of Proof in a Guardianship**

The father first argues that trial court erred by not deviating from binding State Supreme Court precedent on the required burden of proof in a guardianship proceeding. Appellant's Br. at 13-18. He contends that, in the name of due process, the burden of proof in a guardianship proceeding should vary based on the identity of the petitioner and the identity of the proposed guardians. Appellant's Br. at 17-18. His contentions violate basic principles of due process.

Due process requires "fundamentally fair procedures" in addressing limitations on parental rights to children. *In re Welfare of A.W.*, 182 Wn.2d 689, 702, 344 P.3d 1186 (2015). In the *In re Welfare of A.W.* decision, the State Supreme Court held that the preponderance of the evidence standard for guardianships under RCW 13.36 satisfies due process. *In re Welfare of A.W.*, 182 Wn.2d at 710. To establish a guardianship under this statute, a trial court must find by a preponderance of the evidence that a guardianship is in the child's best interest. *In re Welfare of A.W.*, 182 Wn.2d at 711. In determining these "fundamentally fair procedures," the State Supreme Court did not differentiate between the identity of the guardianship petitioner, nor on the identity of the proposed guardian for the child.

RCW 13.36 specifically provides that any party to a dependency (the Department, the Guardian ad Litem, the child, or the parents) may file a guardianship petition. RCW 13.36.030(1). The appellate courts have also reiterated that a guardianship can only be established when it is in the child's best interest, in the context of dual competing guardianship and termination petitions. *See In re Welfare of JB, Jr.*, 197 Wn. App. 430, 439, 387 P.3d 1152 (2016). Such is the situation in this case - the father had filed a guardianship petition, naming maternal relatives, while the Department had filed a termination petition. CP at 1-4, 111-15.

Against these well-settled and binding precedents, the father instead advocates for a novel rule that the burden of proof in a guardianship proceeding should vary depending on who the petitioner is and who the proposed guardian is. *See* Appellant Br. at 17-18. Under his contentions, the father would have trial courts determine guardianships under fundamentally unfair procedures, all in the "name" of due process. These contentions are without merit and unsupported by case law.

The father also claims that "when a fit parent makes a decision, the judiciary must give that decision 'special weight.'" Appellant Br. at 14. However, in this case, the trial court determined that both the mother and the father are unfit parents as part of the termination process. CP at 74, FF IV (E). The trial court found that the father has a long history of

substance abuse and mental health issues, that have prevented him from being able to care for his children, and he has not participated in services to address these issues. CP at 74, FF IV (E). He also has not been visiting with the child and there is a minimal parent-child bond present between him and the child. CP at 75, FF IV (E). Thus, the father is not a fit parent able to make appropriate child rearing decisions that are entitled to “special weight.” Instead, the trial court properly applied binding State Supreme Court precedent that, to establish a guardianship, the court must find by a preponderance of the evidence that such a guardianship is in the child’s best interest. *In re Welfare of A.W.*, 182 Wn.2d at 711.

In determining what is in the best interests of a particular child, the trial court must decide each guardianship case on its own facts and circumstances. *In re Welfare of A.W.*, 182 Wn.2d at 711. There is not an exclusive list of factors that the trial court must consider in determining the best interests of a child. *Id.* Instead, some of these factors include the strength and nature of the parent and child bond, the benefit of continued contact with the parent or the extended family, and the likelihood that the child may be adopted if parental rights were terminated. *Id.* (citing *In re Dependency of A.C.*, 123 Wn. App. 244, 254, 98 P.3d 89 (2004)).

Here, the father filed the guardianship petition, but was unable to establish by a preponderance of the evidence that such a guardianship was

in the best interests of the child. CP at 77, FF VII; CP at 78, FF VIII. The trial court properly reviewed the applicable case law and applied the various different factors in determining the child's best interest. CP at 75-78, FF VII. These factors included culture, language, and heritage issues as to the child; the strength and nature of the parent-child bond; any supposed benefit to continued contact by the parents or the extended family; as well as the child's own health and safety issues. CP at 75-78, FF VII. After reviewing all of the evidence, the trial court properly concluded that a guardianship was not in the child's best interest. CP at 77, FF VII; CP at 78, FF VIII.

Even if a guardianship in general had been appropriate for the child, the trial court properly determined that these specific relatives at issue were not suitable guardians for the child. CP at 77; FF VII. The trial court found that there would be concerns for the child's safety, if placed with these relatives. CP at 78, FF VII. The trial court identified, amongst other issues, the lack of clear boundaries between the parents, with their on-going methamphetamine and mental health issues, and the relatives, and the relatives' inability to stand up to the parents. CP at 78, FF VII. Thus, in addition to concluding that a guardianship in general was not in the child's best interest, the trial court determined that the relatives specifically were not suitable guardians for the child. CP at 77, FF VII.

Substantial evidence supports the trial court's findings on these issues – that a guardianship is not in the child's best interest, and that the relatives are not suitable guardians for the child. First, the father's visits with the child, M.O., have been inconsistent. RP at 345. He has fallen asleep at visits. RP at 279, 295. The social worker never knew until the visit if he would show up or not. RP at 223. The child began to react to going to visits, having stranger anxiety that is outside of developmental norms. RP at 338. M.O. would scream and cry at visits, sometimes for the entire visit. RP at 220, 338. On other occasions, the child would be very stoic, like "a little zombie," not engaging with the parents. RP at 220-21. The Guardian ad Litem regarded the father's inconsistent visitation to be a detriment to the child, given M.O.'s reactions as visits. RP at 345. The parents would also bicker and fight with each other at the visits. RP at 295-96. Thus, substantial evidence supports the trial court's finding that there is a minimal parent-child bond present and that the parents have served to destabilize the child. CP at 75, FF IV (E); CP at 76, FF VII.

In terms of the proposed guardians, the grandmother would be the primary caretaker for the child. RP at 228. She also was the one who would consistently attend visits with the child. RP at 363. However, the grandmother was not able to recognize the process that M.O. had to go through in order to be comfortable during a visit with the relatives.

RP at 365. The child does not engage with the grandmother and refuses to have any contact from her. RP at 228. The child also does not have any type of bond, attachment, or relationship with the grandparents. RP at 228. Thus, substantial evidence supports the trial court's findings that the child does not have a positive relationship, and has very little bond, with the proposed guardians, in addition to the parents. CP at 77, FF VII. In reaching these conclusions, the court applied fundamentally fair procedures and binding State Supreme Court precedent. The trial court's findings that a guardianship in general was not in the child's best interest, and that these relatives specifically were not suitable guardians for the child, should be affirmed.

B. Substantial Evidence Supports the Trial Court's Finding That All Necessary Services Were Offered/Provided To the Father

The father next argues that the trial court erred in finding that all necessary services were offered/provided to him, raising two issues. He first contends that the Department did not offer "bilingual and culturally competent services." Appellant's Br. at 24-28. He then claims that the Department did not offer him specific services addressing substance abuse and parenting. Appellant's Br. at 29-30. Because substantial evidence supports the trial court's detailed findings on these issues, his contentions are without merit.

Because of the highly fact-specific nature of termination proceedings, deference to the trial court is “particularly important.” *In re Welfare of Hall*, 99 Wn.2d 842, 849, 664 P.2d 1245 (1983). On appeal, the court will defer to the trial court’s determinations of witness credibility and the persuasiveness of the evidence, and “its findings will not be disturbed unless clear, cogent, and convincing evidence does not exist in the record.” *In re Dependency of K.R.*, 128 Wn.2d 129, 144, 904 P.2d 1132 (1995).

The trial court found that all court ordered services, and all necessary services, were offered and provided to the father. CP at 74, FF IV (C) and (D). The court also found that the father has failed to follow through with the court ordered services, other than attending a drug/alcohol evaluation that recommended in-patient treatment and spending one night at a detox facility. CP at 74, FF IV (D). Instead, he wanted to go Alaska to work on fishing boats. CP at 74, FF IV (D). Substantial evidence supports these findings.

In contrast to his linguistic contentions on appeal, the father testified at the trial in English. RP at 313. In terms of drug and alcohol services, he completed three different drug and alcohol evaluations during the dependency. RP at 314. One social worker even took him to a detox center, but he left after one night. RP at 314, 327. He knew that he had to do in-

patient treatment. RP at 315. Instead, he informed the social worker that he was going to go work on fishing boats in Alaska. RP at 316, 238. Ms. Reed, the social worker, also discussed parenting services with the father. RP at 213, 293. Parenting education was available to the father during the entire dependency. RP at 293-94. It could even occur at visits. RP at 214. However, the father indicated that he would be leaving the state. RP at 293. The father also stopped attending visits and the social worker never knew if he would be attending or not after that. RP at 214, 223.

Contrary to the father's current contentions, he knew what he was supposed to do, in terms of rehabilitative services, but did not do them. Case law provides that a parent's failure to take advantage of services provided by the State excuses the State from offering additional, beneficial services.

In re Dependency of Ramquist, 52 Wn. App. 854, 861, 765 P.2d 30 (1988). In offering services under the statute, a parent's unwillingness or inability to make use of the services already provided to them excuses the Department from offering extra services that might have been helpful. *In re Dependency of P.A.D.*, 58 Wn. App. 18, 26, 792 P.2d 159 (1990). Such is the case here.

The father also argues that the Department did not provide the relatives with "bilingual and culturally competent services" to support the father's guardianship petition. Appellant Br. at 24-28. However, placement

of children with relatives is not a “service” designed to reunite a parent with a child, but rather an outcome of a dependency proceeding. *In re Dependency of A.A.*, 105 Wn. App. 604, 608-09, 20 P.3d 492 (2001). Furthermore, the father did in fact file the guardianship petition in this case, CP at 111-15, and the grandparents did obtain a homestudy, in support of this guardianship petition. RP at 35. The homestudy provider relied on other relatives in the family home to translate for this homestudy, and these same other relatives were available in the home for the Department as well. RP at 69. The guardianship issue was fully litigated by the trial court, and the father did not prevail. Thus, there is no evidence that bilingual issues were present, let alone that any such issues can be considered to have impacted the case or its ultimate outcome. His contentions are without merit.

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V. CONCLUSION

The trial court properly applied binding state supreme court precedent regarding the preponderance of the evidence standard of proof for guardianship determinations. The father's contentions regarding establishing fundamentally unfair proceedings based on the identity of the petitioner, or the identity of the proposed guardianship, violate due process. The trial court properly found that a guardianship was not in the best interests of the child, and that the relatives specifically were not suitable guardians for the child. Finally, substantial evidence supports the trial court's finding that all services were offered/provided to the father. The trial court's ruling, therefore, should be affirmed.

RESPECTFULLY SUBMITTED this 16th day of January, 2018.

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DECLARATION OF SERVICE

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

On January 16, 2018, I caused a true and correct copy of the BRIEF OF RESPONDENT to be filed electronically with the Court of Appeals, Division II, and to be served via email through the Court's electronic filing system as indicated below:

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