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NO. 96155-7

SUPREME COURT OF THE STATE OF WASHINGTON

In re the Termination of Parental Rights to

M.O.

**RESPONSE OF THE DEPARTMENT OF CHILDREN, YOUTH,
AND FAMILIES TO MOTION FOR DISCRETIONARY REVIEW**

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I. IDENTITY OF RESPONDENT AND DECISION BELOW

The Department of Children, Youth, and Families¹ (Department) responds to the Petitioner's, M.P.'s, motion for discretionary review of the Court of Appeals' Commissioner's Ruling, filed April 12, 2018, affirming the trial court's order terminating his parental rights to this child, M.O. A panel of judges of the Court of Appeals denied G.M.'s motion to modify the Court Commissioner's ruling on July 12, 2018.

II. ISSUES PRESENTED

1. The preponderance of the evidence burden of proof adequately protects a parent's due process rights in guardianship trials under chapter 13.36 RCW. *In the Welfare of A.W.*, 182 Wn.2d 689, 710, 344 P.3d 1186 (2015). Did the trial court violate M.P.'s due process rights by applying that burden of proof when finding that a guardianship was not in a child's best interests?

2. Though M.P. showed initial interest in entering substance abuse treatment after M.O.'s dependency began, he later refused the social worker's offers of service referrals. Did the Court of Appeals' Commissioner properly rule that M.P.'s refusals, as established by the

¹ All child welfare services transferred from the Department of Social and Health Services to the newly created Department of Children, Youth, and Families effective July 1, 2018. RCW 43.216.906.

findings in this case, excused the Department from further offers of services?

III. STATEMENT OF THE CASE

1. Statement of Facts

M.P. is the father of three children, including two-year-old M.O., none of whom are in his care. The Department filed a dependency petition on M.O. after her toxicology screen returned positive for drugs at her birth. Report of Proceedings (RP) at 334. M.P. also has another child who was also previously a dependent child until the child's maternal grandparents obtained non-parental custody in 2013. Exs. 9-12. During the on-going dependency of M.O., the parents had a third child, J.O.-P., in August 2016, who is also now a dependent child. Exs. 13-17.

Early in the underlying dependency of this case, M.P. showed some interest in substance abuse treatment but his interest waned. A Department social worker took M.P. to the detox unit of Kitsap Recovery Center, where M.P. spent one night. RP at 314, 327. He could have entered in-patient treatment there, but he left the program. RP at 314, 327. Nicole Reed, the social worker who served the family during most of the dependency, set up random urinalysis (UAs) for M.P. at Kitsap Recovery Center, the same facility he had attended detox, but he failed to attend the UAs. RP at 197, 212-13.

Months later and following Ms. Reed's referral, M.P. completed a drug and alcohol evaluation in November 2016 that again recommended in-patient treatment, which he could have completed at that facility. RP at 211, 233. If M.P. had engaged in services there, the providers would have also addressed his mental health needs but M.P. failed to participate in it. RP at 213. Ms. Reed and M.P. discussed his desire to enter inpatient treatment, but Ms. Reed required a copy of the evaluation to refer him to treatment and both she and M.P. experienced difficulty obtaining the evaluation from the facility. RP at 238. Ms. Reed eventually stopped "forcing the issue" after seeking the evaluation twice because M.P. told her "he had no desire to participate in inpatient" treatment. RP at 238. At trial, M.P. admitted that he completed three different substance abuse evaluations during this dependency, including the most recent evaluation that again recommended inpatient treatment. RP at 314-15. However, instead of attending treatment, he stated that he was leaving Washington State to work in Alaska. RP at 238, 316.

Like his refusal to participate in substance abuse treatment, M.P. never engaged in this case long enough for the Department to refer him to parenting services. Ms. Reed discussed parenting education services with him, but he responded that he was leaving the state instead. RP at 293. Parenting services were available to M.P. during the entire case and could

have occurred at his visits with the child. RP at 214, 294. However, M.P. stopped attending visits after his visits were separated from the mother's visits and Ms. Reed never knew if he would be present at a visit or not. RP at 214, 223. His visits with M.O. have been inconsistent over the life of this case. RP at 345. When M.P. visited M.O., the child appeared to experience trauma, based on her reactions to the visits. RP at 346.

The parents' non-engagement in services made clear that M.O. could not be reunited with them in the near future, and the parties proposed differing solutions. The Department filed a termination of parental rights petition. CP at 1-4. In response, the father filed a guardianship petition under chapter 13.36 RCW, asking that the maternal grandparents become the guardians for M.O. CP at 111-15.

The proposal to place M.O. with these grandparents presented a number of welfare concerns. The grandmother would be the primary caretaker for the child. RP at 228. She also was the only one who consistently attended visits with the child, as opposed to the grandfather, but the grandmother did not recognize the process that M.O. had to go through to be comfortable during a visit with her. RP at 363, 365. M.O. also does not have any type of bond, attachment, or relationship with the grandparents, and she refuses contact from the grandmother. RP at 228.

In addition to the barriers posed by the lack of any bond and insights into M.O.'s needs, the grandparents also posed safety concerns to M.O. The parents had been living in the grandparents' residence at various points during the case. RP at 172, 280, 341-42, Ex. 23, p. 16-17. The grandmother, along with the child over whom she has non-parental custody, allowed the parents to drive them to a visit with M.O. even though the parents were under the influence of methamphetamines. RP at 277, 344, Ex. 23, p. 16-17. The grandmother has demonstrated a pattern of poor judgement by relying on the parents' word. RP at 350. The grandmother had also committed domestic violence against the grandfather. RP at 340-41, Ex. 23, p. 17-18.

2. Trial Court proceedings

After hearing all of the evidence, the trial court found that the Department offered or provided to M.P. all court ordered and necessary services. Clerk's Papers (CP) at 73-74, 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 and 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 satisfied its burden of proof under the termination petition. CP at 79, Conclusion of Law (CL) III. The court also found that termination of parental rights was in the best interests of the child, and that a guardianship was not in the best interests of the child. CP at 78-79, FF VII, VIII; CP at 80, CL IV. The trial court found that M.O. has a “minimal” bond with M.O. and M.P.’s ongoing weak relationship with her served to destabilize M.O. CP at 74-75, FF IV(E), VII.

Regarding M.P.’s guardianship petition, the trial court found that the child does not have a positive relationship, and has very little bond, with the proposed guardians, who were not suitable guardians for M.O. CP at 77, FF VII. The trial court found that the grandmother had committed domestic violence against the grandfather and that she minimized the parents’ substance abuse and mental health issues, which manifested in a lack of boundaries between herself and the parents. CP at 77, FF VII. Lastly, the trial court found that M.O.’s safety would be at risk with the grandparents. CP at 78, FF VII. Thus, the trial court denied M.P.’s guardianship petition and granted the Department’s termination petition. CP at 81-82, 128-133.

3. Court of Appeals proceeding

M.P. appealed the trial court’s orders, and the Court of Appeals’ Commissioner affirmed, terminating review on April 12, 2018. Ruling at 1.

The Commissioner ruled that the juvenile court properly applied the preponderance of evidence burden of proof to deny M.P.'s guardianship petition. Ruling at 10-11. The Court Commissioner also ruled that although the Department did not make early referrals to services for M.P., his later refusal to participate placed this case within the futility doctrine, and therefore the trial court properly found the Department had offered or provided M.P. all necessary services. Ruling at 16. A panel of judges denied M.P.'s motion to modify the Commissioner's ruling. M.P. now seeks discretionary review from this Court.

IV. REASONS WHY REVIEW SHOULD BE DENIED

This Court should deny M.P.'s motion for discretionary review of the Court of Appeals' Commissioner's ruling terminating review, because it does not presents a significant constitutional issue as claimed by M.P. Mot. for Disc. Rev. at 1 (citing Rules of Appellate Procedure 13.3(a)(1) and 13.4(b)(3)).

First, contrary to M.P.'s arguments, the trial court properly applied the preponderance of evidence burden of proof to find that guardianship was not in M.O.'s best interest. Second, the Court Commissioner did not err in ruling that the futility doctrine applied in this case, because substantial evidence supports the trial court's finding that M.P. refused to participate in services after his initial, brief engagement at the beginning of the

dependency. The Department respectfully requests that this Court deny M.P.'s motion for discretionary review because M.P. does not present any significant constitutional issues.

A. The Trial Court's Application of the Preponderance Burden of Proof in Denying the Petition for Guardianship is Consistent with Washington State Supreme Court Precedent and Does Not Warrant Review

The trial court protected M.P.'s due process rights when it found by a preponderance of the evidence that guardianship is not in M.O.'s best interests. M.P. argues that the trial court should have deviated from preponderance of the evidence, and instead should have applied a different burden of proof because in this case a biological parent proposed a guardianship. Mot. for Disc. Rev. at 9-10. While the Motion does not clearly identify M.P.'s due process argument, in the Court of Appeals he claimed that "due process requires 'proof, by clear and convincing evidence, that guardianship is *clearly* contrary to the child's best interests.'" COA Ruling at 7, quoting Br. of Appellant at 16. This approach to the burden of proof to reject a guardianship lacks any statutory or case law authority and, if implemented, would jeopardize the trial court's responsibility to protect a child's best interests when establishing a dependency guardianship. The Court should decline review of this undeveloped, unsupported due process argument.

As explained by the Court of Appeals ruling at 11, the trial court applied binding precedent that established the preponderance of evidence burden of proof adequately protects parents' due process rights in guardianship proceedings. 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). To establish a guardianship under chapter 13.36 RCW, a trial court must find by a preponderance of the evidence that a guardianship is in the child's best interest. RCW 13.36.040(2)(a); *In re Welfare of A.W.*, 182 Wn.2d at 711. Three years ago, this Court held that this statutory preponderance of the evidence burden of proof satisfies a parent's right to due process in a guardianship proceeding. *In re Welfare of A.W.*, 182 Wn.2d at 710.

In contrast to the on-point precedent of *In re Welfare of A.W.*, no case or statute provides for the burden of proof in a guardianship trial as advocated by M.P., where the burden of proof would be lowered because a biological parent instigated the guardianship petition. Although chapter 13.36 RCW provides that any dependency party may file a guardianship petition, this Court has not differentiated the burden of proof in a guardianship trial depending upon the identity of the petitioner or the proposed guardian. *See In re Welfare of A.W.*, 182 Wn.2d at 710-11; RCW 13.36.030(1).

Since the Washington State Supreme Court's decision in *In re Welfare of A.W.*, Division Two of the Court of Appeals reiterated that the trial court may grant a guardianship petition only when it is in the child's best interest under a preponderance of the evidence burden of proof. *In re Parental Rights to J.B., Jr.*, 197 Wn. App. 430, 439-40, 387 P.3d 1152 (2016). Significantly, the Court of Appeals' holding in *In re Parental Rights to J.B., Jr.*, that the trial court properly considered the child's best interests, occurred in the context of a hybrid guardianship-termination trial. *See id.* The underlying trial in this case presented the same posture: M.P. filed a guardianship petition while the Department filed a termination petition. CP at 1-4, 111-15.

Against these well-settled and binding precedents, M.P. instead advocates for a novel rule that the burden of proof in a guardianship proceeding should vary depending on the identities of the petitioner and proposed guardians. Mot. for Disc. Rev. at 10. M.P. cites no Washington authority for this proposition and the Department is aware of no statute or case law to support it.

M.P. centers his argument on the well-settled general proposition that fit parents have a fundamental right to direct their children's upbringing. Mot. for Disc. Rev. at 7, 11. M.P. then claims that chapter 13.36 RCW "evinces" a parent's authority to direct their child's upbringing,

citing *In re Welfare of A.W.*, 182 Wn.2d at 705. Mot. for Disc. Rev. at 8. However, *In re the Welfare of A.W.* does not stand for the proposition that a guardianship petition equates to parental direction of the upbringing of their child. To the contrary, this Court recognizes that only fit parents are entitled to deference in child-rearing decisions. *In re Welfare of A.W.* at 707 n.16.

Here, the trial court found M.P. currently unfit to parent due to his parental deficiencies. CP at 74, FF IV(E). M.P. has a long history of substance abuse and mental health issues that have prevented him from parenting, and he did not participate in services to address these issues. CP at 74, FF IV(E). M.P. had not been visiting with M.O. and his bond with her is minimal. CP at 75, FF IV(E). These unchallenged findings of fact establish that M.P.'s asserted child-rearing preferences are not entitled to special weight. The Court of Appeals' Commissioner agreed, reasoning that because M.P. is unfit "his opinion is not entitled to any special consideration." Ruling at 10. Therefore, the trial court properly applied binding precedent that, to establish a guardianship, the trial 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.

Thus, M.P.'s complaint that a trial involving both termination and guardianship requires a different burden of proof for guardianship does not

present a significant constitutional question that warrants this Court's review. M.P.'s asserted theory lacks support by any relevant precedent. Moreover, it is doubtful whether the issue would even be fairly addressed here because M.P. does not indicate where any objection to the process was lodged with the trial court. Thus, M.P.'s first issue falls short of the criteria for discretionary review.

B. Sufficient Evidence Supports the Trial Court's Finding of Fact that the Department Offered M.P. All Necessary Services and the Court of Appeals' Recognition that Further Offers Would have Been Futile Is Consistent with Case Law

The Court of Appeals properly ruled that the futility doctrine applies to M.P.'s arguments that he should have received more offers for services. Ruling at 15-16. M.P. argues that the Court of Appeals' Commissioner erred in ruling that any further service offers to M.P. would have been futile. Mot. for Disc. Rev. at 12. This Court should not accept review because substantial evidence demonstrates that M.P. refused the Department's offers of services.

The Court of Appeals' Commissioner properly deferred to the trial court's factual findings. 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 appellate 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).

Under certain facts, trial courts may find that the Department provided a parent with all necessary services when the parent has refused to complete services, even if the Department failed to offer a particular service. Long-established case law provides that a parent’s unwillingness or inability to make use of previously offered services already excuses the Department from offering extra services that might have been helpful. *In re Dependency of Ramquist*, 52 Wn. App. 854, 861, 765 P.2d 30 (1988). Even when the Department “inexcusably fails” to offer a necessary service, “termination is appropriate if the service would not have remedied the parent’s deficiencies in the foreseeable future.” *In re Dependency of T.R.*, 108 Wn. App. 149, 164, 29 P.3d 1275 (2001); *see also In re Welfare of Hall*, 99 Wn.2d at 850-51 (holding that termination of parental rights is appropriate where father could not have corrected his deficiencies in the near future even though Department failed to offer parenting education) *and In re Dependency of P.D.*, 58 Wn. App. 18, 26-27, 792 P.2d 159 (1990) (holding that the record supported termination because further offers of services would not have corrected parental deficiencies in the near future). Further, this Court

recently held that the Department's failure to offer a service does not necessarily preclude termination of parental rights. *In re Parental Rights to K.M.M.*, 186 Wn.2d 466, 482, 379 P.3d 75 (2016) (holding that although Department did not offer father family therapy, termination of parental rights was appropriate because the service could not have remedied father's parental deficiency in the near future).

Even if the Department did not capitalize on M.P.'s initial willingness to enter treatment, the Court of Appeals' Commissioner properly ruled that the futility doctrine applied to this case because M.P. knew what services the court ordered him to complete and the Department offered to assist him in these services but he did not engage. M.P. initially expressed interest in substance abuse treatment but he spent only one night in detox. CP at 74, FF IV(D). Ms. Reed twice tried to obtain M.P.'s November 2016 drug and alcohol evaluation before M.P. began to refuse services, telling her that he was leaving Washington State. RP at 238, 314-16. M.P. did not leave the state but each time Ms. Reed attempted to discuss treatment with M.P. he told her he would be leaving. RP at 238. M.P. told her "he had no desire to participate in inpatient" treatment. RP at 238. M.P. knew that he must complete treatment, but he did not do so. RP at 315. Ms. Reed discussed parenting services with M.P., which were available to him throughout the dependency. RP at 213-14, 293-94. However, M.P. again indicated that he

would be moving. RP at 293. Ms. Reed never knew if M.P. would attend a visit because he stopped consistently attending. RP at 214, 223.

M.P. does not challenge the trial court's factual findings in his motion for discretionary review. Instead, he argues that the Court of Appeals' Commissioner improperly expanded the futility doctrine. Mot. for Disc. Rev. at 13. M.P. relies on *In re Dependency of T.L.G.*, 126 Wn. App. 181, 202, 108 P.3d 156 (2005). Mot. for Disc. Rev. at 13. But that case is distinguishable because there the service delay was in part due to circumstances outside the parties' control and the record did not demonstrate that the parents refused services. *In re Dependency of T.L.G.*, 126 Wn. App. at 201-02. Here, the findings and record show that Ms. Reed attempted to obtain the drug and alcohol evaluation from the provider twice before M.P. told her that he did not want to participate in services. RP at 238. Thus, the Department offered M.P. services, albeit not immediately after the case began, and M.P. refused. RP at 238. M.P. knew that he needed to engage in inpatient treatment to reunite with his two-year-old child, but he did not respond to Ms. Reed's attempts to engage him. CP at 74, FF IV(D); RP at 238, 315-16. Thus, the trial court properly found that the Department offered M.P. all necessary services. *In re Parental Rights to K.M.M.*, 186 Wn.2d at 482; *In re Dependency of T.R.*, 108 Wn. App. at 164.

More importantly, the Commissioner's ruling does not present any conflict with the law that governs use of the futility exception. As the Court of Appeals' Commissioner recognized, this case falls *within* prior analysis of the futility doctrine, because case law demonstrates that when the Department offers services but the parent refuses the trial court may find that the Department nevertheless offered the parent all necessary services. Ruling at 15-16.

In short, M.P.'s second issue does not present a significant constitutional question because the Court of Appeals' Commissioner tied her ruling to specific facts and the ruling did not change the governing law. This Court should decline to review it.

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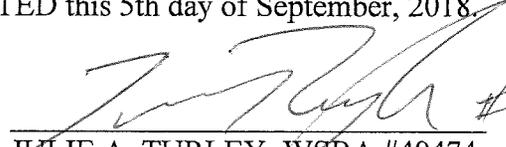
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V. CONCLUSION

This Court should deny M.P.'s motion for discretionary review. M.P. asks this Court to create new law by deviating from a statutorily provided burden of proof for dependency guardianship petitions in opposition to binding Washington State Supreme Court precedent. Furthermore, the Court of Appeals' Commissioner properly ruled the trial court did not err in finding the Department offered M.P. all necessary services because, even though he showed some initial interest in substance abuse treatment, he later refused to engage in services. Thus, M.P. has not presented any significant constitutional issue warranting review.

RESPECTFULLY SUBMITTED this 5th day of September, 2018.


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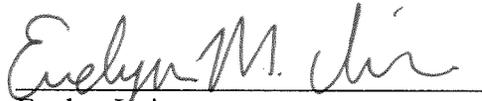
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for

DECLARATION OF SERVICE

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

On September 5, 2018, I caused a true and correct copy of the Response to Motion for Discretionary Review to be filed electronically with the Supreme Court and to be served on the parties electronically through the Court's filing system.

SIGNED in Tacoma, Washington, this 5th day of September, 2018.



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