

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
2/3/2020 11:33 AM  
BY SUSAN L. CARLSON  
CLERK

NO. 98043-8

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**SUPREME COURT OF THE STATE OF WASHINGTON**

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In re the Welfare of  
D.E., V.E., and M.E.,  
Minor Children.

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**RESPONSE TO MOTION FOR DISCRETIONARY REVIEW**

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## I. INTRODUCTION

J.J. is the mother of D.E., V.E. and M.E. Despite being offered or provided multiple services, J.J. cannot or will not protect her children. J.J. is either unwilling or unable to address the serious harms that her substance abuse and domestic violence issues pose to the children. Despite multiple opportunities, J.J. has failed to effectively engage in services and is currently unfit to parent her children.

At the conclusion of the initial fact-finding hearing in November 2018, the trial court did not "think" it could make findings at that moment without additional information and continued trial. The Court of Appeals ruled that the trial court afforded J.J. her procedural due process rights where it provided her with notice and an opportunity to be heard through an evidentiary hearing after a continuance of the trial. The trial court relied only on admissible evidence in its findings. Further, the Court of Appeals ruled that substantial evidence supports the trial court's finding that J.J. is unfit to parent her children. J.J. has failed to meet the burden to justify discretionary review and the Department of Children, Youth, and Families (Department), respectfully requests that the Court deny the motion for discretionary review.

## **II. STATEMENT OF THE ISSUES**

1. Whether the trial court violated J.J.'s procedural due process rights when it exercised its discretion to continue the trial and considered the children's best interests when setting the continuance on a shortened timeline.
2. Whether substantial evidence supports the trial court's finding that J.J. is currently unfit to parent these children based on her unwillingness to acknowledge domestic violence issues and substance abuse and her failure to engage in services to address these issues.

## **III. STATEMENT OF THE CASE**

In March 2016, J.J. filed a petition for an order of protection against S.E., the father of their two children, D.E. and V.E., then three years old and an infant. Ex. 24. J.J. described S.E. as "extremely violent" and "mentally, verbally, and physically abusive" toward J.J. Ex. 24. J.J. also reported S.E. was neglectful of the children. Ex. 24. Five months later, law enforcement placed D.E. and V.E. in protective custody. Exs. 1, 2, 33; RP at 184-85. Reported concerns included neglect, substance abuse and domestic violence issues. Ex. 1; RP at 26.

In November 2016, J.J. entered an agreed order of dependency. Ex. 4. J.J. agreed to participate in random urinalysis (UA) testing, participate in

a drug and alcohol assessment and follow recommendations, and participate in a parenting assessment and follow recommendations. Ex. 4.

In December 2016, J.J. and S.E. were living together when S.E. swung a hatchet at J.J. RP at 177. Although J.J. initially reported the incident to law enforcement, she subsequently denied it occurred. RP at 172, 382, 384, 393. The criminal court entered a no contact order. RP at 171, 177. However, J.J. and S.E. continued to live together, and J.J. was present for an incident in January 2017, where law enforcement arrested S.E. Exs. 42-44; RP at 71-72. J.J. told the Department she was not with S.E., but the Department later learned of multiple no-contact order violations during the months after the December 2016 incident. RP at 225-26.

In March 2017, J.J. gave birth to M.E. and tested positive for amphetamines. RP at 119. J.J. blamed prescription Sudafed, but that would not account for a positive amphetamine result. RP at 119, 381-82, 547. M.E. was placed in out-of-home care at birth via court order. RP at 186.

J.J.'s parenting assessment identified significant concerns. Five months after the Department provided a referral, J.J. completed the parenting assessment. Ex. 27; RP at 20, 24-25. The provider noted that J.J. was protecting S.E. despite the danger to herself and her children. Ex. 27 at 10. The provider noted a strong concern that J.J. is unable to recognize the seriousness of S.E.'s behavior. Ex. 27 at 11. The provider opined that J.J.

could not be protective of her children because she was in complete denial of all the reported concerns at the time of the children's removal. RP at 37. J.J. described her relationship with S.E. as "perfect." Ex. 27 at 4; RP at 26.

Further, she intended to continue her relationship with S.E. Ex. 27 at 10.

The assessor opined J.J. is not able to create a safe and nurturing environment free from violence. RP at 32.

As to her substance abuse, J.J. failed to disclose the positive UA at M.E.'s birth and a prior substance use disorder diagnosis. Ex. 27; RP at 519. While J.J. had recently completed a drug and alcohol assessment with no further recommendations, that evaluation was based entirely on J.J.'s self-report. Ex 27 at 4-5; RP at 199.

As to mental health, J.J. reported multiple mental health diagnoses and implied ongoing psychiatric care. Ex. 27 at 5. However, J.J. had not seen her psychiatrist since April 2016. Ex. 27 at 5; RP at 33-34, 518.

The provider recommended J.J. engage in individual counseling regarding her relationship, attend a domestic violence support group (Personal Horizons), and attend a Protective Parenting Group. Ex. 27 at 12. The provider also recommended J.J. continue to address mental health concerns and review medication plans for mental health and pain management. Ex. 27 at 12. J.J. failed to provide a list of medication as

requested by the social worker, and J.J. failed to follow through with obtaining medication. RP at 200, 659-61.

In May 2017, J.J. entered an agreed order to dependency as to M.E.

~~Ex. 10. Despite referrals and special accommodations of her schedule, J.J. failed to participate in services in November 2017. RP at 39-42.~~

In June 2018, while J.J. and her boyfriend were sleeping in a car, S.E. broke their car windows, attempted to cut the wires in the car, tased J.J.'s boyfriend, and poured gasoline all over the car. Ex. 20; RP at 72-73. J.J. described S.E. pouring gasoline as "spilling" and was quick to note that the incident was "out of character" for him. RP at 73, 409.

Throughout the dependency, J.J. failed to follow through with UAs, with multiple excuses. RP at 194, 199, 130, 249, 339, 365-66. J.J. reported her stepfather assisted her by paying for gas, but she continued to miss UAs, including directly refusing to provide a UA. RP at 86-87, 90, 249, 287, 365.

In August 2018, the parties met for a settlement conference. RP at 124-25. Per the resulting agreed order, J.J. was required to participate in the Protective Parenting Group, Personal Horizons and individual counseling, again all with Advantages Plus on the same day. Ex. 16. In addition, J.J. agreed to complete random UAs and participate in a chemical dependency assessment with collateral information upon a missed or positive UA. *Id.*

The Department arranged for J.J. to attend the three services at Advantages Plus, on the same day, as planned. RP at 45. However, again J.J. failed to follow through, this time informing the provider that she did not need any of the recommended services. Ex. 37; RP at 44-45.

As to the UAs, J.J. tested negative for substances the same day the agreed order was entered, but she had seven days notice. RP at 338-39. J.J. requested the second UA be set over two days, which resulted in a negative, but diluted test result. RP at 339. J.J. failed to follow through a subsequent UA and failed to complete a new drug and alcohol evaluation, as required by the agreed order. RP at 339-41, 360. The case proceeded to a termination of parental rights trial.

At the conclusion of the initial fact-finding, on November 16, 2018, the court declined to enter findings and continued trial. RP at 431. The trial court noted that it struggled in multiple areas, and, in particular, it needed to see what mental health issues, if any, J.J. may be dealing with to “further assess where we are with regard to the likelihood of resolution and the offering of all necessary services.” RP at 433. The court ordered J.J. to complete a UA that day and set a status hearing. RP at 434; CP 105. J.J. tested positive for amphetamines and methamphetamines. RP at 545.

At the first status conference on November 29, 2018, the court ordered services for J.J. CP 110-11. The court ordered J.J. to participate in

random UAs, individual counseling, Protective Parenting Group, and a chemical dependency assessment, and medication management. CP 110-11. The court ordered the Department to provide all available transportation assistance. CP 110-11.

The Department referred J.J. for all ordered services. Exs. 54-56, 65; RP at 473, 533, 630, 638, 657. She attended only one session of the Protective Parenting Group and otherwise failed to engage in services. Exs. 63A, 65; RP at 533-36, 597-98, 603, 630-31, 633.

At the status hearing in January 2019, the court granted the Department's request to reopen the evidentiary hearing and set a date for a fact-finding hearing. RP at 504. The court held a fact-finding hearing on January 30, 2019. RP at 510. At the conclusion of the trial, the court provided an oral ruling that the Department met its burden of proving the elements of RCW 13.34.180(1) by clear, cogent, and convincing evidence and that termination of the parental rights was in the best interest of these children. CP 167-76. The court entered its written findings on March 1, 2019. CP 169-76. The Court of Appeals affirmed on December 6, 2019. J.J. now seeks review in this Court.

#### **IV. ARGUMENT**

This Court reviews a Court of Appeals decision only if it satisfies one of four considerations. RAP 13.4(b). Contrary to what J.J. argues, the

ruling does not conflict with a Supreme Court case, does not involve a significant constitutional issue and is not an issue of substantial public interest. The Court of Appeals Commissioner properly ruled the trial court's process did not violate J.J.'s procedural due process rights and that substantial evidence supports the trial court's finding that J.J. is currently unfit to parent. The motion for discretionary review should be denied.

**A. The Trial Court did not Violate J.J.'s Rights to Procedural due Process When it Provided J.J. the Opportunity to Present all Relevant Evidence Prior to Making its Decision**

The trial court afforded J.J. her procedural due process when it reconvened an evidentiary hearing after continuing trial and before entering final orders. This Court should affirm the Commissioner's ruling that J.J.'s due process rights were not violated for three reasons.

**1. This Court should decline to consider J.J.'s argument because it is raised for the first time on appeal**

This Court should decline to consider J.J.'s arguments about (1) the continuance of the termination trial and (2) the trial court's consideration of the children's best interests in that context because she raises it for the first time on appeal. RAP 2.5(a). While a party may raise a manifest error affecting a constitutional right, RAP 2.5(a)(3), J.J.'s motion does not analyze this standard. An error "is manifest if it either results in actual prejudice . . . or the party makes a plausible showing that the error had practical and identifiable consequences to the trial."

*In re Det. of Monroe*, 198 Wn. App. 196, 201, 392 P.3d 1088 (2017). J.J. cannot show prejudice because the trial court provided J.J. greater procedural due process when it: *more* precisely formulated the issues, allowed *more* time, and ruled on the basis of *more* competent evidence.

**2. The trial court’s oral ruling is not binding, and it did not violate J.J.’s procedural due process rights when the court continued trial**

Even if J.J. had preserved her argument regarding the continuance of the termination trial, review would still not be warranted. J.J.’s due process argument regarding the oral ruling and subsequent continuance fails for three reasons. First, a trial judge’s oral decision is not final. Second, contrary to J.J.’s selective quotation, the trial court’s oral ruling did not definitively determine that the Department had failed to meet its burden. Third, the court has discretion to continue a case and take additional evidence before entering final orders.

Washington courts have long held that “a trial judge’s oral decision is no more than a verbal expression of his informal opinion at that time . . . necessarily subject to further study and consideration, and may be altered, modified, or completely abandoned. It has no final or binding effect, unless formally incorporated into findings, conclusions, and judgment.” *DGHI, Enters. v. Pac. Cities, Inc.*, 137 Wn.2d 933, 944, 977 P.2d 1231 (1999) (quoting *Ferree v. Doric Co.*, 62 Wn.2d 561, 566–67, 383 P.2d 900

(1963)). Until final judgment is entered, the trial judge is not bound by a prior expressed intention to rule in a certain manner. *DGHI, Enters.*, 137 Wn.2d at 944.

In this case, the trial court's oral ruling noted areas in which the court struggled in trying to make a decision. The court stated "*I think I cannot make a finding at this moment in time by clear, cogent, and convincing evidence that all necessary services have been offered or that there is no reasonable likelihood of her correcting them within the immediate future.*" RP at 427-28, 431 (emphasis added). The court ordered the case be continued without written findings and added, "I don't believe I can make findings without additional information." RP at 431, 441. The court acted well within its discretion when it reserved the right to "further study and consider[]" the issue before entering written findings. *DGHI, Enters.*, 137 Wn.2d at 944.

Further, it is very well-established that trial courts may continue trials to receive additional evidence. In two cases very similar to this one, this Court has acknowledged the trial court's discretion to continue trials for additional evidence. In *In re Pawling*, the trial court stated in its oral opinion that it was "not able to make a finding that termination is in the best interests of the child." *In re Interest of Pawling*, 101 Wn.2d 392, 395-96,

679 P.2d 916 (1984). The trial court then continued the case for additional testimony and later terminated parental rights. *Id.* at 394. This Court rejected a challenge to the practice. *Id.* at 395-96. Similarly, in *In re Welfare of A.B.*, this Court acknowledged a trial court's "discretion" to continue a termination trial following a trial court's expression that it was "not satisfied that all necessary services have been identified and provided." *In re Welfare of A.B.*, 168 Wn.2d 908, 915, 232 P.3d 1104 (2010). In fact, this Court has held that when a case involves the custody of children, "the trial court should seek all the light available." *Atkinson v. Atkinson*, 38 Wn.2d 769, 771, 231 P.2d 641 (1951). *Cf. In re Dependency of T.R.*, 108 Wn. App. 149, 158, 29 P.3 1275 (2001) (holding that RCW 13.34 "does not require that termination orders be entered within a specified period after the fact-finding hearing . . .").

Here, the trial court noted that it could not make findings without additional information and instead ordered the trial be continued. RP at 431, 441. Like the above referenced cases, it was well within the trial court's authority to order a continuance to obtain additional information, and the decision to continue trial did not violate J.J.'s procedural rights. *In re Dependency of T.R.*, 108 Wn. App. 149, 158, 29 P.3 1275 (2001).

Contrary to the record, J.J. argues the trial court intended to continue the trial indefinitely until the state met its burden. RP at 434, 446, 453. The court continued the case on a “shortened timeline,” to give the mother “another chance.” RP at 434. In the same hearing, it noted the need to set a date to resume trial and suggested dates in late January 2019. RP at 446. At the end of the hearing, the court thanked the parties for their “commitment to the work of reunification.” RP at 453. When the parties reconvened almost two weeks later, the court set a status hearing a month and a half out, noting it was a “check-in” and either party could request to reopen the evidentiary hearing. RP at 490. The record reflects that the trial court did not continue the case to reach a particular outcome but because it did not believe it could make findings without additional information. RP at 441. This was well within the court’s discretion and did not violate due process. *See DGHI, Enters.*, 137 Wn.2d at 944

J.J. argues that the procedures violated procedural due process. Appellant’s Br., filed June 26, 2019, at 22, 26. The key fact in this case is the trial court’s subsequent evidentiary hearing after the continuance.

There is no likelihood of erroneous deprivation of J.J.’s parental rights where the court provided J.J. the opportunity to present all relevant evidence for the trial court to consider prior to making its decision regarding

the termination of parental rights. Thus, the court's process in this matter did not violate J.J.'s procedural due process rights.

**3. The trial court appropriately considered the children's best interests when determining the length of its continuance**

The trial court appropriately considered the best interests of the children in the context of determining the length of the continuance. In this case, the trial court referenced the child's best interests only in determining the appropriate length of the continuance. RP at 431-432, 434, 441, 453. The trial court stated that the continuance would be on a "relatively short timeline" because permanency was in the children's best interest. RP at 434.

J.J.'s argument to the contrary fundamentally misunderstands this Court's holding in *In re Welfare of A.B.*, 168 Wn.2d at 911. In *A.B.*, this Court held that it is premature for a trial court to consider whether *termination* is in the children's best interest until after the trial court finds that the parent is currently unfit. *In re A.B.*, 168 Wn.2d at 925-26; *see also* RCW 13.34.190 (emphasis added). Here, in deciding the length of the continuance, the trial court was not considering whether termination was in the child's best interests. *A.B.* simply does not apply. J.J.'s argument that trial courts are prohibited from considering the best interests of the child for

any purpose sharply conflicts with the Legislature's emphasis on the primacy of the child's interests. See RCW 13.34.020.

The Court of Appeals commissioner properly ruled that the trial court's consideration of the children's best interest when setting a continuance on a shortened timeline was not a violation of the mother's due process rights. The decision is not in conflict with *In re A.B.*, and thus, this Court should not grant review. *In re A.B.*, 168 Wn.2d at 911.

**B. The Trial Court Appropriately Considered the Mother's Unwillingness to Acknowledge or Address the Impact of Domestic Violence on her Children**

Being the victim of domestic violence is not a parental deficiency. The Department did not advance that position, and the trial court made no findings to that effect. The trial court's finding that J.J.'s parental deficiencies included her "domestic violence issues" is based on J.J.'s unwillingness to address the domestic violence issues, and thus, her inability to be protective. CP 173 at 2.15. The trial court's finding of unfitness is not based on her status as a domestic violence victim.

After establishing the six elements of RCW 13.34.180(1), the Department must also show whether, at the time of trial, J.J. was currently fit to parent. *In re Welfare of A.B.*, 168 Wn.2d at 918-910. This inquiry turns on "whether the existing parental deficiencies, or other conditions,

prevent the parent from providing for the children's basic health, welfare, and safety." *In re Parental Rights to K.M.M.*, 186 Wn.2d. 466, 493, 379 P.3d 75 (2016). "Although domestic violence victims face great challenges, a parent must exercise good judgment to avoid genuine risk of harm to her children." *In re Dependency of G.G., Jr.*, 185 Wn. App. 813, 830, 344 P.3d 234, 243 (2015).

Whether it is an unwillingness or inability to recognize or acknowledge the domestic violence she is experiencing, J.J.'s denial of the issue is an indicator of her parental deficiency. In *In re S.M.H.*, the mother of the children refused to sever her relationship with a boyfriend who was a sexual predator and refused to acknowledge that he was even a risk to her children. *In re Dependency of S.M.H.*, 128 Wn. App. 45, 57-58, 115 P.3d 990, 997 (2005). The appellate court thus affirmed the trial court's termination of the mother's parental rights in part because she was unable to comprehend the risk posed by her partner. *In re Dependency of S.M.H.*, 128 Wn. App. at 57-58.

Here, J.J. is similarly unable to comprehend the risk posed to her children. J.J. expressed an unwillingness to change her situation because despite multiple no-contact orders, she still lived with S.E. and told multiple people she intended to carry on a relationship until he was jailed. Exs. 27 at

10, 37, 42-44; RP at 71-72, 92, 225-26, 241-42, 285. She failed to follow through with her own petition for an order for protection, and she requested that criminal no-contact orders be dropped. Ex. 26; RP at 82, 395. The parenting assessment provider noted that based on what she read in police reports, in conjunction with her interview of J.J., J.J. did not understand the danger posed to the children through her domestic violence relationships. RP at 31, 204, 345, 410. J.J. denied any domestic violence concerns as to her children. Ex. 24 at 4; RP at 78, 382, 384, 395-96. Instead, J.J. characterized her relationship with S.E. as “perfect” even after S.E. came after her with a hatchet. Ex. 27 at 4; RP at 172, 177, 382, 384, 393.

J.J. argues there is no nexus to her ability to parent, but the parenting assessment provider offered uncontroverted testimony that the risk to children raised in a domestic violence environment is long-term trauma. RP at 35. Exposure to domestic violence can affect a child’s physical development, social/emotional development, their ability to learn, and their ability to have healthy relationships in the future. RP at 35-36. It can also affect the way the child relates to the parent in that the child takes on the role of being the protector. RP at 36. The concerns noted were not merely speculative. The provider already observed such a dynamic between J.J. and D.E. RP at 36. D.E. made statements during a visit that “were more to try

to protect his mom and her feelings,” he was overly apologetic, and he tried to take ownership with his sister. Ex. 27 at 8-9; RP at 36.

While D.E., then four and a half years old, took on the role of protector of his mother, J.J. was more concerned with protecting S.E. Ex. 27 at 3, 10; RP at 31, 73, 409. J.J.’s failure to acknowledge S.E.’s domestic violence incidents are evidences that J.J. does not have insight into the concerns that brought her children into care and she does not recognize the seriousness of S.E.’s behavior. RP at 37. As a result, J.J. cannot be protective of her children. RP at 37.

In *In re G.G.*, this Court affirmed a trial court’s termination of parental rights in part because of the parent’s “failure to make appropriate choices and participate in recommended services to address parental deficiencies related to domestic violence trauma that placed her children at risk of harm.” *In re G.G.*, at 830. In a similar case, the Court of Appeals affirmed a trial court’s termination order because of the mother’s “passivity and her inability to protect the children, particularly from KL [the abusive father].” *In re Welfare of L.N.B.-L.*, 157 Wn. App. 215, 254, 237 P.3d 944, 964 (2010). Further, a doctor opined that even if she separated from KL, she could not protect her child’s safety because “she was either unwilling or

unable to use the services to sufficiently improve her ability to raise and protect her children.” Id. at 251.

Similar to *G.G.*, and *L.N.B.-L.*, the focus of the trial court’s finding in this case was not J.J.’s status as a domestic violence victim; rather, it was her failure to acknowledge the domestic violence and her failure to participate in recommended services that rendered her unable to be protective of her children. CP 173 at 2.15; RP at 320; Ex 27 at 10.

J.J. has failed to engage in court ordered services meant to address her domestic violence issues, particularly the Protective Parenting Group, which teaches parents to be protective by prioritizing the children over their relationship. RP at 33. The parenting assessment provider opined that without engaging in services to address the domestic violence issues, J.J. probably intended to continue her relationship with S.E. RP at 37. Without services or even an ability to acknowledge the issues, J.J.’s pattern is to return to a domestic violence relationship. Ex. 27.

The trial court appropriately considered J.J.’s unwillingness to address the impact of domestic violence on her children. This is a highly fact specific inquiry. J.J. does not identify any public policy issue from the fact-specific nature of this case, nor does she identify how these case-

specific issues would affect any other case. J.J. cannot justify discretionary review and thus, this Court should deny her motion.

**V. CONCLUSION**

The trial court afforded J.J. her procedural due process rights where the court held an evidentiary hearing after continuing trial for two months, and based its ruling on competent evidence. Further, the trial court properly found J.J. was unfit based on the facts of this case. J.J. has not demonstrated a basis for review under RAP 13.4(b) and the Department respectfully requests this Court deny the motion for discretionary review.

RESPECTFULLY SUBMITTED this 3<sup>rd</sup> day of February 2020.

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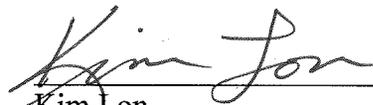
DECLARATION OF SERVICE

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

On February 3, 2020, I caused a true and correct copy of the Response to Motion for Discretionary Review to be filed electronically with the Supreme Court of the State of Washington, and to be served via email through the Court's electronic filing system as indicated below:

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SIGNED in Tacoma, Washington, this 3rd day of February 2020.



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**February 03, 2020 - 11:33 AM**

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**Appellate Court Case Number:** 98043-8  
**Appellate Court Case Title:** In the Matter of the Welfare of D.E., V.E., and M.E., minor children.  
**Superior Court Case Number:** 17-7-02259-8

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