

FILED
Court of Appeals
Division II
State of Washington
1/3/2020 10:08 AM

FILED
SUPREME COURT
STATE OF WASHINGTON
1/3/2020
BY SUSAN L. CARLSON
CLERK

Supreme Court No. 98043-8
Court of Appeals No. 53152-6-II

**IN THE SUPREME COURT
OF THE STATE OF WASHINGTON**

In re the Welfare of

D.E., 7/05/12
V.E., 6/16/15 &
M.E., 3/06/17,

Minor Children.

**MOTION FOR DISCRETIONARY REVIEW
BY THE MOTHER, J.J.**

**ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY
THE HONORABLE ELIZABETH MARTIN, JUDGE**

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I. IDENTITY OF PETITIONER

The mother, J.J., asks this Court to accept review of the Court of Appeals decision terminating review designated in Part II of this motion.

II. COURT OF APPEALS DECISION

The mother seeks review of the decision of the Court of Appeals Commissioner issued on October 8, 2019. A copy of this decision is attached, see App. at 1-27. The Court of Appeals issued an order denying the mother's motion to modify the Commissioner's decision on December 6, 2019. A copy of this decision is attached, see App. at 28.

III. ISSUES PRESENTED FOR REVIEW

1. Should this Court grant review and reverse when the trial court refused to dismiss the termination petitions after the state failed to meet its burden of proof, based on the children's best interests?
2. Should this Court grant review and reverse when the trial court characterized the mother's status as a domestic violence victim as a parental deficiency?

IV. STATEMENT OF THE CASE

J.J. is the mother of three children: seven-year-old D.E., four-year-old V.E., and two-year-old M.E. Ex.s 1, 2, 8. The father of all three children is S.E. *Id.* J.J. loves her children but struggled with poverty, housing insecurity, and transportation issues. RP at 96, 101-02. Her children were found dependent and entered state care. Ex.s 4, 10. In January 2019, the state terminated J.J.'s parental rights. CP 169-76, 409-16, 612-19.

The mother and S.E. had a tumultuous relationship. They met in 2007, when J.J. was 19. RP at 69. J.J. denied that S.E. was violent. RP at 70. However, throughout the case the department received numerous allegations of domestic violence perpetrated by S.E. against J.J. *See, e.g.*, Ex.s 1, 2, 7, 8. In March of 2016, the mother filed a petition for an order of protection against S.E. Ex. 24. The parents reconciled and the mother dropped the petition. RP at 79-81. In August 2016, the state removed D.E. and V.E. Ex.s 1, 2.

Over the next several months, the parents struggled with housing and transportation. In December 2016, the father was arrested for an alleged domestic violence incident. RP at 86. Reportedly, the father swung an axe at the mother, striking her car. RP at 172. The mother denied this allegation at trial. RP at 70.

In March 2017, J.J. gave birth to her youngest child, M.E. Ex. 8. J.J. tested positive for amphetamines when M.E. was born. RP at 119. The mother maintained that this was due to a sinus medication. *Id.* M.E. did not test positive. RP at 144. The state removed M.E. at birth. Ex.s 7, 8.

Throughout the dependency, the department remained concerned about domestic violence by the father against the mother. J.J. denied that the father physically harmed her or the children. RP at 70. However, she

acknowledged that he could be violent at times. RP at 78-79. S.E. threatened and attacked the mother's friends and family members. *Id.*

The mother also testified about an incident in June 2018. RP at 72-73. By that point, the mother had broken up with S.E. and briefly dated another person. *Id.* S.E. attacked the mother and her then-boyfriend in their car, breaking windows and tasing the boyfriend. *Id.* According to the mother, S.E. also poured gasoline over the car. RP at 73. Shortly after this incident, S.E. pled guilty to charges of robbery, malicious mischief, and violating a no-contact order with the mother. Ex. 21. In August 2018, he was sentenced to 60 months confinement, and remained incarcerated throughout the remainder of the dependency. *Id.*

By the time the termination trial started, in November 2018, the mother was no longer in a relationship with the father. RP at 74. She had no contact with him and did not intend to resume the relationship. *Id.* Regardless, the father would not be released from prison for several years. Ex. 21.

During the dependency, the mother was court-ordered to complete the following services: random urinalysis testing, a chemical dependency assessment, and a parenting assessment. RP at 112-13. The department referred the mother to urinalysis testing, a chemical dependency assessment, and a parenting assessment, but the mother struggled with

transportation to services. RP at 101-02, 106-08. She had difficulty getting from her home in Yelm to an agency for urinalysis testing.¹ RP at 119.

Housing and transportation were significant barriers for the mother. Her support system was in Yelm. RP at 139. However, her children and many of her services were in or around Tacoma, WA. RP at 101-02, 120. The department attempted to provide transportation and housing resources, but the options were limited. RP at 96, 20-21. The social worker for most of the dependency, Kyle Wiest, provided the mother with a list of phone numbers to call for various housing resources. RP at 215-16. He did not sit down with her and help her navigate this complicated process. RP at 260-62.

Despite these struggles, the mother did engage in some services. She completed a chemical dependency assessment in March 2017. RP at 117. The parties agree that this assessment recommended no further services. RP at 117, 199. However, at trial the department disputed the results of this assessment because the social worker never provided collateral information to the agency. RP at 119, 243. The department did

¹ The mother also refused to provide a urinalysis sample at a meeting with the department in October 2017. RP at 366. J.J. testified that she did not believe she was obligated to provide one by court order and she was concerned that it would test positive for her sinus medication. RP at 382.

not keep a copy of the mother's chemical dependency assessment, so this document was not available at trial. RP at 308-09, 351.

The mother also completed a parenting assessment in March 2017. Ex. 27. Josette Parker conducted the mother's assessment. *Id.* It was not favorable. *Id.* According to Ms. Parker, the mother's parental deficiencies included "not being able to create a safe and nurturing environment free from violence" and not being employed. RP at 32.

Ms. Parker repeatedly faulted the mother for not holding the father "accountable" for the abuse he perpetrated against her. RP at 31, 32, 35, 57. She believed this was a deficiency even though S.E. was incarcerated for several years because J.J. could hypothetically be abused by another partner. RP at 57-58. Ms. Parker opined about the detrimental effects to children from witnessing domestic violence. RP at 35-36. She recommended the mother engage in protective parenting group, a domestic violence support group, and individual counseling. Ex. 27 at 12. The department referred the mother to these services at Ms. Parker's agency, in University Place, WA. Ex. 27 at 1; RP at 40. The mother had transportation issues and did not participate. RP at 41.

The department never referred the mother to domestic violence services closer to where she resided. RP at 227. At trial, the social worker, Mr. Wiest, testified that these services were not available in Thurston

County. *Id.* The court did not find this testimony credible. CP 172 at section 2.9.7.

During her parenting assessment in March 2017, the mother also disclosed a history of mental illness. Ex. 27 at 5. Ms. Parker recommended that the mother engage in mental health services and medication management. *Id.* at 12. The department did not follow up on Ms. Parker's recommendations. RP at 205-07. From March 2017 until the termination trial in November 2018, the department did not refer the mother to mental health services. RP at 205-07, 334-35.

In August 2018, the department social worker, Ashton Dart, re-referred the mother to urinalysis testing, as well as the domestic violence services provided by Ms. Parker. RP at 43, 334, 338. The mother participated in two urinalysis tests in August 2018. RP at 338-39, 341. She had notice of the first test, which was negative. RP at 338-39. The second test was dilute. RP at 339, 341. Unfortunately, in late August 2018, the mother's car broke down again and she was not able to continue services. RP at 129-30.

The social worker, Ms. Dart, and the Court Appointed Special Advocate (CASA) for the children, Erika Thompson, both recommended termination of the mother's parental rights. RP at 350, 370. They testified that the mother had not corrected her deficiencies during the dependency.

RP at 345-47, 352, 370. They also testified that the children were placed in a pre-adoptive foster home and should be adopted by this placement. RP at 348, 350, 370, 375.

On November 16, 2018, the trial court issued an oral ruling. RP at 427. The court expressed concern about the services offered to address the mother's alleged chemical dependency issues. RP at 428-30. The court noted that the mother had difficulty getting transportation to urinalysis testing, but it was unclear why this service was required in the first place. RP at 429. The court was also concerned about the lack of mental health services provided to the mother after her parenting assessment recommended these services. RP at 430.

After weighing these concerns, the trial court judge concluded, "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 [her deficiencies] within the immediate future." RP at 431. However, the judge went on to clarify that she was not "willing to dismiss this petition because I think there are a lot of issues." *Id.* The court ordered "that this matter be continued without findings." *Id.*

The court ordered a short continuance, to January 2019. RP at 432. The court explicitly connected the length of this continuance to the

children's best interests, stating, "permanency is in these children's best interest, and that's why I need to keep this on a relatively short timeline." RP at 434.

In addition to continuing the termination trial, the court ordered additional services for the mother. RP at 432-33. The court directed the department to investigate services in Thurston County. *Id.* The court also ordered the mother to provide a urinalysis sample that day. RP at 334-35. The court set another hearing for November 29, 2018, to assess the need for additional services. RP at 442, 449.

The mother participated in the urinalysis test ordered by the court. RP at 457. This test was positive for methamphetamines and amphetamines. RP at 457-58. The mother maintained that this resulted from her sinus medication, but the court did not find this credible. RP at 670; CP 171 at section 2.9.2.

The parties returned to court on November 29, 2018. RP at 456. At that time, the court entered a detailed order outlining services for the mother. CP at 110-11. The court ordered urinalysis testing, a chemical dependency assessment, protective parenting group, a psychological evaluation, individual counseling, and medication management. *Id.* The department refused to pay for the mother's chemical dependency assessment or mental health services. RP at 458, 473. Instead, the

department maintained that the mother needed health insurance in order to access these services. *Id.* The court emphasized that the mother needed to be “diligent” about getting insurance and accessing services because “we have children who are in foster care and in a preadopt home and are stable.” RP at 466-67.

The court held a status hearing on January 15, 2019. RP at 494. The department argued that the mother had not sufficiently engaged in services and asked to reopen the termination trial. RP at 496, 500. The mother’s attorney disputed the department’s version of the facts. RP at 497, 501-02. The court decided to reopen the termination trial and set a date for January 30, 2019. RP at 505. The court reiterated that the case was on a “fairly tight time frame.” RP at 504.

The termination trial resumed on January 30, 2019. RP at 510. The court specified that it reopened the case to “look at whether we proceed to final findings in this case or whether we continue it further.” RP at 514. At the resumed trial, the court heard evidence about the mother’s mental health and about her services since November 2018.

From November 2018 to January 2019, the mother participated in some services and visits. She attended a meeting for protective parenting group but missed two other meetings. RP at 535-36. She did not participate in urinalysis testing. RP at 629-30. The mother tried to schedule a

psychological evaluation but missed some appointments. RP at 591, 592-93. She rescheduled this evaluation for February 2019. RP at 604. The mother also attempted to get health insurance but could not get insurance over this short span of time. RP at 654-55. She could not participate in a chemical dependency evaluation or mental health services without insurance. RP at 458, 473.

At the conclusion of trial, the court granted the state's petition and terminated the mother's parental rights. CP 169-76, 409-16, 612-19. J.J. appealed. CP 229. On October 8, 2019, a Commissioner of the Court of Appeals upheld the termination orders. App. at 1-27. J.J. filed a motion to modify the Commissioner's ruling. App. at 28. The Court of Appeals denied her motion on December 6, 2019. *Id.* The mother seeks review.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The mother, J.J., respectfully requests that the Washington Supreme Court grant review and reverse the Court of Appeals. This Court grants review under four circumstances:

- (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
- (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or
- (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
- (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b). Here, this Court should grant review pursuant to subsections (1), (3), and (4).

A. The Trial Court Violated the Mother’s Right to Due Process.

Review is appropriate pursuant to RAP 13.4(b)(3) because the trial court violated the mother’s due process rights. The court refused to dismiss the termination petitions even after finding that the state failed to meet its burden of proof. Review is also appropriate pursuant to RAP 13.4(b)(1) because the trial court expressly considered the children’s best interests in the middle of a termination trial, contrary to this Court’s decision in *In re Welfare of A.B. (A.B. I)*, 168 Wn.2d 908, 911, 232 P.3d 1104 (2010). The Court of Appeals Commissioner erred by concluding that the trial court’s practices were consistent with due process.

1. The trial court violated the mother’s due process rights by refusing to dismiss the termination petitions when the state failed to meet its burden of proof.

Parents have “a fundamental civil right” to control and custody of their children. *In re Dependency of K.N.J.*, 171 Wn.2d 568, 574, 257 P.3d 522 (2011). For this reason, “[p]rocedures used to terminate the relationship between parent and child must meet the requisites of the due process clause of the Fourteenth Amendment to the United States Constitution.” *Id.* Due process is not diminished just because the state has temporary custody of a child. *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S.Ct. 1388 (1982). “If

anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs.” *Id.*

Here, the procedures at trial violated due process. The trial court orally found that the state failed to meet its burden of proof, stating “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 [her deficiencies] within the immediate future.” RP at 431. However, the court was not “willing to dismiss this [termination] petition because I think there are a lot of issues.” *Id.* The court ordered “that this matter be continued without findings.” *Id.*

In other words, the trial court orally ruled that the state failed to meet its burden of proof but then *intentionally held off on entering written findings* in order to give the state more time to meet its burden. RP at 431. The court stated its intention to continue the termination trial indefinitely until the state met its burden, positing the outcome as “whether we proceed to final findings in this case or whether we continue it further.” RP at 514. This amounts to a decision that the state will never lose a termination trial because if it presents insufficient evidence, the court will continue the case until the state wins.

In his Ruling, the Court of Appeals Commissioner does not disagree with this characterization but concludes that this procedure satisfies due process. App. at 25. According to the Commissioner, the trial court's "refusal to dismiss the termination petitions after finding the State had not yet satisfied its burden was a means of ensuring J.J.'s due process rights were protected and that it had the opportunity to consider all relevant evidence." *Id.* The Commissioner added, "The juvenile court should not be punished for carefully considering the evidence presented and determining it was inadequate to come to a decision." *Id.*

The Commissioner and the trial court both erred by refusing to hold the state to its burden of proof. If the state has "not yet satisfied its burden," then the state has failed to meet its burden and the remedy is dismissal. The juvenile court should not have the discretion to "consider[] the evidence presented," determine that the state has "not yet satisfied its burden," and then continue the termination trial indefinitely until the state produces sufficient evidence. If the state's evidence was "inadequate," the remedy must be dismissal, not more time to produce adequate evidence.

The Commissioner's Ruling sets a dangerous precedent for cases involving coercive state action. When the state bears the burden of proof and fails to meet that burden, the remedy must be dismissal. To hold otherwise means that the state can never lose a termination trial; it will

instead be given additional time to meet its burden. This Court should grant review and reverse because the procedures in this case violated due process. *See* RAP 13.4(b)(3).

2. The trial court violated the mother’s due process rights by considering the children’s best interests in the middle of a termination trial.

During a termination trial, the superior court can only consider the children’s best interests *after* finding that the state met its burden of proof under RCW 13.34.180(1). RCW 13.34.190(1); *A.B. I*, 168 Wn.2d at 911. This two-step process is enshrined in Washington law and rooted in due process. *A.B. I*, 168 Wn.2d at 925-26 (citing *Kramer*, 455 U.S. at 759-60).

Parents have a due process right to adjudication of their fitness before courts evaluate the children’s best interests. *Id.* The Washington Supreme Court was clear in *A.B. I*:

. . . [W]hen 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.

Id. at 925. The Court added that it is “premature for the trial court to address the second step before it has resolved the first.” *Id.*

Here, the trial court expressly considered the children’s best interests before finding the mother unfit and before finding that the state met its burden of proving RCW 13.34.180(1). The court found that the state

failed to meet its burden of proof under RCW 13.34.180(1) but refused to “dismiss this petition” and ordered “that this matter be continued without findings.” RP at 431. The court found that “permanency is in these children’s best interest, and that’s why I need to keep this on a relatively short timeline.” RP at 434. The court weighed the mother’s access to services against the children’s best interests, stating that the mother “could have secured Medicaid” and accessed services “had she been diligent,” and “in the meantime, we have children who are in foster care and in a preadopt home and are stable.” RP at 466-67. The court decided to resume trial because it found that “we have got children whose permanency is at issue.” RP at 498.

In short, the trial court guided the outcome of this termination trial based on the children’s best interests, violating due process. *A.B. I*, 168 Wn.2d at 925. The Court of Appeals Commissioner’s Ruling excuses the trial court, reasoning that “[e]nsuring the children’s best interests is an overarching goal of a termination proceeding.” App. at 26. The Commissioner elaborated: “In keeping the continuance short in consideration of the best interests of the children, the juvenile court did not violate J.J.’s substantive due process rights, but rather, appropriately weighed J.J.’s interests in an additional opportunity to engage in services against the children’s right to a speedy resolution.” *Id.*

The Commissioner erred because it was inappropriate and unconstitutional of the trial court to “weigh” the due process rights of the mother against the best interests of the children. During a termination trial, the court can only consider the children’s best interests after determining that a parent is unfit. *A.B. I*, 168 Wn.2d at 925. This sequence is mandated by statute and due process, but it did not occur in this case. *Id.*; RCW 13.34.190(1). The superior court considered the children’s best interests in the middle of a termination trial, violating the mother’s due process rights. This Court should and reverse this manifest constitutional error. *See* RAP 13.4(b)(1).

B. The Trial Court Erred by Finding that the Mother’s Status as a Victim of Domestic Violence was a Parental Deficiency.

Review is also appropriate pursuant to RAP 13.4(b)(4). The trial court in this case found that the mother’s “parental deficiencies include domestic violence issues.” CP 173 at section 2.15. When and how the state terminates the parental rights of a victim of domestic violence is an issue of substantial public interest that should be determined by this Court. *See* RAP 13.4(b)(4).

During trial, the mother denied that the father was abusive. RP at 70, 78, 462-63. However, even if true, domestic violence must be held against the perpetrator, not the victim. The trial court erred because a

parent's status as a victim of domestic violence is not a parental deficiency. See *In re Dependency of D.L.B.*, 186 Wn.2d 103, 124, 376 P.3d 1099 (2016).

Victims of domestic violence are not to blame for abuse committed against them. See, e.g., *Nicholson v. Williams*, 203 F. Supp. 2d 153, 252 (E.D.N.Y. 2002), *vacated by, in part, remanded by Nicholson v. Scoppetla*, 116 Fed. Appx. 313, 316 (2nd Cir. 2004). "It desecrates fundamental precepts of justice to blame a crime on the victim." *Id.* Reflecting this principle, Washington law recognizes that "[p]overty, homelessness, or ***exposure to domestic violence*** as defined in RCW 26.50.010 that is perpetrated against someone other than the child does not constitute negligent treatment or maltreatment in and of itself." RCW 26.44.020(16) (emphasis added).

In this case, the department maintained that the father perpetrated domestic violence against the mother. See Ex.s 1, 2, 7, 8. Despite this, the state's witnesses blamed the mother for the father's actions. Josette Parker, who completed the mother's parenting assessment, testified repeatedly that the mother did not hold the father "accountable" for his behavior. RP at 31, 32, 35, 57. Kyle Wiest, a department social worker, blamed the mother for "putting herself in" a domestic violence relationship. RP at 242. Ashton Dart, the current social worker, agreed that "domestic violence" was a

parental deficiency for the mother. RP at 352. Amy Bielefeld, the social worker supervisor, described the mother's deficiencies to include "domestic violence" and a "lack of insight" into the ramifications of her "actions and decisions." RP at 304.

The Court of Appeals Commissioner's Ruling perpetuated this victim blaming. In his recitation of the facts, the Commissioner erroneously stated that there was a "no-contact order between J.J. and S.E." and "S.E. and J.J. repeatedly violated the no-contact order within the first couple of months while S.E. was in and out of jail." App. at 3. This is incorrect. There was not a no-contact order "between" the parents; there was a no-contact order prohibiting the father, S.E., from contacting the mother, J.J. Ex. 18. J.J. and S.E. did not both "repeatedly violate" this no-contact order; J.J. was not restrained by the order, she was the protected party. S.E., the perpetrator, violated the no-contact order. The Commissioner's factual recitation erroneously places the burden of preventing domestic violence on the victim of this crime.

The Commissioner also erred by concluding that the mother's "unwillingness or inability to acknowledge her own status as a domestic violence victim, engage in helpful services, and the possibility she would not be willing or able to protect her children" amounted to parental unfitness. App. at 22. The Commissioner failed to address RCW

26.44.020. As explained above, exposure to domestic violence, perpetrated against someone other than the child, is not child abuse or neglect. RCW 26.44.020(16). The Commissioner correctly noted that Ms. Parker testified about hypothetical detrimental effects to children from witnessing domestic violence. RP at 35-36. However, those effects result from the abuser's violent actions against the victim. It violates public policy, due process, and RCW 26.44.020(16) to hold the abuser's actions against the victim. This Court should grant review and reverse. RAP 13.4(b)(4).

VI. CONCLUSION

J.J., the mother, respectfully requests that the Washington Supreme Court grant review pursuant to RAP 13.4(b)(1), (3), and (4) and reverse the Court of Appeals decision upholding the orders terminating her parental rights.

RESPECTFULLY SUBMITTED this 3rd day of January, 2020.



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VII. APPENDIX

Court of Appeals Commissioner Ruling Affirming Orders
Terminating Parental Rights
Oct 8, 2019.....1-27

Court of Appeals Order Denying Motion to Modify
Commissioner’s Order
Dec 6, 201928

failed to prove (1) it offered or provided her all necessary services reasonably available and capable of correcting her parenting deficiencies in the foreseeable future, (2) there is little likelihood she can parent in the near future, and (3) that she is an unfit parent. She also argues that the juvenile court violated her due process rights. This court considered J.J.'s appeal on an accelerated basis under RAP 18.13A and affirms the juvenile court.

FACTS

In August 2016, law enforcement removed D.E. and V.E. from J.J. and S.E.'s care due to the deplorable condition of their home and reports of substance abuse and domestic violence. The trailer where J.J. and S.E. lived with their children was full of garbage. J.J. and S.E. had stacked filthy dishes in the sink and left spoiled food out. The trailer lacked edible food, water, and sanitation.

The Department assigned Kyle Wiest, a former social worker for the Children's Administration, to this case from November 2016 through June 2018. He identified J.J.'s parental deficiencies as substance abuse, domestic violence, and lack of parenting knowledge. He was also concerned about J.J.'s ability to provide for the children, as she did not have a job or stable housing. In November 2016, J.J. entered an agreed order of dependency as to D.E. and V.E. She agreed to complete random urinalyses (UAs), a drug and alcohol evaluation, and parenting assessment. At the first review hearing, the dependency court amended the order to include parent coaching.

Wiest primarily communicated with J.J. through text messages and phone calls. He explained contact with J.J. was sporadic, because she often ignored his questions concerning services and referrals. He most often heard from her concerning visitation arrangement.

In December 2016, Camm Clark, a Thurston County Sheriff's Deputy, responded to a disturbance in Yelm involving J.J. and her children's father, S.E. When Deputy Clark arrived to the scene, J.J. reported that S.E. had swung an ax at her and her car, causing damage to the vehicle. Officer Clark observed the damage and said it looked like someone hit it with a blunt object. While he did not search J.J. and S.E.'s residence, when the door was open, Deputy Clark noticed a white hatchet on the floor of the residence with white paint on it. J.J.'s vehicle was white. He also described the condition of the home as deplorable.

As a result of the ax incident, a trial court imposed a no-contact order between J.J. and S.E. However, J.J. told Wiest after the incident that she wanted to remain in a relationship with S.E. S.E. and J.J. repeatedly violated the no-contact order within the first couple of months while S.E. was in and out of jail.

Wiest expressed concern at J.J.'s desire to continue a relationship with a violent man. J.J. seemed unwilling to recognize the unhealthiness of the relationship and Wiest opined even if she broke up with S.E., her nonchalant attitude towards domestic violence did not bode well for future relationships. While a trial court recently sentenced S.E. to several years in prison, Wiest remained concerned J.J. would enter into another relationship with an abuser.

In March 2017, J.J. gave birth to M.E. The Department removed M.E. within a few days of her birth because J.J. tested positive for amphetamine when M.E. was born, and had not yet addressed her substance abuse or domestic violence issues. M.E. did not test positive for any substances. Two months later, in May 2017, J.J. entered an agreed

order of dependency as to M.E. reflecting the need for the same services as agreed to in the previous dependency orders.

Around the time of M.E.'s birth, Wiest had a discussion with J.J. regarding her medication. J.J. stated her psychiatrist had prescribed her painkillers for her back along with antidepressants. Wiest requested documentation for the prescriptions, but J.J. did not provide any.

In March 2017, after M.E. was born, J.J. completed a drug and alcohol evaluation at Prosperity Wellness, which did not recommend further services. Wiest explained he found the results unreliable because the provider did not have any collateral information from the Department and the evaluation was based entirely on J.J.'s self-report. However, Wiest never provided Prosperity Wellness with the collateral information in his possession or requested an updated report.

Also in March 2017, Josette Parker, a therapist at Advantages Plus Counseling, conducted a parenting assessment of J.J.³ Aside from conducting the in-person consultation, Parker observed J.J. interacting with all three children during visitation for approximately an hour. Parker identified J.J.'s parental deficiencies as being unable to create a safe, nurturing, violence-free environment for her children, and relatedly, her unwavering commitment to S.E. despite his abusive behavior. Parker recommended J.J. participate in individual counseling, a protective parenting group, and a domestic violence

³ The Department sent its original referral in October 2016. The five-month delay was the result of J.J.'s failure to respond to numerous calls from the office and cancelling appointments.

support group. Parker also recommended J.J. follow up with her psychiatrist and medical doctors to address any ongoing medication needs.

Parker's "[r]eserved" her recommendation regarding reunification because of J.J.'s relationship with S.E. Report of Proceedings (RP) Nov. 6, 2018 at 34. Despite being a reported victim of domestic violence, J.J. described her relationship with S.E. to Parker as "perfect." RP Nov. 6, 2018 at 26. She denied he had any violence or substance abuse issues. Consequently, Parker opined J.J. could not protect her children if returned to her care because she did not recognize danger of her relationship with S.E. and how it impacted them. She explained children regularly exposed to domestic violence are at risk of long term trauma affecting their development, ability to learn, and chance at a healthy future. Further, Parker reported that J.J. did not have any insight into the reasons law enforcement removed her children or the Department's ongoing concerns. She blamed the condition of the trailer she was living in at the time law enforcement removed the children on the landlord acting in retaliation.

Towards the beginning of the dependency, J.J.'s visitation with her children occurred twice a week for two hours. According the Wiest, J.J.'s visitation attendance was generally inconsistent. When she did show up she was between 10 and 40 minutes late, and there were multiple no shows.

Around March 2017, when Parker observed visitation, the visitation agency began requiring J.J. to confirm her attendance ahead of time because she was late or no-showing often, and the transporters did not want to take the kids all the way to the South Hill Mall or Yelm if J.J. was not going to show up. Parker noted that J.J. was 15 minutes late to the visit she observed, and that J.J. was unprepared for the visit. To accommodate

J.J. and her transportation difficulties, the dependency court adjusted visitation to once a week for four hours. J.J. was more consistent in her visitation attendance after the change. It later adjusted J.J.'s visitation again, splitting it into two sessions so J.J. could have time alone with D.E., her eldest. Since August of 2018, of 18 visits, J.J. was late to 14.

According to Wiest, the Department offered J.J. various resources to assist with transportation issues, and encourage service engagement and visitation attendance. These resources included bus passes, an Orca card, a bicycle, and gas cards. Wiest also obtained an Intercity Transit card for J.J., but was never able to give it to her because she would not respond to his requests to meet or pick it up. At one point during the dependency, J.J. told Wiest her car needed repairs and the Department considered assisting J.J. in paying for her car repairs. Wiest requested J.J. provide the Department with an estimate from a reputable auto repair shop. J.J. did not provide an estimate, and told Wiest she was going to have a friend to the repair work for her. When asked if Wiest looked into whether protective parenting group or individual counseling service providers were available to J.J. in Thurston County, he stated that based on a conversation with a Thurston County Social worker, he did not believe they existed.

In November 2017, the Department referred J.J. to Personal Horizons, a domestic violence support group run by Parker. Parker called J.J. twice, but did not receive a response, and closed the referral. Six months later, in May 2018, Parker received a second referral for Personal Horizons from the Department, and first referrals for individual counseling and protective parenting. The Department and Parker arranged an opportunity for J.J. to complete all three of her recommended services on the same day

in the same location, back-to-back to minimize transportation obstacles. On the day in question, May 31, 2018, J.J. did not appear and did not contact Parker. Parker texted J.J. that day and the following day, but J.J. did not respond. Parker and the protective parenting class coordinator made a few other attempts through June to contact J.J. to no avail.

J.J. also failed to consistently provide UAs to the Department. She told Wiest the primary reason she did not attend her UA appointments was because of transportation unavailability. She was also adamant that she did not need UAs and that she did not have a substance abuse problem. J.J. missed 10 to 12 UAs while Wiest worked with her during the dependency.

In June 2018, S.E. was released from prison briefly. He and J.J. reconnected, which led to an altercation in which S.E. poured gasoline on J.J.'s car, smashed in her windows, cut the wires of her car, and attempted to tase her boyfriend. 3RP at 361. J.J. denied he poured gasoline on her car; she said it "spilled." RP Nov. 6, 2018 at 73. She admitted S.E. broke her car windows and tased her boyfriend, but described the actions as "extremely out of [S.E.'s] character." RP Nov. 6, 2018 at 73.

In August 2018, the parties met for a settlement conference and entered an order amending the service plan. J.J. again agreed to engage in the Department's recommended services on the same day in the same location. Parker made another round of referrals: the third for Personal Horizons, and the second for individual counseling and the protective parenting group. Parker closed the referrals in early September due to J.J.'s lack of contact and a resulting inability to schedule the services.

On September 10, J.J. texted Parker asking for opportunity to engage in services as she continued to struggle with transportation. Parker informed J.J. that she had closed the referrals, and J.J. responded that she did not need any of the services Parker recommended anyway.

J.J. expressed to Wiest that she believed her only issue was housing. Wiest explained to J.J. multiple times that was inaccurate, but she did not change her mind. Wiest explained that while housing was a concern, it was not the primary barrier to J.J.'s reunification with her children. But housing instability, was, in fact, an ongoing problem for J.J. Her one period of stable housing occurred when she lived with her stepfather a few months in early 2017. However, J.J.'s stepfather kicked her out in April 2017 because he believed she stole money from him and requested a no-contact order against her.

To assist with housing instability throughout the dependency, Wiest provided J.J. with resources in the Pierce County area, including contact information for domestic violence shelters, Access Point for housing, Pierce County Housing Authority, and Tacoma Housing Authority, among others. He communicated with her regarding these options through text and e-mail. During a family team decision meeting Wiest sat down with J.J. and went over the housing resources he provided with her. J.J. told Wiest she had contacted the agencies listed and that they were full. He suggested looking into domestic violence shelters or sober living houses and she stated she did not want to live in either. Because of her refusal to pursue those options, the dependency court eventually ordered J.J. to "look into housing more locally including clean and sober housing or [domestic violence] housing." RP Nov. 7, 2018 at 219. The dependency court also ordered the Department to refer J.J. for a family reunification program (FUP)

voucher. Wiest put J.J. on the waiting list for the voucher. J.J.'s turn to apply came around the end of May 2018. Wiest subsequently met J.J. in Yelm to provide her with the application. J.J. claims she filled it out and gave it to a visit supervisor at Olive Crest. Wiest asked the visit supervisor if he or she received the application and he or she said no.

Wiest opined that while he worked with J.J., she did not make any progress in correcting her parental deficiencies. She continued to deny any domestic violence occurred. She did not demonstrate her sobriety for any stretch of time and did not cooperate with housing assistance. The dependency court had found J.J. to be in partial compliance during one review hearing, but the court never found she made any progress.

Amy Bielefeld, a social worker supervisor, oversaw Wiest as his case supervisor beginning in mid-February of 2018. She individually worked the case for a month in July 2018 after Wiest left the Department and before Ashton Dart took over in August 2018. 3RP at 298. Bielefeld identified J.J.'s parental deficiencies as unaddressed substance abuse, overall instability, domestic violence, and a lack of insight into the ramifications of her decisions on her children. Bielefeld was aware of J.J.'s transportation issues and like Wiest, offered J.J. bus passes for Pierce and Thurston Counties, and a bicycle, but J.J. did not want any the offered resources. During her month on the case, Bielefeld received J.J.'s FUP voucher application, but notified J.J. that it was incomplete and she would not qualify. Because J.J. never submitted additional paperwork needed, the Department never submitted her application. Bielefeld opined it was unlikely J.J. could address the Department's basic concerns in a reasonable amount of time. She believed reunification

would take at least nine to twelve months. Although J.J. would agree to complete services, she nearly always failed to follow through.

Dart began working with J.J. in August 2018. Her UA on August 10, 2018 was negative. J.J.'s second UA from August 17 was also negative, but appeared diluted, which the Department construes as positive.

Dart was aware of J.J.'s housing and transportation struggles. Regarding housing, Dart provided J.J. with a flyer for the Pierce County Housing Authority that contained a link to its new subsidized housing program and recommended J.J. apply. Regarding transportation, Dart testified that at the August 2018 settlement conference, J.J. reported transportation was no longer an issue. J.J. specifically stated she obtained her license and fixed her car so she would be able to attend services.

Dart opined J.J. had not made any progress towards correcting her parental deficiencies during Dart's time on the case. Despite multiple conversations with J.J. about the necessity of services, J.J. would not follow through. As of the termination trial, J.J. had only engaged in a parenting assessment, and refused to acknowledge any of the Department's concerns. J.J. has also been unable to stabilize her own life or prove she could provide stability for her children. She believed it would take anywhere from nine to twelve months for J.J. to address her parental deficiencies and be a stable parenting resource if J.J. complied with the Department's recommendations.

Erika Thompson began working as the CASA for the children in March 2017. Her contact with J.J. throughout the case was intermittent. She noticed a pattern in that J.J. would become more communicative when visitation was approaching. Thompson would often text J.J. updates or information, but would not receive a response until it was time

for J.J.'s visitation with her children. At an October 2017 meeting in Lakewood, Thompson and J.J. were discussing transportation issues, and those present offered to refer her to a UA that day to save her a trip. J.J. refused. S.E.'s sister Shyla attended the same meeting and offered to assist in transporting J.J. to any visits and appointments needed. Shyla stated she was the manager at Domino's and could make her own schedule, meaning she could be at J.J.'s disposal. She also offered to help get J.J. a job at Dominos. To help facilitate J.J.'s engagement, Thompson requested an Office of Public Defense (OPD) worker for J.J., and the dependency court assigned Brenda Lopez. Brenda Lopez secured an intake appointment at Sophie House for J.J., but J.J. did not show for the appointment.

Thompson believes termination is in the children's best interests because J.J. has not made any progress towards rectifying her parental deficiencies. She opined the children all need permanency and consistency.

On November 1, 2018, the juvenile court concluded it could not make findings by clear, cogent and convincing evidence that all necessary services were offered or that there is no reasonable likelihood of J.J.'s correcting them within the immediate future. The juvenile court did not find J.J.'s testimony credible, but it also noted weaknesses in the Department's case. It mentioned the Department did not trust the accuracy of J.J.'s chemical dependency assessment result, but did not make an effort to provide the agency with collateral information at the time the assessment was completed. The juvenile court also observed it was unclear why the Department kept requesting UAs when the chemical dependency assessment did not recommend further services. Additionally, it did not find

Wiest's statement that there were not comparable services offered in Thurston County credible.

The juvenile court also took issue with the confusion concerning J.J.'s alleged mental health problems and related services. Despite Parker's recommendations that J.J. participate in individual counseling and resume medication management, those services had been lined out on the dependency court's order. Yet a service letter that went out in May 2018 included mental health services. Wiest had testified the Department crossed out those services because their inclusion was a clerical error.

The juvenile court was simultaneously unwilling to dismiss the termination petition because J.J. continued to suffer parental deficiencies:

And so my solution and what I am ordering is that this matter be continued without findings by the Court at this moment and that we immediately start to address where I find there to be deficiencies in what has been offered and what mother needs to do.

In not terminating your children this morning, [J.J.], I want you to know that I think you have some work to do. And what I am inclined to do is to continue this just until the end of January or sometime in February and give the Department an opportunity to work with [J.J.], but, [J.J.], you really need to step it up.

...
... If we can see significant progress from [J.J.] that leads the Court to conclude that there is a likelihood that we could be reunified, then we can move forward. But if that--if I don't see that within a fairly short time frame and the Department immediately addresses the deficient areas that I have identified, then I think termination will be appropriate at that point, but not today.

4RP at 431-34. The juvenile court ordered J.J. to complete a UA that day in an attempt to determine whether substance abuse was a problem.

The juvenile court reconvened on November 29, 2018. The results of J.J.'s UA came back positive for methamphetamine. J.J. later testified that her positive

methamphetamine result was impossible. The juvenile court ordered J.J. to go to SeaMar for medication management and to complete a chemical dependency assessment within 30 days. Dart then helped J.J. fill out a Medicaid application so she could afford a psychological evaluation.

The juvenile court reconvened again for a status hearing on January 15, 2019. The juvenile court reiterated the parties were on a short timeline because the children's permanency was at issue. The Department reported J.J. had not participated in any services from the juvenile court's November 2018 order. J.J. countered that despite faxing her insurance application to SeaMar, the agency reported it never received the fax, preventing J.J. from accessing services. The juvenile court decided it was going to reopen the termination trial.

On January 30, 2019, the juvenile court reconvened the termination trial. A number of witnesses testified to the Department's efforts at engaging J.J. in services. Mary Meigs-Heino testified about her attempts at scheduling a psychological evaluation for J.J. with Dr. O'Leary and J.J.'s failure to attend. Dart provided J.J. with bus tickets and Visa gift card to assist her in getting to her psychological evaluation. Samantha Asbjornsen, the Protective Parenting Group (PPG) Coordinator for Clarity Counseling, testified that J.J. attended one PPG session on January 14, 2019, but did not attend additional sessions. Thompson took the stand again and testified that there has been little improvement since the parties continued trial two months ago. She believed it was unfair to the children to keep them languishing without a decision. She was particularly worried about D.E. because he was old enough to recognize the uncertainty of his situation. At the conclusion of trial the juvenile court entered an oral ruling finding the

Department met its burden under RCW 13.34.180(1) by clear cogent and convincing evidence and termination of J.J.'s parental rights was in the best interests of the children. The court entered its written findings of fact, conclusions of law and orders terminating J.J.'s parental rights, from which she appeals.

ANALYSIS

The juvenile court may order termination of a parent's rights as to his or her child if the Department establishes the six elements in RCW 13.34.180(1)(a) through (f) by clear, cogent, and convincing evidence. RCW 13.34.190(1)(a)(i). Clear, cogent and convincing evidence exists when the ultimate fact at issue is shown to be "highly probable." *In re the Welfare of Sego*, 82 Wn.2d 736, 739, 513 P.2d 831 (1973) (quoting *Supove v. Densmoor*, 225 Or. 365, 372, 358 P.2d 510 (1961)). The Department also must prove by a preponderance of the evidence that termination of parental rights is in the child's best interests. RCW 13.34.190(1)(b).

Because the juvenile court has the advantage of observing the witnesses, deference to the court is particularly important in termination proceedings. *In re the Welfare of Aschauer*, 93 Wn.2d 689, 695, 611 P.2d 1245 (1980); *In re Dependency of K.R.*, 128 Wn.2d 129, 144, 904 P.2d 1132 (1995). This court limits its analysis to whether substantial evidence supports the juvenile court's findings. *Sego*, 82 Wn.2d at 739. Substantial evidence is evidence sufficient to persuade a fair-minded rational person of the truth of the declared premise. *Bering v. SHARE*, 106 Wn.2d 212, 220, 721 P.2d 918 (1986), *cert. dismissed*, 479 U.S. 1050 (1987). This court does not review credibility determinations or weigh the evidence. *Sego*, 82 Wn.2d at 739-40.

At trial, J.J. stipulated that RCW 13.34.180(1)(a) through (c) were met. J.J. argues the trial court erred: (1) by finding the Department provided all necessary services under RCW 13.34.180(1)(d); (2) by finding there is little likelihood she can parent in the near future, and under RCW 13.34.180(1)(e); (3) by finding J.J. is an unfit parent under RCW 13.34.020; and (4) because the juvenile court violated her due process by continuing the termination trial rather than dismissing the termination petitions when it concluded it could not make findings.

Necessary Services

Under RCW 13.34.180(1)(d), the Department must prove “[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.” In determining whether the Department met its burden, the juvenile court may consider “any service received, from whatever source, bearing on the potential correction of parental deficiencies.” *In re Dependency of D.A.*, 124 Wn. App. 644, 651-52, 102 P.3d 847 (2004), *review denied*, 154 Wn.2d 1030 (2005).

The Department, however, does not have to provide services when the parent is unable or unwilling to make use of them. *In re Dependency of Ramquist*, 52 Wn. App. 854, 861, 765 P.2d 30 (1988), *review denied*, 112 Wn.2d 1006 (1989). And even if the Department “inexcusably fails” to offer services to a willing parent, termination is still appropriate if the services “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 the Welfare of Hall*, 99 Wn.2d 842, 850-51, 1245 (1983).

With respect to services, J.J. challenges the following Findings of Fact:

2.9 The services ordered pursuant to the aforesaid dependency orders have been expressly and understandably offered or provided to [J.J.], including: random urinalysis testing, a drug and alcohol assessment, a parenting assessment and all services recommended by the assessment, a domestic violence support group, individual counseling, the Parent Protection Group, a psychological evaluation, and medication management.

2.9.4 [J.J.]'s testimony regarding going online and determining she was not eligible for health insurance is not credible. Insurance was not an impediment to accessing services.

2.10 [J.J.] has failed to effectively avail herself of the services ordered pursuant to the aforesaid dependency orders. During the entire time period relevant to these proceedings, the aforementioned services were available if [J.J.] had chosen to avail herself of such services.

2.11 All services reasonably available, capable of correcting the parental deficiencies within the foreseeable future have been offered or provided.

Clerk's Papers (CP) at 171-73.

J.J. challenges the juvenile court's November 2018 order that J.J. participate in services despite being uninsured in addition to its finding that lack of insurance was not an impediment to service access.⁴ However, even without insurance, J.J. had the opportunity to engage in multiple services and generally failed to do so. Most notably, the Department twice attempted to arrange with Parker for three of J.J.'s services to be scheduled back-to-back one day a week so that J.J. only needed to coordinate one trip per week. J.J. failed to appear for the first set of appointments and did not respond to requests to set up a second set of appointments. J.J. attributed her absences to

⁴ These services included random UAs, an updated chemical dependency assessment, protective parenting group, psychological evaluation, individual counseling, and medication management.

transportation difficulties. However, J.J. also refused the Department's multiple offers for bus passes and a bicycle. The Department even offered to pay for her car repairs, but J.J. would not provide a repair estimate. J.J. also failed to participate in services scheduled as a result of the juvenile court's continuance. For example, the Department referred J.J. a psychological evaluation, and despite the provider's willingness to accommodate J.J.'s schedule, she did not attend her appointments. While the Department should have assisted J.J. in obtaining insurance earlier, it does not appear insurance would have made J.J.'s participation any more likely.

J.J. also argues the Department failed to provide mental health services in a timely manner. In March 2017, Parker recommended individual counseling and medication management. J.J. reported her psychiatrist, Dr. Robert Sands, who she had been seeing since she was a teenager, prescribed her multiple medications. But unbeknownst to the Department or Parker, J.J. had not attended an appointment with Dr. Sands since April 2016. The Department requested a list of J.J.'s medications and dosages, but J.J. never provided them. In March 2017, J.J. indicated she had insurance that would cover the cost of her medications. When asked if she made any appointment with the agency facilitating her insurance coverage, J.J. responded that she was "not sure what happened with that." RP Jan. 30, 2019 at 661. The Department erroneously crossed out individual counseling and medication management from a court order, but referred J.J. for individual counseling in May 2018, August 2018, and November 2018. In November 2018, in addition to the psychological evaluations, the Department also referred J.J. to SeaMar, which provides medication management and counseling services. J.J. did not engage, providing further evidence of futility.

And while J.J. engaged in a few services, she expressed she did not believe she needed services. She told Parker she did not need the services Parker recommended. She told Wiest she believed housing was her only barrier to reunification and that she did not have a substance abuse problem and did not need UAs. She also testified that she did not need a psychological evaluation. Even after the juvenile court continued trial and gave J.J. an additional opportunity to engage in services, J.J. failed to comply. Substantial evidence supports the juvenile court's finding that the Department offered or provided all necessary, reasonably available services.

Little Likelihood of Remedy

In order to terminate a parent's rights, RCW 13.34.180(1)(e) requires the juvenile court find that there is little likelihood that conditions will be remedied so that the child can be returned to the parent in the near future. In determining whether RCW 13.34.180(1)(e) has been met, the focus is on whether parenting deficiencies have been corrected. *T.R.*, 108 Wn. App. at 165. The juvenile court may not terminate a parent's rights unless it finds that the parent is currently unfit to adequately care for the dependent child. *In re the Welfare of A.B.*, 168 Wn.2d 908, 911, 232 P.3d 1104 (2010). "When it is eventually possible, but not imminent, for a parent to be reunited with a child, the child's present need for stability and permanence is more important and can justify termination." *C.B.*, 134 Wn. App. at 958-59. The juvenile court may consider the parent's history of parenting and compliance with services to determine whether conditions are likely to be remedied in the near future. *In re Dependency of J.C.*, 130 Wn.2d 418, 428, 924 P.2d 21 (1996). When a parent does not "substantially improve" her parental deficiencies within 12 months of the court entering dispositional orders, a rebuttable presumption exists that

there is little likelihood the parent will remedy his or her conditions in the near future. RCW 13.34.180(1)(e). The burden of production is on the parent to rebut the presumption, but the ultimate burden of persuasion remains with the State. *In re the Welfare of C.B.*, 134 Wn. App. 942, 955, 143 P.3d 846 (2006); 5 WASH. PRAC., EVIDENCE LAW AND PRACTICE § 301.14 (6th ed.).

With respect to the likelihood of conditions being remedied, J.J. challenges the following Finding of Fact:

2.18 The rebuttable presumption under RCW 13.34.180(1)(e) applies in this case because this parent has failed to substantially improve her parental deficiencies within 12 months, following entry of the dispositional order. Even if the presumption did not apply, however, this element is still met because there is little likelihood that conditions will be remedied so that the above-named child can be returned to [J.J.] in the near future. [J.J.] is in denial regarding her parental deficiencies. She is in denial regarding the conditions of the home at the time of removal. [J.J.] blames others for the conditions in the home and her failure to engage in services. [J.J.]'s testimony regarding the circumstances of the dependency, including blaming the landlord for the condition of the home, is not credible. [J.J.] has failed to follow through with services to address her parental deficiencies. [J.J.] dismisses services as being unnecessary, and continues to offer excuses for not engaging in services, which does not bode well for the future. Once [J.J.] chooses to engage in services, it will take at least 9 months of her engaging in services and maintaining progress before the Department can consider reunification. This exceeds the near future for these children.

CP at 235.

J.J. argues the court erred finding the Department satisfied RCW 13.34.180(1)(e)'s rebuttable presumption because it erred in finding the Department had satisfied its burden of proof under RCW 13.34.180(1)(d). She also challenges the juvenile court's finding that there was little likelihood J.J. could parent in the near future because the juvenile court's decision was based on only two months of access to mental health services.

This court concludes substantial evidence supports the court's finding that J.J. failed to rebut the presumption. As outlined above, J.J. was uninterested in participating in mental health services. She also lacked insight into her deficits and refused to acknowledge she would benefit from services. J.J. specifically testified she did not believe a psychological evaluation was necessary. See *In re Dependency of S.M.H.*, 128 Wn. App. 45, 60, 115 P.3d 990 ("When a parent has not been able to address parental deficiencies over a lengthy dependency, a court is 'fully justified' in finding termination is in the child's best interests") (quoting *A.W.*, 53 Wn. App. at 33), *review denied*, 156 Wn.2d 1001 (2005); *In re Dependency of C.T.*, 59 Wn. App. 490, 499, 798 P.2d 1170 (1990) (court considered that parent expressed no interest in getting services or had refused services when deciding whether all appropriate services had been offered.), *review denied*, 116 Wn.2d 1015 (1991).

A determination of what constitutes "near future" depends on the child's age and the circumstances of the placement. *In re Dependency of T.L.G.*, 126 Wn. App. 181, 204, 108 P.3d 156 (2005); see also *In re Dependency of P.A.D.*, 58 Wn. App. 18, 27, 792 P.2d 159, (six months not in near future of fifteen-month-old), *review denied*, 115 Wn.2d 1019 (1990); *A.W.*, 53 Wn. App. at 32 (one year not in near future of three-year-old); *In re the Welfare of Hall*, 99 Wn.2d 842, 850-51 664 P.3d 1245 (1983) (finding eight months not in the foreseeable future for a four-year-old). According to Dart and Bielefield, it would have taken at least nine months of J.J.'s consistent engagement in services to remedy her parental deficiencies. That is not in the near future of six-year-old D.E., three-year-old V.E., or 1-year-old M.E. This court concludes that substantial evidence supports the

juvenile court's findings of fact and its conclusion that under RCW 13.34.180(1)(e), there was little likelihood J.J. could remedy her parenting deficiencies in the near future.

Unfitness

In termination proceedings, the Department must establish by clear, cogent, and convincing evidence that the parent is currently unfit. *In re the Welfare of A.B.*, 181 Wn. App. 45, 58, 323 P.3d 1062 (2014). To prove current unfitness, the Department must show that the parent's deficiencies prevent the parent from providing the child with "basic nurture, health, or safety." *A.B.*, 181 Wn. App. at 61 (quoting RCW 13.34.020). The child's right to basic nurturing includes the right to a safe, stable, and permanent home and a speedy resolution of the dependency proceeding. RCW 13.34.020; *In re Dependency of J.A.F.*, 168 Wn. App. 653, 681, 278 P.3d 673 (2012). A parent can also be considered unfit "if he or she cannot meet a child's basic needs." *In re Custody of B.M.H.*, 179 Wn.2d 224, 236, 315 P.3d 470 (2013).

J.J. argues the trial court erred in finding her an unfit parent because the three parental deficiencies it identifies--domestic violence issues, substance abuse issues, and condition of the home at the time of removal--are unrelated to her ability to parent. First, J.J. insists the juvenile court was wrong in characterizing J.J.'s status as a domestic violence victim as a parental deficiency. Second, J.J. claims the Department failed to show any connection between J.J.'s substance use and her ability to parent. Third, J.J. contends it is unfair to fault her for an unkempt home when the Department never offered her any services to correct the issue.

With regard to unfitness, J.J. challenges the following Findings of Fact:

2.14 [J.J.]’s parental deficiencies include substance abuse issues. [J.J.] remains in denial regarding her substance abuse issues despite a positive UA for methamphetamines and despite a reported history of substance abuse issues.

2.15 [J.J.]’s parental deficiencies include domestic violence issues. [J.J.] is in denial regarding any domestic violence between she and [S.E.], despite filing a protection order in March 2016 alleging [S.E.] is extremely violent, mentally, verbally, and physically abusive to [J.J.] and despite two domestic violence incidents during the dependency. Her testimony regarding the lack of domestic violence between her and [S.E.] lacks credibility. She is unable to recognize the seriousness of [S.E.]’s behavior and she does not believe she needs domestic violence support. She cannot be protective of her children.

2.16 [J.J.] has not effectively engaged in services to address her parental deficiencies. [J.J.] is currently unfit.

CP at 173.

This court concludes that substantial evidence supports the juvenile court’s finding of unfitness. First, J.J. mischaracterizes the court’s finding concerning domestic violence. The juvenile court was concerned with J.J.’s unwillingness or inability to acknowledge her own status as a domestic violence victim, engage in helpful services, and the possibility she would not be willing or able to protect her children. J.J. frequently recanted her own reports of domestic violence perpetrated by S.E. and often denied or blamed others for his violent behavior. Parker testified that children raised in homes with domestic violence suffer long term trauma. It affects children’s development, ability to learn, and capacity for healthy relationships. Substantial evidence supports the juvenile court’s finding that J.J.’s domestic violence issues constitutes a parental deficiency rendering J.J. unfit.

Second, J.J. denies any connection between her substance abuse and her ability to parent. She argues that although she tested positive for amphetamine at M.E.’s birth, the fact that M.E. did not indicates her drug use is sporadic. Further, J.J. notes she only tested positive for methamphetamine once, in November 2018. However, the

Department counters that the positive result was the only truly random UA to which J.J. submitted. J.J. attributes the positive results to her Sudafed usage, but that is not a credible explanation. J.J. also emphasizes her chemical dependency evaluator concluded no other services were necessary. But in November 2018, the parties agreed an updated chemical dependency assessment with more information was necessary due to J.J.'s positive UA result, and J.J. never completed a second assessment. Dart also testified that despite the fact no witness had reported observing J.J. high, J.J.'s ongoing housing instability, inconsistent communication, and lack of motivation could also be signs of substance abuse. It is unclear how much of J.J.'s issues stem from substance abuse. J.J.'s psychiatrist diagnosed her with a substance abuse issue when she was a teenager, but she maintains she does not currently abuse any substances. Partially due to this unknown, J.J. has been unable to demonstrate she is competent to provide for children's basic health, welfare, and safety.

Third, J.J. argues it is unfair for the condition of her home to be held against her when the Department failed to offer her remedial services. However, throughout the case, J.J. has moved around and refused to provide the Department with a current address. Had J.J. maintained housing long enough for the Department to conduct a home visit, perhaps J.J. could have requested, or the Department would have offered, additional assistance. Regardless, her lack of insight into her domestic violence issues and substance abuse qualify as substantial evidence that she is unfit to parent her children.

Due Process

"The due process clause of the Fourteenth Amendment protects a parent's right to the custody, care, and companionship of her children." *In re the Welfare of Key*, 119

Wn.2d 600, 609, 836 P.2d 200 (1992) (citing *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972)), *cert. denied*, 507 U.S. 927 (1993). Accordingly, “[p]arental termination proceedings are accorded strict due process protections.” *In re Interest of Darrow*, 32 Wn. App. 803, 806, 649 P.2d 858, *review denied*, 98 Wn.2d 1008 (1982). “Due process requires that parents have notice, an opportunity to be heard, and the right to be represented by counsel.” *Key*, 119 Wn.2d at 611 (citing *In re Myricks*, 85 Wn.2d 252, 254, 533 P.2d 841 (1975)). In determining whether a parent has received adequate due process, this court balances: (1) the parent’s interests, (2) the risk of error created by the procedures used, and (3) the State’s interests. *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976); *In re Dependency of C.R.B.*, 62 Wn. App. 608, 614-15, 814 P.2d 1197 (1991). Due process violations are reviewed de novo. *In re the Welfare of L.R.*, 180 Wn. App. 717, 723, 324 P.3d 737 (2014).

J.J. has a fundamental civil right to control and custody of her children. *In re Dependency of K.N.J.*, 171 Wn.2d 568, 574 P.3d 522 (2011). The state has a *parens patriae* interest in preserving and promoting the welfare of J.J.’s children. *In re Dependency of I.J.S.*, 128 Wn. App. 108, 116, 114 P.3d 1215, *review denied*, 155 Wn.2d 1021 (2005). J.J. argues the third factor, the risk or error, weighs in her favor and the juvenile court violated her procedural due process rights because it did not dismiss the termination petitions despite finding the State had not met its burden under RCW 13.34.180, held two status conferences with unclear evidentiary standards, and considered the children’s best interests prior to ruling on the State’s burden.

Relevant to the issue of due process, J.J. challenges the following Finding of Fact:

2.21 An order terminating all parental rights is in the best interests of the aforesaid minor child. These children deserve permanence, and they cannot achieve the permanence they deserve until the parental rights are terminated. The mother has failed to effectively engage in services to address her parental deficiencies and she is currently unfit to parent.

CP at 174.

This court concludes the juvenile court did not err. First, it intentionally declined to enter findings and rule on the termination petition until it collected further evidence. Its refusal to dismiss the termination petitions after finding the State had not yet satisfied its burden was a means of ensuring J.J.'s due process rights were protected and that it had the opportunity to consider all relevant evidence. The juvenile court should not be punished for carefully considering the evidence presented and determining it was inadequate to come to a decision.

In *T.R.*, 108 Wn. App. at 158, a trial court held trial on the petition for the termination of T.R.'s mother's rights but declined to make findings so the parties could explore a guardianship option. *T.R.*, 108 Wn. App. at 155. Fourteen months later the trial court reconvened and granted the Department's termination petition without reopening evidence. *T.R.*, 108 Wn. App. at 156. T.R.'s mother argued the trial court violated her due process rights. The *T.R.* court found that while an additional evidentiary hearing would have been preferable, the trial court did not violate the mother's due process rights. *T.R.*, 108 Wn. App. at 160. Unlike the mother in *T.R.*, here J.J. had the benefit of an additional evidentiary hearing. Additionally, here, the delay between the original fact finding and the juvenile court's entry of findings was only a few months. The juvenile court did not violate J.J.'s due process rights.

Second, the juvenile court held two status conferences while trial was continued. These hearings did not violate due process since the trial court only relied on evidence admitted during trial for its findings. The juvenile court scheduled the "check-ins" to ensure the parties were following its orders regarding services and to provide the parties with an opportunity to request the reopening of evidence. The juvenile court's procedural decisions created little risk of erroneous deprivation of J.J.'s parental rights. The *Mathews* factors weigh against J.J.

Third, J.J. faults the juvenile court for considering the children's best interests and contends doing so was a violation of substantive due process rights. Ensuring the children's best interests is an overarching goal of a termination proceeding. *In re Dependency of A.W.*, 53 Wn. App. 22, 33, 765 P.2d 307 (1988), *review denied*, 112 Wn.2d 1017 (1989). In keeping the continuance short in consideration of the best interests of the children, the juvenile court did not violate J.J.'s substantive due process rights, but rather, appropriately weighed J.J.'s interests in an additional opportunity to engage in services against the children's right to a speedy resolution.

CONCLUSION

Continuing and reconvening the termination trial did not violate J.J.'s right to due process. Substantial evidence supports the juvenile court's findings of fact. The court's findings of fact support its conclusions of law that the required elements for termination of parental rights under RCW 13.34.180(1)(a) through (f) were proved by clear, cogent, and convincing evidence and that termination of J.J.'s parental rights is in the best interests of her children. Accordingly, it is hereby

ORDERED that the juvenile court's orders terminating J.J.'s parental rights to D.E., V.E., and M.E. are affirmed.

DATED this 8th day of October, 2019.

Eric B Schmidt
Eric B. Schmidt
Court Commissioner

cc: Stephanie A. Taplin
Marlo S. Oesch
Hon. Elizabeth P. Martin

December 6, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In the Matter of the Welfare of

D.E; V.E.; M.E.,

Minor Children.

Cons. Nos. 53152-6-II
53159-3-II
53162-3-II

ORDER DENYING
MOTION TO MODIFY

Appellant mother, J.J., filed a motion to modify a commissioner's October 8, 2019 ruling in this matter. After consideration, this court denies appellant's motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. Maxa, Worswick, Melnick

FOR THE COURT:



CHIEF JUDGE

Supreme Court No. (to be set)
No. 53152-6-II

CERTIFICATE OF SERVICE

I, Stephanie Taplin, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct to the best of my knowledge:

On January 3, 2020, I electronically filed a true and correct copy of the **Motion for Discretionary Review to the Washington Supreme Court by the Mother, J.J.**, via the Washington State Appellate Courts' Secure Portal to the Washington Court of Appeals, Division II. I also served said document, including the appendix, as indicated below:

Marlo Oesch
Assistant Attorney General

(X) via email to:
marloo@atg.wa.gov,
shstacappeals@atg.wa.gov

J.J., the mother

(X) confidential address

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



STEPHANIE TAPLIN
WSBA No. 47850
Attorney for Appellant, J.J.

NEWBRY LAW OFFICE

January 03, 2020 - 10:08 AM

Transmittal Information

Filed with Court: Court of Appeals Division II
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Appellate Court Case Title: IN RE THE WELFARE OF: D.E., V.E., & M.E.
Superior Court Case Number: 17-7-02259-8

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