

No. 98825-1

NO. 79714-0

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

In Re Dependency of: B.S., minor child

STATE OF WASHINGTON, DEPARTMENT OF CHILDREN, YOUTH
AND FAMILIES,

Respondent,

v.

S.W.,

Appellant.

BRIEF OF RESPONDENT

ROBERT W. FERGUSON
Attorney General

RACHEL BREHM KING
Assistant Attorney General
WSBA #42247
3501 Colby Ave. #200
Everett, WA 98201
(425) 257-2170
OID #91145

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I. INTRODUCTION

S.W., the mother of infant B.S., appeals from an order of dependency. Three months prior to this child's birth, an order entered terminating the parental rights of the mother as to three of her older children following a four day contested termination trial. Since the mother's severe deficiencies remained, the Department of Children, Youth, and Families (Department)¹ filed a dependency petition and the court removed B.S. from the mother's care at birth. The Department again attempted to offer the mother services to remediate the same parental deficiencies, but was once more unsuccessful.

At a dependency trial regarding B.S., which occurred about one year after the prior termination trial, the Department presented the order from the recent termination of parental rights trial as evidence of the mother's parental deficiencies. The Department proved that those same deficiencies remained. The Department proved that the mother had engaged in no services to remediate her deficiencies. The Department also presented evidence that because of those same deficiencies, S.W. could not care for

¹ At the time the dependency petition was filed, the state agency petitioning for dependency was the Department of Social and Health Services – Children's Administration. As of July 1, 2018, a new state agency took over the functions and duties of Children's Administration. RCW 43.216.906. Therefore, the petitioner at trial and the responding party here is now the Department of Children, Youth, and Families (Department).

her vulnerable infant. Because substantial evidence supports the trial court's findings, this Court should affirm the trial court's dependency order.

II. COUNTERSTATEMENT OF THE ISSUES

1. Did the trial court err by relying on the findings of fact established in a previous termination trial, in combination with other evidence, in order to find dependency in the present case?

2. Did substantial evidence support the trial court's finding that the mother was not capable of adequately caring for B.S., such that the child is in circumstances which constitute a danger of substantial damage to the child's psychological or physical development?

III. STATEMENT OF THE CASE

B.S. was born on April 13, 2018, and was eight months old at the time of trial. CP 43 (Finding of Fact (FF) 2.2.5).² S.W. and A.S. are the parents of B.S.³ CP 43 (FF 2.2.2, 2.2.3).

² Unless otherwise noted, the mother has not assigned error to the findings of fact cited herein. They must be accepted as verities for purposes of this appeal. *In re the Welfare of A.W.*, 182 Wn.2d 689, 711, 344 P.3d 1186 (2015); *In re Dependency of M.S.R.*, 174 Wn.2d 1, 9, 271 P.3d 234 (2012).

³ A.S. is the biological father of B.S. CP 43 (FF 2.2.3). On November 1, 2018, an order of dependency entered finding B.S. dependent as to the father pursuant to RCW 13.34.030(c). CP 43 (FF 2.2.4). The father was not a subject of the trial nor this appeal. CP 43 (FF 2.2.4). He was, however, present for the trial. CP 43 (2.2.4).

The mother has a long history with the Department. CP 43 (FF 2.2.6-2.2.10). In addition to B.S., she has had four other children. Her first child was born when she was 17 years old. CP 43 (FF 2.2.6). Her parental rights were terminated, and that child has been adopted. CP 43 (FF 2.2.6).

The mother's other children, K.R.-K.W., K.R.T.W., and S.R.P.W., were also the subjects of dependencies. CP 43 (FF 2.2.7-2.2.8). They were removed from the mother's care in December 2015. Ex. 16, at 3. In the order of dependency filed on April 26, 2016, the mother stipulated that she had parental deficiencies relating to parenting issues, mental health concerns, and lack of stable housing. CP 43 (FF 2.2.8). During that dependency, the Department offered the following services: parenting classes; a parenting coaching (Family Preservations Services); individual counseling; a drug and alcohol evaluation; and random urinalyses. CP 43 (FF 2.2.10).

The mother also completed a psychological evaluation with a parenting component with Dr. Sierra Swing. CP 43 (FF 2.2.11). Dr. Swing completed her report in September 2017. CP 43 (FF 2.2.11). Dr. Swing diagnosed the mother with posttraumatic stress disorder with dissociative symptoms, other specified personality disorder with mixed personality features, and borderline intellectual functioning. CP 43 (FF 2.2.11). The mother had complex trauma resulting from multiple traumas over the course of her life. CP 43 (FF 2.2.11). Dr. Swing recommended that the mother

engage in counseling. CP 43 (FF 2.2.11). The mother needed to start to be able to identify emotions, form insight into her own emotions and difficulties, and recognize the impact that her behavior has on others. CP 43 (FF 2.2.11). She needed to understand how those factors have played a role in her life. CP 43 (FF 2.2.11). Dr. Swing offered a poor prognosis for the mother being able to parent. RP 77-78; Ex. 16, at 12.

In February 2018, a contested trial occurred on the Department's petition for termination of the mother's parental rights. Ex. 16. After a four day trial, the court found that despite the Department offering all necessary services for three years, the mother had made no progress and remained unfit to parent K.R.-K.W., K.R.T.W., and S.R.P.W. Ex. 16, at 12. The court found that even if the mother engaged in all the necessary services, she was unlikely to improve to the point where she could parent in the next 18 months to two years. Ex. 16, at 12. In an order containing over 220 findings of fact, the court terminated the mother's parental rights as to the three children. Ex. 16. The mother appealed that order.⁴

⁴ See *In re Dependency of S.R.P.W.*, No. 78195-2-I, 2019 WL 181996 (Wash. Ct. App. Jan. 14, 2018) (unpublished) (affirming termination of parental rights). Ms. W's motion for reconsideration was denied on March 4, 2019. Ms. W sought discretionary review. Review was denied and the mandate was issued August 2, 2019.

Just two months after the order entered terminating the mother's parental rights to her three older children, this child B.S. was born. CP 44 (FF 2.2.17). Without any kind of advanced notice regarding the mother's prior involvement with CPS, Providence Hospital called in an intake to Child Protective Services, reporting concerns about the mother and father's behavior following the birth. CP 44 (FF 2.2.18); RP 74-75. The Department filed a dependency petition on April 16, 2018. CP 43 (FF 2.2.1).

At shelter care, the court ordered out of home placement. CP 452. The court authorized unsupervised visitation. CP 453. The parents agreed to engage in parenting classes and to provide a UA that day, and thus the court ordered those things. CP 454. The court continued to order the parents to complete UAs. CP 385-86, 163; CP 45 (FF 2.2.27).

The Department made multiple referrals to permit the mother to complete the UAs, and made considerable efforts to offer the UAs at times and locations that would work for the mother. CP 45 (FF 2.2.28, 2.2.29); RP 86, 90; Ex. 17; Ex. 24. The mother provided one UA for the Department shortly after B.S.'s birth, which was positive for opiates. CP 45 (FF 2.2.30); RP 27. The mother reported that the positive UA resulted from prescribed pain medication provided after her cesarean section birth, but she never provided documentation to the Department of her prescription for that pain medication. CP 45 (FF 2.2.31-2.2.32); RP 27. Other than one UA positive

for opiates and a possible second clean UA, the mother has not provided UAs as requested by the Department and ordered by the court. CP 45 (FF 2.2.33); RP 27-28, 90.

The Department also attempted to offer the mother parenting education. CP 45 (FF 2.2.34); RP 85. The mother attempted to attend parenting classes, but the parenting classes were intended for older children and not appropriate. CP 45 (FF 2.2.35); RP 85. The Department referred the mother for individualized parenting instruction, with an educator who would have worked one-on-one with the mother during her visitation. CP 45 (FF 2.2.36); RP 85, 91; Ex. 18. However, the mother refused to work with the parenting educator unless additional time was added to her visits, a request that was denied by the juvenile court. CP 45 (FF 2.2.37). Therefore, the mother never engaged with the parenting educator. RP 25.

At trial, the mother reported that she was engaging in mental health counseling twice per month with Mr. Ashley Flowers at Compass Health. CP 46 (FF 2.2.41); RP 19. The mother had not informed the court, Department, or the attorney guardian ad litem (AGAL) of her engagement in counseling prior to her testimony at trial. CP 46 (FF 2.2.42). No information was available at the time of trial to verify the mother's attendance, or to determine whether the mother had made any progress, during her alleged work with Mr. Flowers. RP 19-20, 79.

Trial commenced on January 23, 2019. CP 41. Department supervisor George Nelson testified and explained that the mother had made no progress since her rights were terminated as to her three older children one year prior. RP 79. He testified that the mother continued to have little to no insight into what her issues were, that she remained reluctant to cooperate with the Department or to engage in services, and that the mother's life continued to be characterized by underlying chaos. RP 77-80. Mr. Nelson testified that the mother would not be able to read cues and respond in a developmentally appropriate way to infant B.S. RP 83. He also testified that the mother would have difficulty putting B.S.'s needs before her own needs or the needs of her relationships. RP 83. He explained that the mother struggled to meet her own needs, let alone B.S.'s basic needs. RP 83. He testified that the visits with B.S. were going poorly, despite the parents' best efforts, with B.S. crying uncontrollably and refusing a bottle. RP 80-82. The parents had at times failed to attend to the child's basic needs such as changing diapers. RP 80-82. He expressed that the mother's ongoing lack of cooperation with services, especially diagnostic tools such as assessments, interfered with the Department's ability to make informed decisions about the mother's exact parental deficiencies and how to remedy them. RP 84.

The mother testified at trial. RP 11. During her testimony, the mother claimed she moved into a new apartment with the father in December of 2018. CP 46 (FF 2.2.51); RP 13. The mother had not previously reported that she had obtained an apartment to the Department, and the Department has not inspected the home to assess its suitability. CP 46 (FF 2.2.51); RP 13. She was unable to recall her address. CP 46 (FF 2.2.51); RP 13. She was also unable to report what she paid for rent. CP 46 (FF 2.2.51); RP 13-14.

At the time of trial, the mother did not work. CP 46 (FF 2.2.52). The mother's sole sources of income were her SSI, public benefits, and the father's SSI. CP 46 (FF 2.2.53); RP 14-15. She pooled her income with the father and he handled paying the bills. CP 46 (FF 2.2.53). The mother was unable to articulate the basis for her eligibility for social security benefits. RP 15. She did not drive, and relied on her friends and family to drive her places. RP 33-34.

The mother remained in a relationship with the father. CP 46 (FF 2.2.50); RP 12. They visited and lived together. RP 13, 32. The father had already been determined by a court to not be a safe parent for B.S. CP 197-209. At the time of trial, his visitation with B.S. was supervised by court order. CP 154, 159. He had not engaged in any services. RP 79.

The mother acknowledged that she had been recommended to engage in mental health counseling during the prior dependency, but she had really engaged in only seven or eight sessions. RP 37. She admitted that she never completed a drug/alcohol evaluation. RP 38. She agreed that she had been offered the opportunity to work with Amanda Farmer for parenting instruction. RP 38-39. The mother acknowledged that she could still benefit from a parent coach. RP 45.

After B.S.'s birth, the juvenile court had authorized the mother and the father to have unsupervised visitation. CP 46 (FF 2.2.55). However, that order was modified in November 2018. CP 46 (FF 2.2.55). At the time of trial, the juvenile court required the visitation of both the mother and the father to be supervised. CP 46 (FF 2.2.55).

Victoria Metcalf, a Department social worker, transported the child to and from unsupervised visits from June to November 2018. RP 55-57. Ms. Metcalf testified that she observed B.S. returning from the parents' visitation with his diaper and clothing wet. RP 62-64. She observed that his diaper at times had not been changed during the visit. RP 62-64. She observed the parents' car to smell of cigarette smoke once, marijuana once, and a sweet smell that was not marijuana or cigarette smoke once. RP 60-61.

The attorney guardian ad litem recommended that B.S. be found dependent. CP 119-125. Following testimony and closing arguments, the trial court determined that the Department had met its burden to prove that B.S. was a dependent child. Findings of fact, conclusions of law, and an order of dependency entered on February 11, 2019. CP 41-62. The mother's appeal followed. CP 17-40.

IV. ARGUMENT

A. On Appeal, a Dependency Order Should Be Affirmed When, as Here, It Is Supported by Substantial Evidence

In any dependency proceeding initiated by the Department, the State must to prove, by a preponderance of the evidence, that the child meets the statutory definition of a dependent child. RCW 13.34.110; *In re Dependency of M.P.*, 76 Wn. App. 87, 90, 882 P.2d 1180 (1994). RCW 13.34.030(6) defines a dependent child as one who:

- (a) Has been abandoned;
- (b) Is abused or neglected as defined in Chapter 26.44 RCW by a person legally responsible for the care of the child;
- (c) Has no parent, guardian or custodian capable of adequately caring for the child, such that the child is in circumstances which constitute a danger of substantial damage to the child's psychological or physical development; or
- (d) Is receiving extended foster care services, as authorized by RCW 74.13.031.

In this case, the Department alleged that B.S. was dependent as defined in RCW 13.34.030(6)(c). CP 580, RP 129. While there are no

required factors the court must consider when determining whether a parent is capable of parenting under RCW 13.34.030(6)(c), the juvenile court must examine a parent's overall ability to meet their parenting obligations. *See In re Dependency of J.B.S.*, 123 Wn.2d 1, 12, 863 P.2d 1344 (1993). The dominant consideration is the safety and welfare of the child. RCW 13.34.020. The Department does not need to wait until a child suffers actual harm, but may act when the petitioner shows there is a danger of harm. *In re Dependency of Schermer*, 161 Wn.2d 927, 951, 169 P.3d 452 (2007) (citing *In re Welfare of Frederiksen*, 25 Wn. App. 726, 733, 610 P.2d 371 (1979)).

Trial courts are given broad discretion in matters concerning the welfare of children. *In re Marriage of Rich*, 80 Wn. App. 252, 258, 907 P.2d 1234 (1996). In evaluating risk of harm sufficient to establish dependency, the trial court has considerable discretion. *Schermer*, 161 Wn.2d at 951. An appellate court will affirm an order of dependency as long as substantial evidence supports the trial court's findings and conclusions of law. *In re Dependency of M.S.D.*, 144 Wn. App. 468, 478, 182 P.3d 978 (2008). Evidence is substantial if, when viewed in the light most favorable to the prevailing party, a rational trier of fact could find the fact by a preponderance of the evidence. *Id.*

In this case, the record shows a dependency proceeding was necessary because the mother was not capable of parenting B.S. at the time of his birth or at the time of trial. The trial court's findings are supported by substantial evidence, and the trial court's ruling that B.S. is dependent should be affirmed.

B. The Trial Court Did Not Abuse Its Discretion When It Admitted and Relied Upon the Prior Termination Trial Findings

The trial court did not abuse its discretion in admitting the findings from the termination trial. The evidence was admissible, relevant, and highly reliable, and therefore the trial court did not abuse its discretion in considering the findings as substantive evidence.

At the beginning of the trial, the Department moved to admit 16 exhibits, which were all certified copies of court orders related to the prior dependency and terminations. RP 6; Ex. 1-16. The mother objected to the court's consideration of "any specific findings in those documents of the dependency." RP 6. After clarification that any hearsay, such as factual allegations in a dependency petition, would not be considered, the court asserted that findings made by agreement or after a contested hearing, could be considered. RP 8. The mother's attorney agreed "for a dependency order[.]" RP 8. The mother's attorney clarified that she was objecting to "the specific permanency planning review orders, those specific findings I

would ask the Court not necessarily take into consideration for this.” The Court admitted the documents. RP 8.

In the court’s oral ruling, the court determined, “The findings that the court made with the same parties basically, I think, the collateral estoppel applies to them, and they’re not hearsay, they’re findings that were made after a trial, they have been admitted, and I think the Court can consider them.” RP 140. The court also stated, “with regard to the actual findings that were entered shortly before the child’s birth, and relevant to things that were happening with the mother in the year or so before the child’s birth, I think the Court not only can consider them, it’s pretty much bound by them.” RP 140.

First, the mother raises this argument for the first time on appeal. At trial, she objected only to the findings contained within dependency review orders (like permanency planning review orders), and agreed that findings that were either agreed to or resulted from a contested hearing were admissible and could be considered by the trial court. RP 8. The general rule is that an appellant may not raise an argument for the first time on appeal. RAP 2.5(a); *Brundridge v. Fluor Fed. Servs., Inc.*, 164 Wn.2d 432, 441, 191 P.3d 879 (2008). Because the mother raises her argument for this first time on appeal without a basis for doing so, this court should decline to consider it.

If this Court does agree to consider the mother's arguments, the juvenile court "has broad discretion in dependency and termination proceedings to receive and evaluate evidence in light of a child's best interest." *In re Interest of J.F.*, 109 Wn. App. 718, 728, 37 P.3d 1227 (2001) (citing *In re Dependency of C.B.*, 61 Wn. App. 280, 287, 810 P.2d 518 (1991)). But, such discretion does not permit juvenile courts to disregard evidence rules, especially where the deprivation of parental rights is involved. *In re Welfare of Ross*, 45 Wn.2d 654, 655–56, 277 P.2d 335 (1954); *In re Welfare of Baum*, 8 Wn. App. 337, 339–40, 506 P.2d 323 (1973). RCW 13.34.110(1) and JuCR 1.4(c) require juvenile courts to observe the rules of evidence in dependency and termination proceedings. The trial court did so in this case.

First, the document in question is a court record. RCW 5.44.010 renders certified copies of court records admissible without additional authentication. The findings in questions were found under a higher burden – clear, cogent, and convincing evidence – than is required at a dependency trial, contributing even more to their reliability. Ex. 16, at 14.

Second, the termination findings were relevant both to the mother's capacity to parent, and the reasonable efforts undertaken by the Department to avoid intervention. Past parenting history is relevant to the finding of dependency; the danger to the child may be based on past history of the

parent's interaction with other children. *See In re Welfare of Frederiksen*, 25 Wn. App. 726, 610 P.2d 371 (1979) (evidence of parental deficiencies that resulted in harm to siblings and of remedial services offered relevant at fact-finding trial regarding child removed at birth). Parenting history has also long been considered relevant to a termination of parental rights proceeding. *See, e.g., In re Welfare of Ross*, 45 Wn.2d 654, 657, 277 P.2d 335 (1954) (entire record of parenthood is open to investigation and inquiry in termination of parental rights fact-finding); *In re Dependency of P.A.D.*, 58 Wn. App. 18, 27-28, 792 P.2d 159 (1990) (evidence of a prior termination of parental rights is admissible).

The mother asserts that the trial court found that the mother lacked capacity to parent as a matter of law, rather than relying on adequate evidence that the mother lacked the capacity to care for this child. Br. at 2-3, 7-9, 14-15. However, the trial court did not find dependency "as a matter of law." The Department did not rely exclusively on the findings of fact, nor could it to meet its burden. Instead, the Department presented the findings coupled with substantial evidence regarding what had occurred following B.S.'s birth. The court heard an entire day of testimony, and received 21 exhibits. The Department presented three witnesses. RP 8, 54, 66. The mother presented two witnesses, in addition to her own testimony. CP 98, 110. The court considered 20 admitted exhibits, in addition to

Exhibit 16, the 2018 Order Terminating Parental Rights. Ex. 1-20, 24. The court additionally considered the report of the guardian ad litem. CP 119-125.

The Department did not ask the court to find B.S. dependent as a matter of law, or based exclusively on prior court findings. The Department showed at trial that the mother has many, if not all, of the same issues she had in January of 2018. The mother has not yet addressed her mental health issues or her lack of parenting skills. She continues to present a risk of harm to her vulnerable newborn child, B.S. The substantial evidence to support the trial court's findings will be presented in further detail below.

The trial court did not err in relying on Exhibit 16, the findings of fact and conclusions of law, from the mother's prior termination trial. Since the trial court did not abuse its discretion in admitting this evidence, this Court should affirm.

C. Collateral Estoppel Was Correctly Applied by the Trial Court

The mother next argues that the trial court erred by applying the doctrine of collateral estoppel to the findings of fact rendered in the prior termination order. Br. at 9. She contends that the admission of the findings violated her right to due process. Br. at 8, 14. Because each of the elements of the doctrine are met, the trial court properly applied the doctrine and

considered the prior findings of fact as evidence in this dependency fact finding.

Due process requires parents have notice, an opportunity to be heard, and the right to be represented by counsel, and more specifically open testimony, time to prepare and respond to charges, and a meaningful hearing before a competent tribunal in an orderly proceeding. *In re Dependency of A.M.M.*, 182 Wn. App. 776, 790, 332 P.3d 500 (2014); *In re Dependency of H.W.*, 70 Wn. App. 552, 555 n.1, 854 P.2d 1100 (1993). Whether a proceeding satisfies due process is reviewed de novo. *In re Welfare of J.M.*, 130 Wn. App. 912, 920, 125 P.3d 245 (2005).

Collateral estoppel bars relitigation of any issue that was actually litigated in a prior lawsuit. *In re Dependency of H.S.*, 188 Wn. App. 654, 660, 356 P.3d 202 (2015) (citing *State Farm Mut. Auto. Ins. Co. v. Avery*, 114 Wn. App. 299, 304, 57 P.3d 300 (2002)). Collateral estoppel applies only where a prior proceeding: 1) involved an identical issue; 2) resulted in a final judgment on the merits; 3) involved the same party; and 4) will not work an injustice as applied. *Christensen v. Grant Cty. Hosp. Dist. No. 1*, 152 Wn.2d 299, 307, 96 P.3d 957 (2004).

Although the statutory elements required differ for a finding of termination and a finding of dependency, many of the factual issues remain the same. The issues are whether the mother has any parenting deficiencies,

how those deficiencies impair her ability to parent, what services the Department may have offered to remediate those deficiencies, and whether she is currently fit to parent this child. See RCW 13.34.060(6)(c); 13.34.065(5)(a)(i); 13.34.180(1); *Schermer*, 161 Wn.2d at 943 (Although parental unfitness is not necessary for a dependency, “a dependency determination requires a showing of parental deficiency”); *In the Matter of K.M.M.*, 186 Wn.2d 466, 493, 379 P.3d 75 (2016) (“The proper inquiry is whether the existing parental deficiencies, or other conditions, prevent the parent from providing for the child’s basic health, welfare, and safety.”).

Next, the parties remain the same: both actions were between the mother and the Department. The fact that each proceeding involved different children does not impact the application of this doctrine to the prior findings: rather, the Department simply must prove that the mother’s parental deficiencies (established by collateral estoppel) also impact her ability to parent this child (proven by separate evidence at trial).

Next, the mother contends that the prior findings were not final due to her pending appeal. Br. at 12. Finality is normally “conclusively established by a judgment on the merits by affirmation on appeal.” *In re Dependency of H.S.*, 188 Wn. App. 654, 661, 356 P.3d 202 (2015) (quoting *Chau v. City of Seattle*, 60 Wn. App. 115, 120, 802 P.2d 822 (1991)). But absolute finality is not required for collateral estoppel. *Id.* For the purposes

of collateral estoppel, a final judgment “includes any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect.” *H.S.*, 188 Wn. App. at 661 (quoting *Cunningham v. State*, 61 Wn. App. 562, 567, 811 P.2d 225 (1991)).

In this case, this Court issued an unpublished opinion affirming the order of termination on January 14, 2019. *See In re Dependency of S.R.P.W.*, No. 78195-2-I, 2019 WL 181996 (Wash. Ct. App. Jan. 14, 2018) (unpublished). On January 23, 2019, the Department relied on the findings at trial. CR 41. The trial court determined the findings to be sufficiently final that they could be relied upon. Such reliance is appropriate, because a trial judgment is considered a final on the merits, and will remain so until it is overturned in a higher court. *See Nielson v. Spanaway Gen. Med. Clinic, Inc.*, 135 Wn.2d 255, 263-64, 956 P.2d 312 (1998) (judgment awarding damages was a final judgment on the merits for collateral estoppel purposes even though a compromise settlement was reached during the pendency of an appeal). This is analogous to the court’s consideration of evidence of a final judgment and sentence under ER 803(a)(22), as the conviction may be considered and “[t]he pendency of an appeal may be shown but does not affect admissibility.” This is also consistent with the purpose of collateral estoppel, which is to encourage respect for the judicial decisions by

ensuring finality. *In re Dependency of H.S.*, 188 Wn. App. 654, 660-661, 356 P.3d 202 (2015).

Next, applying collateral estoppel does not work an injustice or offend due process. The mother previously had a full and fair opportunity, complete with all the hallmarks of due process, to defend against the Department's termination petition at the prior trial. *See Christensen*, 152 Wn.2d at 317 ("A full and fair opportunity to litigate is required."). After the conclusion of that proceeding, findings of fact and conclusions of law were rendered by a standard of clear, cogent, and convincing evidence. The mother had an opportunity to appeal from that order, which she did. The Department is now entitled to rely on those findings in subsequent proceedings, especially in proceedings that require proof by a lower burden.

Finally, the mother was not "estopped" in the sense that she was prevented from putting on any evidence of her own to rebut the evidence produced by the Department in the form of the findings of fact from the prior termination trial. If she had in fact remedied her parental deficiencies such that she was then a safe parent for B.S. at the time of trial, she could have presented that evidence. She did, in fact, present some evidence of that nature. For example she testified that she had engaged in ongoing mental health counseling with Mr. Flowers and that she had acquired an apartment with the father. CP 46 (FF 2.2.41, FF 2.2.51); RP 13, 19. The mother also

presented the testimony of Felicia Harris, who testified regarding observations of the mother parenting regarding her three older children. RP 110-111. The mother was not barred from presenting any evidence based on the doctrine of collateral estoppel.

The application of the doctrine of collateral estoppel in this context promotes judicial efficiency and prevents relitigation of identical issues. It is just in this context. The trial court did not err in applying the doctrine of collateral estoppel to the findings from the previous termination trial regarding Ms. W's older children.

If this Court determines that the court erroneously considered the termination trial findings, then it must consider whether any prejudice resulted. An erroneous admission of evidence is "not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). In this case, between the verities on appeal, and the other evidence presented at trial, there is ample evidence of to support the findings of fact and conclusions of law. This will be further discussed below.

D. Substantial Evidence Supported the Trial Court's Order of Dependency

The Department proved at trial that the mother had extensive, protracted, longstanding parental deficiencies that prevented her not only from parenting this child B.S. but her three prior children as well. The Department proved those parental deficiencies remained unremediated and continued to present a barrier to her safe parenting of B.S. This court should affirm the trial court's dependency order because it is supported by substantial evidence.

During the mother's previous dependency, her children remained out of her care for over two years while she was ordered to participate in services provided by the Department. CP 43 (FF 2.2.9).

The Department received an intake from Providence Hospital indicating concerns surrounded the circumstances of B.S.'s birth. RP 75. The Department did not present first hand testimony regarding what medical providers observed at the hospital, and any information contained in reports from the hospital were admitted only as hearsay evidence. *See, e.g.*, RP 76-77. Instead, the Department presented the evidence of supervisor George Nelson. CP 66. Mr. Nelson had supervised the social workers assigned to the mother's cases for two and a half years. RP 71. He attended court hearings, attended family meetings, interacted directly with

the mother, briefly encountered her with her children, and reviewed the mother's cases at minimum monthly with the assigned social workers. RP 71-73.

Mr. Nelson explained that the Department, although it considered the reports of behavior in the hospital, primarily relied on the information gathered during the prior dependencies when it assessed that B.S. would be at imminent risk of harm in the mother's care. RP 76-77. Mr. Nelson testified that, recent to B.S.'s birth, the mother had completed a psychological evaluation with a parenting component that offered a poor prognosis for her capacity to safely parent without intensive intervention. RP 77-78. The evaluator made several recommendations for services that the mother did not engage in. RP 77-78. Further, Mr. Nelson testified that the mother never completed a court-ordered drug and alcohol evaluation. RP 78. He testified that the mother did not engage in UAs as ordered. RP 78.

Mr. Nelson testified that the mother had experienced a tremendous amount of trauma in her life. RP 78. She had not taken the steps to address that trauma such that she was able to function as a parent and meet her child's needs. RP 78. The mother does not challenge, and therefore it is a verity that, Dr. Swing diagnosed the mother with posttraumatic stress disorder with dissociative symptoms, other specified personality disorder

with mixed personality features, and borderline intellectual functioning. CP 43 (FF 2.2.11). The mother has complex trauma resulting from multiple traumas over the course of her life. CP 43 (FF 2.2.11). Mr. Nelson explained how the mother's mental health impacted her ability to be a safe parent for B.S. For example, Mr. Nelson testified that the mother struggled to meet her own basic needs. RP 83. Mr. Nelson also indicated that she had previously presented with difficulties in reading cues and responding to a child in a developmentally appropriate way. RP 83. He explained that the mother's life was characterized by underlying chaos. RP 80. He also testified that she had little insight into her deficiencies. RP 78.

The mother demonstrated in her own testimony that this remained true. The mother was unable to testify as to why her rights were terminated as to her older children, why B.S. was removed from her care, or why her visitation was moved from unsupervised to supervised while B.S. was in shelter care status. RP 78. Her testimony demonstrated that she continued to not be able to engage in basic life functions such as maintaining a job or paying bills. RP 14. At the time of trial, the mother and the father had just obtained an apartment, but had not reported that information to the Department or AGAL. RP 13-14. They had previously been staying "with a friend." RP 22.

The mother's testimony regarding her visitation demonstrates another example of her lack of insight. The mother testified that visits with B.S. were going well, and that B.S. "doesn't really cry." RP 41-43. But Mr. Nelson explained that supervised visits were going poorly. RP 41-43, 80. He testified that the visits are challenging for everyone involved. RP 81. B.S. cried a lot and was very difficult to soothe. RP 81.

Due to trial continuances, there was an unusually long period of time between the filing of the dependency petition and the dependency fact-finding. During that time period, the court ordered, and the Department offered, several services. Significantly, the juvenile court gave the mother and the father an opportunity to demonstrate that they could appropriate parent B.S. by permitting them to have unsupervised visitation. CP 46 (FF 2.2.56); CP 453, 385. The parents were unable to demonstrate adequate parenting, even during brief unsupervised visitation, and the court ordered supervised visitation in November 2018. CP 46 (FF 2.2.56); CP 162-63. During visits, the parents failed to even meet the child's basic needs, such as changing diapers. RP 62-64.

Substantial evidence supports the trial court's findings that B.S. has no parent, guardian, or custodian capable of adequately caring for the child, such that the child is in circumstances which constitute a danger of

substantial damage to the child's psychological or physical development.

The dependency order should be affirmed.

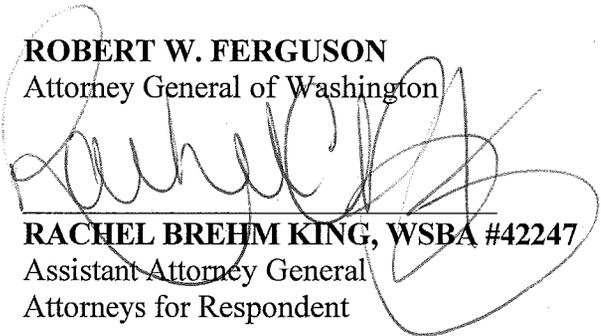
V. CONCLUSION

There is substantial evidence in the record to support the trial court's findings that the Department proved the elements of RCW 13.34.030(6)(c) by a preponderance of the evidence. The order of dependency should be affirmed.

RESPECTFULLY SUBMITTED this 2nd day of September, 2019.

ROBERT W. FERGUSON
Attorney General of Washington

By:


RACHEL BREHM KING, WSBA #42247
Assistant Attorney General
Attorneys for Respondent

NO. 79714-0

**COURT OF APPEALS FOR DIVISION I
STATE OF WASHINGTON**

In re Dependency of B.S., minor child,

STATE OF WASHINGTON,
DEPARTMENT OF CHILDREN,
YOUTH AND FAMILIES,

Respondent,

v.

S.W.,

Appellant

DECLARATION OF
SERVICE

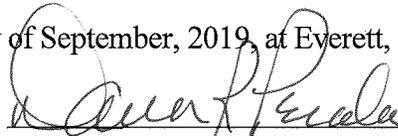
I affirm under penalty of perjury of the laws of the State of Washington that the following is true and correct to my best knowledge and belief:

1. My name is Dawn R. Perala and I am employed as a paralegal for counsel for respondent.

2. On **September 3, 2019**, I filed the **BRIEF OF RESPONDENT** electronically with the Court of Appeals, Division I, through the Court's online filing system.

3. With the permission of the recipient(s), an electronic version of the document was delivered using the Court's filing portal to all parties of record.

DATED this 3rd day of September, 2019, at Everett, Washington.



Dawn R. Perala, Paralegal

ATTORNEY GENERAL'S OFFICE - EVERETT

September 03, 2019 - 11:33 AM

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