

Court of Appeals Division III

State of Washington

Opinion Information Sheet

Docket Number: 26179-4

Title of Case: In re the Termination of S. J.

File Date: 08/02/2011

SOURCE OF APPEAL

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Appeal from Spokane Superior Court

Docket No: 06-7-01425-4

Judgment or order under review

Date filed: 05/16/2007

Judge signing: Honorable Jerome J Leveque

JUDGES

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In re the Termination of: No. 26179-4-III

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S.J. )  
 ) Division Three  
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 ) PUBLISHED OPINION  
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Brown, J. ? TH appeals the termination of her parental rights to her son, SJ.

Dispositive here, TH contends the trial court erred in finding all necessary services had

been offered or provided because the Department of Social and Health Services (DSHS) failed to provide timely mental health services or sufficient attachment and bonding services. We agree. Additionally, TH contends her constitutional due process rights have been violated because the trial court did not specifically find she was currently an unfit parent and we agree that finding cannot be inferred. We reverse and remand for further proceedings.

#### FACTS

SJ was born to TH in November 2002. In April 2005, DSHS removed SJ and his older half-brother from TH's care due to allegations of unsanitary living conditions and No. 26179-4-III  
In re the Termination of SJ  
TH's drug use. The parties agreed to dependency on May 31, 2005. The court required TH to complete a substance abuse evaluation and treatment, submit to

random urinalysis (UA) testing, complete a psychological evaluation and participate in

mental health services, join a domestic violence victims' program, participate in a

parenting assessment, and establish a safe, clean, drug-free home.

Between June 2005 and December 2005, TH was admitted to but unsuccessfully

discharged from three inpatient treatment centers. TH discovered she was pregnant in

January 2006. TH successfully completed an inpatient treatment program in February

2006. She planned for an outpatient program and arranged for post-treatment living at

the Safe Harbor House and Maternity Home. In March 2006, TH participated in a

psychological evaluation with Dr. Christine Guzzardo. TH's social worker informed Dr.

Guzzardo of TH's history of drug addiction and mental health issues. Dr. Guzzardo

diagnosed TH with bipolar disorder and borderline intellectual functioning. TH began

individual counseling, actively participating in her sessions and improving her ability to

identify symptoms of a bipolar episode and get the help she needed. In April 2006, TH

began supervised visitation with SJ at the YWCA. In May 2006, she transferred to the

YWCA's parenting education program. The parent educator provided TH with verbal

and hands-on instruction during the visits.

Despite making progress in her initially identified parental deficiencies, DSHS

decided TH still had not secured suitable housing or progressed in her relationship with

SJ. In May 2006, DSHS petitioned to terminate TH's parental rights with SJ.

2

No. 26179-4-III

In re the Termination of SJ

TH continued working on her deficiencies and successfully graduated from the

drug-treatment outpatient program in June 2006. She explained she could have been

successful sooner had her mental health issues been addressed at the same time. The

State does not dispute TH has since remained clean and sober. TH moved into the

Safe Harbor House and Maternity Home as planned. TH had her baby, JH, in August

2006. JH has remained in TH's care. In November 2006, TH moved into St. Margaret's

women's shelter in order to find housing allowing SJ to live with her. While at St.

Margaret's, TH successfully enrolled in school, obtained a job, attended domestic

violence and parenting classes, and cared for JH.

In December 2006, TH and SJ began therapeutic visitation with Carol Thomas.

Ms. Thomas' role was to help create a healthy parent-child relationship and ensure

nothing detrimental was said to SJ. The therapeutic visitation continued until March

2007, just before trial, when the visits were suspended at Ms. Thomas' urging due to

the harmful impact the visits were having on SJ. SJ's behavior towards TH had

become increasingly resistant and challenging because of his unusual negative acting-

out behaviors, he was controlling and increasingly aggressive. TH had faithfully kept

the scheduled visitations and applied parenting suggestions but she met increasing

resistance from SJ when she attempted physical contact or to maintain control over the

visitations. TH theorized SJ had detached from TH and had attached to the foster

parents who had successfully intervened in this case. SJ clung to the foster parents at

visitation drop off and the foster parents noticed SJ's increased stress at pick up. At

No. 26179-4-III

In re the Termination of SJ

the termination trial, the family preservation therapist testified she could provide

attachment therapy and that TH requested it. These unprovided attachment and

bonding services are central here.

DSHS's social worker testified he identified bonding and attachment as a major issue between TH and SJ. Despite this, he had not referred TH for bonding and attachment services because he (incorrectly as noted below) believed the YWCA was incorporating the methods into its parenting education, he did not receive a complaint from TH regarding the services, and he did not want to refer TH to additional services to save her time traveling on the bus. The social worker testified TH was not referred for a psychological evaluation until December 2005, because the court order specifically stated that the evaluation was not to be conducted until TH was sober. He conceded since TH completed treatment, he had no concerns about her sobriety and she had complied with all services offered to her. The social worker testified he supported the termination despite his recommendation that JH remain with TH, because TH has not been able to rectify her relationship with SJ and because he had

been out of her care for approximately one and a half years. He found that SJ could

not wait any longer for TH to remedy her parental deficiencies and that he was in need

of stability.

The YWCA parent educator testified her role during the visitation was to provide

parenting suggestions and she related the YWCA includes some bonding and

attachment principals like cuing but, contrary to the social worker's viewpoint, does not

No. 26179-4-III

In re the Termination of SJ

offer bonding and attachment services. She noted TH struggled with keeping to a

schedule during the visits and that SJ's behavior would escalate during the visits. In

the end, the parent educator opined TH had not made any progress in her parenting of

SJ because she was unable to recognize SJ's emotional needs.

Ms. Thomas noted TH's attempts to provide behavior controls and to guide and direct SJ were minimal and ineffective. She opined TH was unable to supply SJ

with emotional support, calm SJ down, or initiate physical contact with SJ without SJ

becoming angry. Ms. Thomas acknowledged she did not know if TH had had enough time to correct her inability to regulate SJ's behavior. She related she had not looked

into or determined the source of TH's inability. Ms. Thomas related she was unaware of what TH's service providers identified as the source of the concerns regarding TH's

parenting. Ms. Thomas had worked with families where "a child is very angry, very

aggressive towards a parent, not defining them as a parental authority," and had

success "decreasing those behaviors, increasing their definition of the parent as a

parental authority as someone who will direct and guide them and someone who can

regulate their emotional states." Report of Proceedings (RP) (March 26, 2007) at 27.

In the end, Ms. Thomas opined it was unlikely that a healthy relationship would develop

in the near future due to SJ's entrenched perception of his mother and TH's inability or

unwillingness to parent SJ effectively.

The guardian ad litem testified SJ was a difficult child and had significant

behavior problems including hitting, kicking, and cruelty to animals, destruction of

5

No. 26179-4-III

In re the Termination of SJ

property, and other violent behavior. She stated that SJ could not wait any longer for

TH to remedy her parental deficiencies despite TH's success and improvement.

In its findings of fact the court found that despite the fact that TH had been

offered a substance abuse evaluation and treatment, random UA/BA testing, a

psychological evaluation, mental health services, domestic violence training, a

parenting assessment, and parenting education, she had failed to repair her

relationship with SJ. The court noted Ms. Thomas' testimony that TH was unlikely to be

able to perceive and cope with SJ's behavior problems in the near future. The trial

court terminated TH's parental rights with SJ.

TH appealed. This appeal was stayed in May 2008 pending a decision and

mandate in *In re Welfare of A.B.*, 168 Wn.2d 908, 919, 232 P.3d 1104 (2010).

## ANALYSIS

The dispositive issue is whether the trial court erred in finding all necessary

services had been provided. TH contends the State failed to provide timely mental

health services and needed attachment and bonding services.

A parent has a fundamental liberty interest in the care, custody and management

of her child. *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599

(1982). Thus, termination of parental rights should be allowed "only for the most

powerful of reasons." *In re Welfare of A.J.R.*, 78 Wn. App. 222, 229, 896 P.2d 1298

(1995). Washington courts use a two-step process when deciding whether to terminate

parental rights. *In re A.B.*, 168 Wn.2d at 911; RCW 13.34.180(1); .190. "The first step

No. 26179-4-III

*In re the Termination of SJ*

focuses on the adequacy of the parents and must be proved by clear, cogent, and

convincing evidence. The second step focuses on the child's best interests and need

be proved by only a preponderance of the evidence. Only if the first step is satisfied

may the court reach the second." *In re A.B.*, 168 Wn.2d at 911 (citations omitted).

The first step involves six statutory elements. RCW 13.34.180(1). They are:

- (a) That the child has been found to be a dependent child;
- (b) That the court has entered a dispositional order pursuant to RCW 13.34.130;
- (c) That the child has been removed or will, at the time of the hearing, have been removed from the custody of the parent for a period of at least six months pursuant to a finding of dependency;
- (d) That 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;
- (e) That there is little likelihood that conditions will be remedied so that the child can be returned to the parent in the future; [and]
- (f) That the continuation of the parent and child relationship clearly diminishes the child's prospects for early integration into a stable and permanent home.

RCW 13.34.180(1). The trial court entered findings on all six elements. TH challenges

the court's findings regarding (d), (e), and (f).

Our review is limited to determining if substantial evidence supports the trial

court's findings of fact. In re Welfare of C.B., 134 Wn. App. 942, 952-53, 143 P.3d 846

(2006). Evidence is substantial if it is sufficient to persuade a fair-minded person of the

truth of the declared premise. Id. at 953. Because the trial court has the opportunity to

hear the testimony and observe the witnesses, its decision is entitled to deference. In

No. 26179-4-III

In re the Termination of SJ

re Dependency of A.V.D., 62 Wn. App. 562, 568, 815 P.2d 277 (1991). Consequently,

we do not judge the credibility of the witnesses or weigh the evidence. Id.

The termination statute requires the State to prove DSHS "offered or provided all

and necessary services, reasonably available, capable of correcting the parental

deficiencies." RCW 13.34.180(1)(d). To meet this statutory burden, the State must

tailor the services it offers to meet each individual parent's needs. In re Dependency of

T.R., 108 Wn. App. 149, 161, 29 P.3d 1275 (2001). DSHS, however, is not required to

offer services when a parent is unable to benefit from the services. Id. at 163. Further,

"even where the State inexcusably fails to offer a service to a willing parent, . . .

termination is appropriate if the service would not have remedied the parent's

deficiencies in the foreseeable future." Id. at 164.

TH first contends the State failed to tailor services to her needs because despite

knowing she suffered from a mental illness, DSHS took a sequential approach and

failed to refer her to mental health services until December 2005. She contends co-

existent mental health services were necessary for successful early treatment. Thus,

she argues, the delay contributed to the deterioration of the once-strong bond with SJ.

The State responds it relied on the court order specifically directing mental health

services would be sequential to TH's sobriety and no evidence shows TH's failures to

complete treatment were linked to her mental health. We disagree with the State.

First, the record reflects TH succeeded in inpatient treatment soon after

receiving mental health services despite failing three times in the previous year. The

No. 26179-4-III

In re the Termination of SJ

situation suggests the mental health services helped her get sober. In any event, it is

not TH's burden to show they did. Second, our legislature found:

"[P]rior state policy of addressing mental health and chemical dependency

in isolation from each other has not been cost-effective and has often

resulted in longer-term, more costly treatment that may be less effective

over time. The legislature finds that a substantial number of persons

have co-occurring mental and substance abuse disorders and that

identification and integrated treatment of co-occurring disorders is critical

to successful outcomes and recovery."

Laws of 2005, ch. 504, § 101. DSHS failed to tailor TH's services to her co-occurring

problems; the services were not integrated. As TH argues, her attachment-relationship

with SJ may not have deteriorated if she had earlier completed treatment.

TH next contends DSHS failed to provide necessary bonding and attachment

services, even though the State acknowledged a lack of attachment and bonding was

preventing TH from effectively caring for SJ. The State now speculatively argues TH

could not have benefitted from attachment and bonding services. Even so, the State

presented testimony tending to show its (incorrect) belief that TH was receiving

bonding and attachment services at the YWCA. Further the State responds TH had not

complained about the services at the YWCA and the provider wanted to save TH

additional travel time. These arguments are not well-taken.

Though the YWCA parent educator testified TH was unable to read SJ's

emotional cues and struggled with setting limits with him, she acknowledged she did

not have any idea why TH was not progressing in terms of recognizing SJ's emotional

needs. She related she did not know whether TH and SJ had ever been assessed for

No. 26179-4-III

In re the Termination of SJ

purposes of attachment and that she did not work on bonding and attachment with

them. Likewise, Ms. Thomas testified TH did not provide behavioral or emotional

control or guidance to SJ. Ms. Thomas related she did not know the source of TH's

relationship problems with SJ. DSHS's role was to identify the problem. Ms. Thomas

testified she had successfully worked on attachment problems with other families.

Moreover, the record showed TH applied the suggested parenting skills and

attempted to control SJ's behavior but was met with unusually strong controlling and

aggressive behavior from SJ. It was DSHS's role to work with SJ to reduce this

unusual behavior, not TH's role to counteract SJ's new controlling and aggressive

behaviors related to his detachment from TH during his bonding with the foster parents

while in State care. Importantly, the record shows TH and SJ were attached at the

initiation of the dependency. Ultimately, it was DSHS's responsibility to identify the

services TH and SJ needed and provide them. It identified attachment and bonding as

a "major issue" and failed to provide attachment and bonding services. RP (Mar. 13,

2007) at 455.

In sum, TH cured the deficiencies triggering the State's removal of SJ,

unsanitary living conditions and drug use, and she established the required safe, clean,

and drug-free home. When the dependency was initiated TH and SJ shared a bond

and attachment that diminished over time as SJ became bonded with his foster parents.

SJ became detached from TH as he bonded with his foster parents. The State failed to

timely provide TH mental health services while she struggled with her drug addiction.

10

No. 26179-4-III

In re the Termination of SJ

TH was unable to restore her relationship with SJ even though she attempted to apply

the parenting skills taught to her. The record shows TH maintained a relationship with

her other children who did not exhibit SJ's unusual controlling and aggressive

behaviors. TH was not provided attachment and bonding services for her and SJ even

though the State acknowledged her need. We cannot say the services would have

been futile. And, considering SJ's detachment from TH while in State care, when at the

same time, TH awaited delayed services, placing the burden on TH to repair the

detachment-damage seems fundamentally unfair in a constitutional due process

context. See *In re Dependency of K.N.J.*, 2011 WL 2118793, at \*2 (Wash. May, 26,

2011). The trial court erred in finding that all necessary services had been provided.

Having so decided, we do not decide whether the trial court erred in deciding

whether little likelihood remained for remedying conditions in the near future or whether

continuation of the parent-child relationship would diminish SJ's prospects for early

integration into a stable home. Finally, on remand, if termination should proceed, we

direct the trial court to enter specific findings regarding TH's current fitness to parent

under *In re A.B.*, 168 Wn.2d at 911. Based on this record we are unable to infer

parental fitness. Termination of the parent-child relationship must be based on current

parental unfitness. *In re Dependency of T.L.G.*, 126 Wn. App. 181, 203, 108 P.3d 156

(2005). "RCW 13.34.180(1), implicitly requires evidence of current parental unfitness,

and thus 'comports with the constitutional due process requirement that unfitness be

established by clear, cogent and convincing evidence.'" In re A.B., 168 Wn.2d at 919

11

No. 26179-4-III

In re the Termination of SJ

(quoting In re Dependency of K.R., 128 Wn.2d 129, 142, 904 P.2d 1132 (1995)).

Reversed and remanded for action consistent with this opinion.

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Brown, J.

WE CONCUR:

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Kulik, C.J.

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Sweeney, J.

12

