Filed
Washington State
Court of Appeals
Division Two

April 27, 2020

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

IN THE MATTER OF THE WELFARE OF: K.B., A minor child.	No. 53292-1-II RULING REVERSING ORDER TERMINATING PARENTAL RIGHTS

R.B.[1] gave birth to her son, K.B., in January 2016, while married to R.P.[2] R.P. appeals the juvenile court's order terminating his parental rights to K.B. He argues: (1) the Department of Children, Youth and Families (Department) did not provide him with necessary services to correct a primary parental deficiency, lack of a parent-child bond; and (2) the Department failed to prove that he was an unfit parent. This court considered R.P.'s appeal on an accelerated basis under RAP 18.13A and reverses the juvenile court.

[1] R.B. is not a party to this proceeding and the juvenile court has terminated her parental rights.

[2] Neither R.P. nor R.B. believes R.P. is K.B.'s biological father.

FACTS

The Department filed a dependency petition for K.B. one week after his birth. A few months later, R.P. agreed to the dependency. At R.P.'s first dependency review hearing in May 2016, R.P. did not have any visits scheduled with K.B., ostensibly because R.P. had not established paternity. So the juvenile court ordered R.P. to complete a paternity test before any visits occurred.[3] In compliance with the juvenile court's order, the Department refused to provide visits to R.P.

K.B. lived with R.B. in an in-home dependency from March 1, 2016, until being removed from R.B.'s care on April 11, 2017. R.P. had limited interaction with K.B. during this time. He only saw K.B. a few times when he was an infant and still in R.B's care. Since then, R.P. has not seen K.B. at all because he refused to comply with the court order for paternity testing.

K.B. has been in the same foster home since August 2017. His foster parents wish to adopt him. R.B. signed an open adoption agreement with the foster parents.

Despite not engaging in paternity testing, R.P. completed a chemical dependency assessment in June 2016. The evaluation recommended that R.P. participate in alcohol and drug information school, based in part on the fact that R.P. did not report any drug use. But his urinalysis (UA) came back positive for methamphetamine. Under these circumstances, that "assessment would be considered void because, obviously, due to his UA, he wasn't being fully honest." Report of Proceedings (RP) Jan. 14, 2019 at 132.

[3] It is not clear if the juvenile court ordered the paternity test in the initial dependency order or at a later point in the dependency. *See* Clerk's Papers (CP) at 154 (suggesting test was ordered in an October 2016 review hearing).

Social worker Samantha Patton referred R.P. to a parenting assessment, but the initial provider could not complete the assessment because R.P. could not participate in a parent-child observation. But in 2018, Patton found a provider who could do the parenting assessment without K.B. being present.

Therapist Josette Parker completed the parenting assessment for R.P. in July 2018. Parker thought R.P. had good answers to questions about child rearing, but she was concerned about his criminal history and his most recent drug charge in 2015. R.P. also had slightly elevated scores for anger issues, although Parker did not refer him to anger management because he was below the cut-off for services and she did not believe that it would be worthwhile since R.P. was refusing to take the paternity test. In his parenting assessment, R.P. told Parker he would not take a paternity test because he thought it would remove him from the case since he is not K.B.'s biological father.

Parker did not believe R.P. could parent K.B. because they did not have any kind of bond and R.P. had not "made significant changes in his life and his support system that would allow for [K.B.] to have a safe, healthy, nurturing environment where there weren't bad influences, where there weren't people using drugs around him." RP Feb. 14, 2019 at 167.

The Department offered R.P. paternity testing several times during the dependency. For example, Patton referred R.P. to paternity testing three times, but each time he refused. K.B.'s guardian ad litem (GAL) Amber Hasler, was certified to perform paternity swabs and she offered to come to R.P.'s home in Spokane and do the swab, but R.P. declined. R.P. never completed this service.

Because of R.P.'s failure to complete the paternity test, he has not had any contact with K.B. He has no bond with K.B. and does not know him. Patton testified that because of this, it would traumatize K.B. to move him to R.P.'s care. Patton added that even if R.P. could have contact with K.B., he would still be unable to care for K.B. for nine months to one year because the Department would have to further assess his parenting deficiencies. Hasler would not be supportive of visits because K.B. had to go through so much already and even if R.P. did engage in paternity testing, she thinks K.B. would need to be reintroduced to R.P. slowly. Parker thought placement with R.P. would harm K.B. both emotionally and psychologically because the two do not know each other.

After a termination trial, the juvenile court terminated R.P.'s parental rights. R.P. appeals.

ANALYSIS

I. Fatherhood

This matter is atypical, in that it involves the termination of a presumed parent's rights. Because he was married to R.B. when K.B. was born, R.P. is his presumed father under RCW 26.26A.115(1)(a)(i), despite that R.P. and R.B. do not think R.P. is K.B.'s biological father. RCW 26.26A.115(1)(a)(i) provides:

> (1) An individual is presumed to be a parent of a child if:
> . . . .
> (i) The individual and the woman who gave birth to the child are married to or in a state registered domestic partnership with each other and the child is born during the marriage or partnership, whether the marriage or partnership is or could be declared invalid . . . .

A presumption of parentage, however, is just that. It is rebuttable. RCW 26.26A.100(2) ("There is a presumption under RCW 26.26A.115 of the individual's

parentage of the child, unless the presumption is overcome in a judicial proceeding or a valid denial of parentage is made under RCW 26.26A.200 through 26.26A.265."); *see also* RCW 13.34.030(17) (defining a "[p]arent" as "the biological or adoptive parents of a child, or an individual who has established a parent-child relationship under RCW 26.26A.100, unless the legal rights of that person have been terminated by a judicial proceeding . . .").

But both parties agree that a dependency proceeding is an inappropriate forum for rebutting presumed parenthood. RCW 26.26A.115(2); RCW 26.26A.475. Rather, anyone seeking to rebut the presumption must file a separate parentage action under Chapter 26.26A RCW. They also agree that the Department lacks standing to file a parentage action. RCW 26.26A.405 (parentage action may be filed by the child, the birth mother, a parent, a person seeking adjudication of parentage, the division of child support, an adoption agency, or a legal representative of a deceased person, an incapacitated person, or a minor).

And both parties acknowledge that paternity testing results have limited utility when the presumptive father does not want to rebut the parentage presumption. RCW 26.26A.435(2) and (3). In a parentage action, genetic testing, specifically a test result that shows no genetic link between parent and child, is still not completely determinative of legal parentage. For example, a parentage court cannot rebut a presumption of parentage after the child turns four unless the presumed parent is not a genetic parent and never resided with the child, and never held out the child as the presumed parent's

child, or the child has multiple presumed parents.[4] RCW 26.26A.435(2)(a). Here, R.B. has held himself out as K.B.'s father. And K.B. turned four in January 2020.

And for a child for whom "the woman who gave birth to the child is the only other individual with a claim to parentage," if no party to the parentage proceeding challenges the presumed parentage, the parentage court will "adjudicate the presumed parent" as the parent of the child with no genetic testing required. RCW 26.26A.435(3)(a). But if either the presumed parent or the woman who gave birth to the child challenges parentage, and the presumed parent is not a genetic parent, the parentage court then must adjudicate parentage based on the best interest of the child.[5] RCW 26.26A.435(3)(c); RCW 26.26A.460 (best interest standard).

In sum, R.P. is K.P.'s legal father because he is K.B.'s presumed (and unrebutted) father. Neither the dependency court nor the Department could rebut this presumption in the dependency action. And the Department has no authority to file a separate parentage action. Because R.P. is K.B.'s legal father, he has the same liberty interest in the care, custody, and control of K.B. as any biological or adoptive parent. *In re Parentage of L.B.*,

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[4] At the start of the dependency, there were other alleged fathers. They have since been dismissed from the dependency.

[5] Relying on RCW 26.26A.435(3)(c), the Department also believes that the best interest standard applies if the birth mother does not participate in a parentage action. But that section provides that the best interest standard is triggered only when either the presumed parent or the birth mother challenges parentage. R.P. does not challenge his presumed parentage and, therefore, has not filed any parentage proceeding that could result in the rebuttal of his parentage presumption. It follows that only a challenge by R.B. could trigger the best interest evaluation under section (3)(c). RCW 26.26A.405 (parties to parentage action); RCW 26.26A.435(3)(c). Neither party cites or discusses RCW 26.26A.435(4), which also requires a best interest analysis under certain other circumstances, so this court will not address it here.

155 Wn.2d 679, 708-10, 122 P.3d 161 (2005), *cert. denied sub nom. Britain v. Carvin*, 547 U.S. 1143 (2006).

II. Termination

To terminate parental rights, the Department must first prove the six elements outlined in RCW 13.34.180(1) by clear and convincing evidence. RCW 13.34.190(1)(a)(i); I*n re Dependency of T.L.G*., 126 Wn. App. 181, 197, 108 P.3d 156 (2005). Second, a preponderance of the evidence must establish that termination is in the child's best interests. RCW 13.34.190(1)(b); *In re the Welfare of A.B.*, 168 Wn.2d 908, 911, 232 P.3d 1104 (2010). Along with these two statutory requirements, due process also requires the court to make a finding of current parental unfitness. *In re Parental Rights to K.M.M.*, 186 Wn.2d 466, 479, 379 P.3d 75 (2016).

The Department's arguments to affirm the termination rely on two assumptions. First, it assumes that paternity testing is a service that the father refused, justifying withholding contact from K.B. and necessarily preventing him from participating in any bonding or attachment services.[6] Second, it assumes that it was bound by the juvenile court's order to refuse parent-child contact and its failure to provide contact should not affect termination. This court addresses these assumptions in turn.

[6] Although visitation is not a stand-alone service, *In re Dependency of T.H.*, 139 Wn. App. 784, 792, 162 P.3d 1141 (2007), the Department concedes that this ban on in-person contact also prevented R.P. from engaging in any attachment and bonding services or therapeutic visitation. *See T.H.*, 139 Wn. App. at 792 ("There may be situations where visitation is part of a required service, such as an interactive parenting class."); *see generally In re Hauser's Welfare*, 15 Wn. App. 231, 236, 548 P.2d 333 (1976) (if "a finding of no residual relationship between the natural parents and the child was based upon the agency-created absence of visitations, the injustice of such authoritarian dominance would be apparent").

A. Services

Under the fourth statutory termination factor, RCW 13.34.180(1)(d), the Department has an obligation to provide all services that the court ordered, as well as "all necessary services, reasonably available, capable of correcting the parental deficiencies within the foreseeable future." RCW 13.34.180(1)(d). "[N]ecessary services" are those services "needed to address a condition that precludes reunification of the parent and child." *In re Dependency of A.M.M.*, 182 Wn. App. 776, 793, 332 P.3d 500 (2014).

The Department must tailor the services it offers to meet each individual parent's needs. *In re the Welfare of S.J.*, 162 Wn. App. 873, 881, 256 P.3d 470 (2011). But, "'[w]here the record establishes that the offer of services would be futile, the trial court can make a finding that the Department has offered all reasonable services.'" *K.M.M.*, 186 Wn.2d at 483 (quoting *In re the Welfare of C.S.*, 168 Wn.2d 51, 56 n.2, 225 P.3d 953 (2010)).

1. Paternity Testing as a Service

"[S]ervices" in a dependency are reasonably available supports that the Department must provide to a parent to "enable them to resume custody." RCW 13.34.136(b)(i). That is, a service helps correct parenting deficiencies so that a child may be returned home. RCW 13.34.180(1)(d). It follows that something that cannot correct a parental deficiency does not amount to a necessary "service" under Chapter 13.34 RCW. *Cf. K.M.M.*, 186 Wn.2d at 480-81 (inappropriate services are not necessary services).

Because paternity testing in this situation would not affect the child welfare proceedings, it is not a child welfare "service." During the entire dependency, R.P. was

K.B.'s legal father. So R.P. did not have to prove a genetic connection to K.B. to receive services necessary to correct his parental deficiency, lack of a parent-child bond.

As discussed, paternity test results of a presumed parent submitted in a dependency do not change a presumed parent's status as a legal parent. So even had R.P. submitted a paternity test that showed he had no genetic connection to K.B., he would still be K.B.'s legal father and he would have still needed to develop a bond with his son. Thus, the juvenile court's finding that genetic testing for R.P. was "a service critical to . . . establishing a relationship" with K.B. lacks support. Clerk's Papers at 205 (Finding of Fact 2.14). It was neither a "service" nor was it "critical" to forming a relationship. Because of this, the Department's argument that R.P. had to engage in an unnecessary "service" before accessing any services that were actually necessary to repair the parent-child bond is questionable.

But here, paternity testing was also court ordered. And RCW 13.34.180(1)(d) requires the Department to provide a parent with both any reasonably available services that could assist with reunification *and* court-ordered services. The Department relies heavily on the court order to contend that the father needed to complete a genetic test before he could have contact with K.B.

2. Reasonably Available Services/Court Ordered Services

The Department contends that any parent-child contact was not reasonably available because the juvenile court ordered R.P. to take a paternity test before he could have in-person contact with K.B., and he never took one. But the Department is not necessarily excused from offering a service simply because a juvenile court ordered it to offer services sequentially.

For example, in *In re S.J.*, the juvenile court also ordered sequential services. There, the parent could not obtain a psychological evaluation until they were sober. *S.J.*, 162 Wn. App. at 878. Division Three reversed the termination, stating "[t]he State failed to timely provide [the parent with] mental health services while she struggled with her drug addiction." *S.J.*, 162 Wn. App. at 883.

S.J. rejected the Department's argument that the juvenile court order justified its failure to timely offer mental health services. It also found a connection between the parent's failure to complete drug treatment and her mental health issues. *S.J.*, 162 Wn. App. at 882.

Here, the first circumstance is present, in that the juvenile court's order blocked the Department from providing timely in person parent-child contact and thus any related services requiring in-person contact. And, as in *S.J.*, simply because the dependency court placed a court-ordered roadblock in the way of accessing a necessary service and the Department followed the court's instructions, does not mean that termination was appropriate.

The second circumstance is not as clearly present, but also weighs in favor of reversal. In *S.J.*, the dependency court believed that a parent had to be sober to benefit from mental health services. But legislative findings that these services should be "co-occurring" undercut that assumption. *S.J.*, 162 Wn. App. at 882. Here, the dependency court also relied on an incorrect belief: R.P. had to submit a genetic test before he could establish a relationship with his legal son, K.B. But this court's review of the parentage laws supports that at all times during the dependency, the dependency court and the Department had the obligation to provide the same services to R.P. as any other parent

who lacks a bond with their child. *L.B.*, 155 Wn.2d at 708-10. Under these circumstances, *S.J.* supports that the dependency court should not have conditioned R.P.'s access to K.B. on his completion of a genetic test.

Also, a third circumstance, not present in *S.J.*, supports that R.P. should have had access to K.B. In *S.J.*, both of the sequentially ordered services were necessary services. But here, genetic testing was unnecessary because R.P. was K.B.'s legal father. In sum, the parent-child bond needed to be strengthened but the Department failed to offer contact and contact-based services that would do this.[7]

3. Timeline of Services

The Department also argues that even had the Department provided attachment and bonding services, these services could not correct the parental deficiency "within the foreseeable future." RCW 13.34.180(1)(d). The Department relies on testimony that it would have taken nine to twelve months for R.P. and K.B. to bond.

R.P. counters with *In re Matter of B.P. v. H.O.*, 186 Wn.2d 292, 376 P.3d 350 (2016). In *B.P.*, our Supreme Court rejected the Department's argument that it did not have to provide a parent with any attachment and bonding services. It determined that the child's lack of a bond with her parent and concomitant bond with her foster parents

[7] The Department is excused from offering a service if it would be futile. But the Department did not argue futility at the termination trial, the juvenile court did not make a futility finding here, and although the Department's brief sets out the futility standard, it makes no argument that attempts to repair the parent-child bond would have been futile. *B.P.*, 186 Wn.2d at 332. The record also shows that R.P. engaged in assessments or services for which the Department did not impose a roadblock, which would make it difficult to apply futility here. *B.P.*, 186 Wn.2d at 316 n.5 (the futility rule "derives from cases in which the State made repeated offers of services but eventually gave up after the parent refused to accept any of those offers").

"were exacerbated by the State's failure to timely provide necessary services." *B.P.*, 186 Wn.2d at 315 (citing *S.J.*, 162 Wn. App. at 877-78; and *C.S.*, 168 Wn.2d at 55-56). It reversed the termination, despite that the juvenile court found that services necessary to build a parent-child relationship "would take one year or more and that is too long." *B.P.*, 186 Wn.2d at 311 (internal quotation omitted). The juvenile court made a similar finding here and, as in *B.P.*, it does not preclude reversal.

B.P. added, "the parent must have the opportunity to benefit from all services available to address a barrier to family reunification." *B.P.*, 186 Wn.2d at 315. Similarly, that did not happen for R.P. Also as in *B.P.*, nothing in the record here supports that the Department decided to withhold attachment services during the dependency "because they would have failed or taken too long."[8] *B.P.*, 186 Wn.2d at 318. But it still offered R.P. nothing to facilitate a parent-child bond. *B.P.*, 186 Wn.2d at 318. Through this failure, the Department deprived R.P. of "any opportunity to demonstrate h[is] capacities for real attachment work," and "violated its statutory and constitutional obligation to offer or provide 'all necessary services, reasonably available, capable of correcting parental deficiencies within the foreseeable future.'" *B.P.*, 186 Wn.2d at 319 (quoting RCW 13.34.180(a)(d)).

B. Unfitness

R.P. also argues that the Department failed to present sufficient evidence to support that he is unfit to parent K.B. He mainly contends that the juvenile court

[8] And *B.P.* requires this court to discount non-expert witness testimony at the termination hearing that the Department should be excused from providing parent-child contact and bonding services at this stage. *B.P.*, 186 Wn.2d at 317-18.

improperly considered the lack of a parent-child bond and how it could affect K.B. in determining that R.P. cannot parent K.B. *B.P.* 186 Wn.2d at 321 (citing *In re the Welfare of A.B.*, 181 Wn App. 45, 64, 323 P.3d 1062 (2014)).

The Department responds that K.B.'s wellbeing is a valid factor in determining parental fitness, citing *C.S.*, 168 Wn.2d at 54. It also argues that a parent's lack of ability to bond with a child is also an appropriate unfitness consideration, citing *In re K.M.M.*, 186 Wn.2d at 491.

But the Department agrees with R.P. that a "lack of a bond should not be a parental deficiency where it might be remedied through additional services." Respondent Br. at 10 (citing *B.P.*, 186 Wn.2d at 321). It then relies on R.P.'s failure to complete a genetic test to access parent-child services to distinguish *B.P.* This court, however, has already rejected the Department's argument that it did not have to provide R.P. with services to repair the parent-child bond. *B.P.*, 186 Wn.2d at 321. Under these circumstances, this court concludes the Department failed to prove that R.B. was currently unfit to parent K.B. Accordingly, it is hereby

ORDERED that the order terminating R.P.'s parental rights to K.B. is reversed and this matter is remanded to the juvenile court.

Aurora R. Bearse
Court Commissioner

cc: Marek E. Falk
Julie A. Turley
Hon. Philip Sorensen