NO. 34950-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

In re the Dependency of N.M.,

STATE OF WASHINGTON/DSHS,

Respondent,

v.

F.M.,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable James R. Orlando, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The juvenile court erred in ordering termination of appellant's parental rights. CP 17-19.

2. The court erred in finding without sufficient evidence that the child's chances of a stable home would be substantially diminished if the parent-child relationship were to continue. CP 23, Finding of Fact (FOF) 14. A copy of the court's findings and conclusions is attached as appendix A.

3. RCW 13.34.180 and RCW 13.34.190 are unconstitutional because they do not require the trial court to find termination is the least restrictive alternative before terminating a parent's fundamental rights.[1]

4. RCW 13.34.190(1)(b), which waives proof that services were offered in cases of alleged abandonment, is unconstitutional as applied to a parent whose location is known.

5. The court erred in finding that reasonable efforts to reunify the family were not necessary. CP 22 (FOF 8).

6. The court erred in finding that the Department was not required to provide services to F.M. CP 22 (FOF 9).

6. The court erred in finding that F.M. showed an intent to forego her parental responsibilities despite an ability to do so. CP 22 (FOF 7).

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[1] Appellant is aware of Division One's recent decision in In re the Dependency of I.J.S., 128 Wn. App. 108, 114 P.3d 1215, review denied, 155 Wn.2d 1021 (2005), holding these statutes constitutional. As argued infra, appellant is raising new arguments that are beyond the scope of I.J.S .'s holding. Additionally, appellant respectfully asserts that I.J.S . was wrongly decided.

7. The court erred in concluding that F.M. abandoned N.M. beyond a reasonable doubt. CP 24 (COL 3).

8. The court erred in finding that there is little likelihood conditions will be remedied so that the child can be returned to the parent in the near future. CP 22 (FOF 11).

Issues Pertaining to Assignments of Error

1. Did the state fail to prove by clear, cogent, and convincing evidence that continuing the parental relationship would diminish the child's prospects for early integration into a stable and permanent home, when the State's witness gave a conclusory opinion that parroted the statutory requirement without a substantial factual basis for support?

2. Are RCW 13.34.180 and RCW 13.34.190 facially unconstitutional and unconstitutional as-applied because they permit the State to terminate parental rights without first showing by clear, cogent, and convincing evidence that termination of all parental rights, including the right to visit, is necessary to protect that child from harm?

3. Whether RCW 13.34.190(1)(b), providing that the State need not offer services to the parent before terminating parental rights if the child is abandoned, violates procedural due process because the risk of erroneously terminating the fundamental right to parent outweighs the minimal burden to the State of offering services when the parent's location is known?

4. Whether the State failed to prove abandonment, as defined by RCW 13.34.030(1), beyond a reasonable doubt?

B. STATEMENT OF THE CASE

1. Procedural History

N.M. was born December 20, 2002. CP 21. F.M., the appellant, is her mother. CP 21. On May 20, 2005, the State filed a dependency petition. CP 5. On November 16, 2005, the State filed a termination petition. CP 1. A trial was held and the trial court granted the petition on June 1, 2006. CP 17, 20-24. F.M. appeals this decision. CP 26.

2. Substantive Facts

Stating that she was unable to care for her child, F.M. gave N.M. to Betty Friberg while on a cross country bus trip on February 27, 2005. Ex. 1 at 3. Several weeks later, Friberg contacted Child Protective Services about the child. Ex. 1, at 3. On March 22, 2005, F.M. signed a voluntary placement agreement for her daughter. CP 21. The child, N.M. has been in foster care since May 20, 2005, and now recognizes her foster mother as "mom." CP 22; RP 25.[2] F.M. visited her daughter twice, most recently on April 12, 2005. CP 22. The social worker testified that when F.M. arrived for the visit, she did not appear "neat" and was accompanied by a male claiming to be the child's father, but who was not. RP 19. She concluded, however, that the visit was "innocuous" and that F.M. had "good interactions" with her daughter. RP 19.

At the time of trial, F.M. was incarcerated and did not appear. RP 2. The trial attorney said he had made repeated attempts to have F.M. appear telephonically, but the prison did not respond. RP 2.

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[2] RP refers to the Verbatim Report of Proceedings for May 10, 2006.

At trial there was testimony from three witnesses: Carolyn Floyd, a social worker with the Department of Social and Health Services ("the Department"), Erik Jensen, the guardian ad litem who supervised the Court Appointed Special Advocate ("CASA") volunteer assigned to the case, and Roberto Lael, F.M.'s boyfriend. RP 3, 35, 39-40.

Floyd testified that F.M. had abandoned N.M. RP 6. She said that although services were not required, the Department would have provided them if F.M. had requested. RP 7. She stated repeatedly that F.M. did not come forward and request services. RP 7, 16. Floyd did not tell F.M. over the phone that services were available. RP 17. Nor did Floyd have personal knowledge that F.M. was ever informed of any available services. RP 17. She said that she mailed a plan for services, and that she believed others had spoken to F.M. about services, and that F.M. had opportunities to learn about services while in prison. RP 17-18.

Since F.M.'s last visit with her daughter in April, 2005, F.M. contacted Floyd twice. In September, 2005, F.M. called Floyd and inquired about her daughter. RP 9. F.M. said she was at a motel but did not leave a number where she could be reached. RP 9. In October, 2005, F.M. called again, and made an appointment to meet with Floyd. RP 9. She did not specifically inquire about her daughter. RP 9. F.M. came to the Department and left shortly thereafter without requesting visitation. RP 8-9.

Since October, 2005, F.M. had not had contact with Floyd or her daughter. RP 10. During that time, F.M. had been in custody for all but a few days. RP 34; Exs. 7, 11, 14.

Floyd testified that the necessary assessment services could not be completed in prison, and that even if F.M. were to be released immediately, and immediately request services, reunification with her daughter would take at least a year. RP 20-23. Floyd offered her belief that the "near future" is three to six months, not over a year because N.M. is developmentally disabled, is nearly four years old, and has had little to no contact with her mother for two years already. RP 12, 24, 28.

Floyd was asked a series of questions regarding the Department's recommendation of adoption:

Q: Would adoption provide a safe and stable home?
A: It would.
Q: Could adoption occur if the parental rights continue?
A: It could not.
Q: Therefore, would continuing the parental relationship prevent this child from being adopted, from being integrated into a permanent and stable home?
A: Yes.

RP 14-15.

The trial court found that services were not required under RCW 13.34.190 because the child was abandoned beyond a reasonable doubt. CP 22. The court further found there was little likelihood conditions would be remedied so that the child could be returned to F.M. in the near future. CP 22. The court also found that "Continuance of the parent-child relationship clearly diminishes the child's prospects for integration into a stable and permanent home." CP 23.

C. ARGUMENT

1. THE STATE FAILED TO PROVE BY CLEAR, COGENT, AND CONVINCING EVIDENCE THAT CONTINUING THE PARENTAL RELATIONSHIP WOULD DIMINISH THE CHILD'S PROSPECTS FOR INTEGRATION INTO A STABLE HOME.

"It is no slight thing to deprive a parent of the care, custody, and society of a child, or a child of the protection, guidance, and affection of the parent." State v. Rasch, 24 Wash. 332, 335, 64 P. 531 (1901). The harsh finality of termination, with its potential emotional and mental impact on both the child and the parent should be avoided whenever possible. In re Adoption of J.D., 42 Wn. App. 345, 350, 711 P.2d 368 (1985). To terminate a parent's rights, the state must prove the six statutory elements in RCW 13.34.180(1) by clear, cogent, and convincing evidence.[3] RCW 13.34.190; In re Dependency of H.W., 92 Wn. App. 420, 425, 961 P.2d 963 (1998). The sixth element, subsection (f), requires the State to prove "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. To meet this burden, the State must show the ultimate fact at issue is "highly probable." In re Dependency of K.R., 128 Wn.2d 129, 141, 904 P.2d 1132 (1995). Such findings may be overturned on appeal if they are not supported by substantial evidence sufficient to persuade a fair-minded, rational person. In re Welfare of C.B., 134 Wn. App. 942, 952-53, 143 P.3d 846, 850 (2006). Here, there was no such substantial evidence, but instead mere conclusory opinions and findings which parroted the statutory requirements. See CP 23; RP 14-15.

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[3] The statute is quoted in appendix B.

The mere fact that no adoption can occur without termination of the natural parent's rights is insufficient to support a finding that continuation diminishes the child's prospects for integration into a stable home because this factor is present in every case. See In re Welfare of Churape, 43 Wn. App. 634, 638-39, 719 P.2d 127 (1986). If this fact were sufficient, the requirement would be meaningless. The only evidence supporting the trial court's finding was the social worker's response to a series of questions, mostly requiring only a "yes" or "no" answer, merely parroting the statutory language. RP 14-15. The assistant attorney general (AAG) asked, "Would adoption provide a safe and stable home?" and Floyd responded that it would. RP 14-15. The AAG asked, "Would continuing the parental relationship prevent this child from being adopted, from being integrated into a permanent and stable home?" and Floyd said, "Yes." RP 14-15. There was no elaboration or reference to any evidence. The social worker's testimony offered little in the way of facts, and certainly not clear, cogent, and convincing evidence supporting the statutory element. Her testimony alone does not support a finding of diminished prospects and the finding is inadequate to support a termination order. See, e.g., Churape, 43 Wn. App. at 639; In re Dependency of C.R.B., 62 Wn. App. 608, 618-19, 814 P.2d 1197 (1991); but see In re Dependency of J.W., 90 Wn. App. 417, 432, 953 P.2d 104 (1998) ("J.W. lived in a foster home and could not be placed for permanent adoption until Williams' rights were terminated. Thus, we hold that the required finding was highly probable.")

Such conclusory testimony was found to be insufficient in C.R.B ., 62 Wn. App. at 618-19. Citing the requirement of proof by clear, cogent, and convincing evidence, the C.R.B . court held the evidence insufficient to satisfy RCW 13.34.180 and .190 because it consisted of "legal conclusions parroting the language of the statutory requirements." Id. at 618-19. Specifically, this procedure produced insufficient supporting facts and did not permit meaningful appellate review of the termination order. Id. at 619. As in C.R.B ., the record only shows legal conclusions and prevents meaningful review of the issue. It is, therefore, insufficient to uphold the termination order.

There was no evidence that a continued relationship would "create feelings of insecurity and instability" in N.M. See In re Esgate, 99 Wn.2d 210, 214, 660 P.2d 758 (1983). On the contrary, Floyd admitted the most recent visit was "innocuous" and F.M. and her daughter had "good interactions." RP 19. Although testimony showed N.M. identified her foster mother as "mom," no evidence showed this bond would be impeded by a continuation of the legal relationship to her natural mother. RP 25.

No evidence showed the existence of a family willing to take permanent responsibility for N.M. Given this lack of evidence, any prospects for permanency are purely theoretical. Theoretical possibilities are not sufficient to support termination. See In re Dependency of T.R., 108 Wn. App. 149, 166, 29 P.3d 1275 (2001) (explaining that when it comes to dependency matters, theoretical possibilities are not enough).

The court's finding of fact is also conclusory and was based solely on similarly conclusory testimony. CP 23. The trial court found that continuation of the parent-child relationship "clearly diminishes the child's prospects for integration into a stable and permanent home." CP 23. The only evidence on this issue was that N.M. cannot be adopted until F.M.'s rights are terminated, as discussed above. RP 14-15. This single, brief finding of fact highlights the dearth of evidence regarding this factor. There was no further elaboration and no reference to any evidence to substantiate this boilerplate statement. This finding is inadequate to uphold a termination order. See C.R.B ., 62 Wn. App. at 619; see also, In re Detention of LaBelle, 107 Wn.2d 196, 218, 728 P.2d 138 (1986) (findings must be "sufficiently specific to permit meaningful review").

The State has not shown by clear, cogent, and convincing evidence that continuation of the legal relationship between parent and child would diminish N.M.'s prospects for early integration into a stable and permanent home. The termination order, therefore, should be reversed. See RCW 13.34.190; C.R.B ., 62 Wn. App. at 619.

2.RCW 13.34.180 AND RCW 13.34.190 ARE UNCONSTITUTIONAL BECAUSE THEY REGULATE A FUNDAMENTAL RIGHT BUT ARE NOT NARROWLY DRAWN.

"Terminating parental rights is one of the severest of state actions and implicates fundamental interests." In re the Dependency of J.M., 130 Wn. App. 912, 921, 125 P.3d 245 (2005) (citing M.L.B. v. S.L.J., 519 U.S. 102, 116, 117 S. Ct. 555, 136 L. Ed. 2d 473 (1996)); see also, e.g., Santosky v. Kramer, 455 U.S. 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982); In re Parentage of C.A.M.A., 154 Wn.2d 52, 57, 109 P.3d 405 (2005); In re Custody of Smith, 137 Wn.2d 1, 15, 969 P.2d 21 (1998), aff'd sub nom., Troxel v. Granville, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000); In re I.J.S ., 128 Wn. App. 108, 116, 114 P.3d 1215, rev. denied, 155 Wn.2d 1021 (2005); U.S. Const. amends. 1, 5, 14; Wash. Const. art. 1, § 7. Parental rights are a fundamental liberty interest protected by the constitution. Santosky, 455 U.S. at 753. The state may not disturb the family unit unless it is necessary to protect a child's right to conditions of minimal nurture, health,

and safety. RCW 26.44.010; In re Welfare of Frederiksen, 25 Wn. App. 726, 734, 610 P.2d 371 (1979).

Because this case involves state interference with fundamental parental rights, the standard of review is strict scrutiny. C.A.M.A., 154 Wn.2d at 57; Smith, 137 Wn.2d at 15; I.J.S ., 128 Wn. App. at 116. The termination statutes, however, do not require the Department to prove by clear, cogent and convincing evidence that termination is the least restrictive alternative available to protect the dependent child from harm. As such, the statutes, RCW 13.34.180 and .190, are facially unconstitutional, and the termination order issued pursuant to them must be reversed. See Smith, 137 Wn.2d at 15 (statutes burdening parental rights must survive strict scrutiny); but see, I.J.S ., 128 Wn. App. at 111; see also, In re Tiffany P., 215 W.Va. 622, 600 S.E.2d 334, 337-39 (2004) (reversing a termination order on the grounds that termination was not the least restrictive alternative available because, although the father was unfit to be a custodial parent, the father and child benefitted from continued supervised visits); In the Interest of D.A., 846 So.2d 1250 (Fla. App. 2003) (termination order reversed where the Department of Children and Families failed to establish that termination was the least restrictive means of protecting the child when it failed to consider the possibility of a guardianship with the child's grandmother); In the Interest of C.W.W., 788 So.2d 1020, 1023-24 (Fla. App. 2001) (termination order reversed where the Department failed to establish that termination was the least restrictive means of protecting the child when it failed to put forth evidence that the mother's continued contact with her children would harm them or any evidence establishing that the child would be harmed by continued custody with the foster family).

The termination statutes do not possess the necessary ends-means-fit to be considered narrowly tailored for constitutional purposes. The first step in complying with strict scrutiny requires the State to identify a compelling regulatory objective. C.A.M.A., 154 Wn.2d at 61; Smith, 137 Wn.2d at 15, 20. The only objective compelling enough to encroach on parental rights is unfitness of the parent to have any contact with the child, or actual detriment or harm to the child. In re Custody of Shields, 157 Wn.2d 126, 144-45, 136 P.3d 117 (2006); C.A.M.A., 154 Wn.2d at 64; Smith, 137 Wn.2d at 18.

The second step in complying with strict scrutiny requires the State show the relation between its stated objective (i.e., preventing harm to the child) and the proposed means of achieving it (i.e., permanently and completely severing all contact between parent and child) is closely drawn. Put another way, the means of regulation (termination) must be "necessary" in achieving the State objective (preventing harm to the child) and cannot be overly sweeping. See, e.g., Griswold v. Connecticut, 381 U.S. 479, 487, 85

S.Ct. 1678, 1683, 14 L. Ed. 2d 510 (1965); Aptheker v. Secretary of State, 378 U.S. 500, 508-514, 84 S. Ct. 1659, 1667 (1964); NAACP v. Button, 371 U.S. 415, 438, 83 S. Ct. 328, 340, 9 L. Ed. 2d 405 (1963).

Failure to narrowly tailor a statute that burdens a citizen's fundamental rights with a proper means-end-fit is constitutionally fatal. See, e.g., Aptheker, 378 U.S. at 508 (holding unconstitutional on its face an overly broad statute which burdened the right to travel); Griswold, 381 U.S. at 487 (1965) (declaring unconstitutional a state law forbidding contraceptive use because the state's regulation of fundamental rights was too drastic). In his Griswold concurrence, Justice White explained that if a statute is not precisely drafted so it regulates **only** what is necessary to achieve the State's objective, it cannot survive strict scrutiny.

But, in any event, it is clear that the state interest in safeguarding marital fidelity can be served by a more discriminately tailored statute, which does not, like the present one, sweep unnecessarily broadly, reaching far beyond the evil sought to be dealt with and intruding upon the privacy of all married couples. Here, as elsewhere, "(p)recision of regulation must be the touchstone in an area so closely touching our most precious freedoms."

Griswold, 381 U.S. at 498 (White, J. concurring) (citations and quotations omitted). This touchstone has been lost in the current Washington termination statutes.

The absence of a means-end fit comprises the heart of F.M.'s challenge.[4] F.M. asks this Court to hold the termination statutes improperly mandate termination when a lesser degree of regulation can adequately protect the child and will preserve some elements of the parent-child relationship.

Under strict scrutiny, the State must demonstrate that the complete destruction of the parent-child relationship is necessary to prevent identifiable

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[4] The I.J.S . court did not meaningfully address whether the termination statutes incorporate a proper means-end fit. Therefore, this issue should be treated as a case of first impression.

harm to the child and there are no less restrictive alternatives. The problem here is the termination statutes are not narrowly tailored such that they permit **only that degree of regulation** required to prevent harm to the child. Declaring a child dependant does not mean the parent is completely unfit to associate in any way with his or her child. While the State may prove a parent unfit to oversee the day-to-day care of a child, this does not prove the relationship between biological parent and child must be permanently and completely severed to prevent harm to the child. See, e.g., In re Tiffany P., 215 W.Va. at 625-27 (although father was unfit to be a custodial parent, the father and child benefitted from continued supervised visits; court held termination was not an appropriate remedy).

A parent is still presumed fit to visit and maintain contact even though a child is dependent. RCW 13.34.136. In fact, the parent retains a right to visit even when the parent is not participating in services unless the visits are proven harmful to the child. Id.

This statute shows the Legislature's recognition that parents have numerous rights, including custody and visitation. Those rights may be unbundled and precisely regulated. Unfortunately, the Legislature was not as precise when it drafted the termination statutes. If broadly interpreted, the termination statutes allow the Department to re-bundle those rights and terminate **all** of them simply by showing the parent is unfit to meet some, but not all, of his or her parental obligations.

Without a statutory requirement that the Department prove termination is necessary to prevent actual detriment to the child, the statutes

are unnecessarily broad, reaching far beyond the State's legitimate regulatory power. It is this imprecision in the means-end-fit requirement which makes this statutory scheme facially invalid. Aptheker, 378 U.S. at 514; In re Custody of Smith, 137 Wn.2d at 29-30. Consequently, reversal of the termination order is required. In re Tiffany P., 215 W.Va. at 625-27; In the Interest of D.A ., 846 So.2d at 1250; In the Interest of C.W.W., 788 So.2d at 1023-24.

The termination statutes are also constitutionally invalid because they improperly shift the burden onto the parent to raise the question of whether there are less restrictive alternatives.[5] The Washington Supreme Court has described the state's burden under strict scrutiny as follows:

> Where fundamental rights are involved, state interference is justified only if the state can show that it has a compelling interest and such interference is narrowly drawn to meet only the compelling state interest involved.

Smith, 137 Wn.2d at 15 (emphasis added) (citing Roe v. Wade, 410 U.S. 113, 155, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973); O'Hartigan v. Department of Personnel, 118 Wn.2d 111, 117, 821 P.2d 44 (1991); In re Welfare of Sumey, 94 Wn.2d 757, 762, 621 P.2d 108 (1980)); see also, C.A.M.A., 154 Wn.2d at 57; Nielsen v. State Bar Ass'n, 90 Wn.2d 818, 820, 585 P.2d 1191 (1978) (strict scrutiny places the burden on the State to show constitutionality); D.A ., 846 So.2d at 1250; C.W.W., 788 So.2d at 1023-24.

Although the State bears this constitutional burden, Division One's interpretation in I.J.S ., effectively relieved the State of this burden. In I.J.S ., the parent challenged the termination statutes, arguing the Department failed to prove the less restrictive alternative of a dependency guardianship was not a viable option. 128 Wn.2d at 110. Division One held "strict scrutiny does not require the trial court to consider dependency guardianship as an alternative to termination if a petition has not been filed." I.J.S ., 128 Wn. App. at 121.

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[5] Division One's decision in I.J.S . does not address the burden-shifting issue raised herein.

Citing In re Dependency of K.S.C., 137 Wn.2d 918, 976 P.2d 113 (1999), the I.J.S . court reasoned the Washington Supreme Court reviewed the guardianship and termination statutes and concluded that a court is not required to consider a guardianship when no party has petitioned for one. I.J.S ., 128 Wn. App. at 120. Under I.J.S ., if a parent raises a strict scrutiny challenge to the statutes, the parent must also file a dependency guardianship petition. Id. This improperly permits the State to shift its burden to the parent.

The I.J.S . court also failed to recognize that K.S.C. only involved a question of statutory interpretation, not a constitutional due process claim. Where a statute negates a state's constitutional burdens, the statute must be stricken as facially unconstitutional. U.S. Const. amend. XIV.

A constitutionally proper statute would require the Department to prove, at a minimum, that the statutorily recognized alternatives to termination would harm the child before termination is permitted. Those alternatives are a dependency guardianship and an open adoption.[6] RCW 13.34.231; RCW 26.33.295. Here, the Department failed to prove these options were not available or that continuation of the visits harmed the child. This is because the statutes do not require it. K.S.C., 137 Wn.2d at 927; In re Dependency of A.V.D., 62 Wn. App. 562, 573, n.10, 815 P.2d 277 (1991).

Dependency guardianships are a recognized less restrictive alternative to termination. Over a decade ago, Division One considered whether a trial court must consider less restrictive alternatives before terminating a parent's fundamental rights. A.V.D ., 62 Wn. App. at 574-75. In A.V.D ., the record showed the parent was unlikely to remedy parental defects but the child would not be harmed by continued contact with her parents. Despite these findings, the trial court terminated the parent's rights in order to secure permanency for the child.

The appellate court was asked to decide whether the trial court must order a guardianship or some kind of post-termination visitation order as a less restrictive alternative to termination. The A.V.D . court held the trial court had no alternative but to order termination because under the statutes at that time, a guardianship was inherently temporary and the Legislature had mandated that permanency overrides continued parent-child contact. Id., at 574 (citing In re Ramquist, 52 Wn. App. 854, 862-63, 765 P.2d 30 (1989)). In

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[6] I.J.S . does not contemplate open adoptions as a less restrictive alternative to termination. Instead, it discussed only dependency guardianships, relying on the reasoning of K.S.C. As such, I.J.S . does not address one of the central questions here -- whether the Department must show open adoption is not a viable alternative before it may terminate.

so ruling, however, Division One appeared to chafe at the restrictiveness of the statutory structure:

> Unfortunately, although the trial court found that Van Dam's continued contact with V is in [V's] best interests, the statutory scheme does not allow us to grant a biological parent visitation rights after his parental rights have been terminated. See In re Ferguson, 41 Wn. App. 1, 8, 701 P.2d 513, review denied, 104 Wash.2d 1008 (1985).

A.V.D ., at 575 n.13.

Subsequent to A.V.D ., the Washington Supreme Court was asked to determine if the termination statutes required a trial court to consider a dependency guardianship when no party had petitioned for a guardianship under RCW 13.34.230, .231. K.S.C., 137 Wn.2d at 931. In examining the statutory claim, the Court held they "do not demand consideration or creation of a dependency guardianship where there has been no petition for the creation of one." Id. Importantly, the K.S.C. court did not consider the constitutional question at issue here.

Division One subsequently revisited its decision in A.V.D . and held a dependency guardianship is sufficiently permanent to be a viable alternative to termination. In re Dependency of A.C., 123 Wn. App. 244, 251, 98 P.3d 89, 93 (2004). It noted statutory changes since A.V.D ., reasoning "[t]hese changes reflect the increasing interest in providing children with continuing connection to their extended family, culture, traditions and history." Id. A guardianship "provides for a secure placement of the child while authorizing both visitation between parent and child and continuing involvement by state agencies." Id. (citing In re F.S., 81 Wn. App. 264, 270, 913 P.2d 844 (1996)). From this, it concluded a dependency guardianship can provide a stable and permanent

home and, therefore, presents a viable and less restrictive alternative to the State's complete termination of a parent-child relationship. Id.

Open adoption is another valid alternative to termination that must be proven nonviable before a termination order is granted. Open adoption is a method by which a birth parent willingly gives up her legal status as a parent in exchange for maintaining the right to have some contact with the child. RCW 26.33.295. While the statute ultimately requires termination, it provides an alternative that permits some degree of relationship.

Division One was previously asked to consider the alternative of open adoptions in In re the Welfare of Ferguson, 41 Wn. App 1, 701 P.2d 513 (1985). There, the mother challenged a termination order on the grounds that the trial court failed to explore the possibility of an open adoption which would have allowed her to visit her daughter twice a year. Id. at 7. The appellate court declined to consider open adoption as a viable alternative because the Legislature had not yet provided legislation recognizing open adoptions in Washington. Id. at 8.

Five years later, the Legislature passed the open adoption statute. RCW 26.33.295. When Division One subsequently revisited the issue in A.V.D ., it held the trial court could not consider this alternative:

> It appears that an ideal solution here would have been an open adoption by the maternal grandparents. This would have assured V the permanence she needs and the statute dictates while allowing her emotional connection with her father to continue despite his admitted inability to care for her. **Under the statutory scheme, however, the trial judge lacked the authority to permit such a solution.**

A.V.D ., 62 Wn. App. at 573, n. 10 (emphasis added).

If this interpretation of the termination statutes is correct and the statute bars the judiciary from considering whether open adoption is a less restrictive alternative to termination, then the statute must be struck down as unconstitutional. A legislature may not handcuff the judiciary when constitutional considerations are at stake. It is the court's duty to fully consider a citizen's constitutional rights and no statute can limit this duty. See, e.g., State v. Holley, 209 Neb. 437, 445, 308 N.W.2d 341 (1981) (holding that complete termination is a last resort and courts have the discretion to consider alternatives).

As currently interpreted, the statutes allow open adoption to be misused as a bargaining chip to discourage parents from exercising their right to a termination trial. The Department regularly offers this option while attempting to get to a settlement.[7] The Department can then withhold the open adoption alternative if a parent decides to exercise his or her right to a termination trial. Strict scrutiny is not something to be bargained away. If there is a less restrictive alternative to termination known to the Department, it has a constitutional duty to implement that option or offer proof the option would harm the child. See, In the Interest of C.W.W., 788 So.2d at 1023.

In response the Department will likely ask this Court to follow Division One's opinion in I.J.S ., 128 Wn. App. at 108. As stated above, I.J.S .

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[7] The Department has admitted this in its briefing to Division One in the case of In Re Dependency of J.L., COA no. #57271-7-I (see Brief of Respondent at 40-41).

did not decide all of the issues raised herein. Additionally, I.J.S . should not be followed because of its numerous flaws.

The court in I.J.S . held that RCW 13.34.180 and RCW 13.34.190 "do not violate the parent's substantive due process rights" because they "require the State to prove the relationship with the parents harms the child but proof of the statutory factors satisfies that burden." 128 Wn. App. at 111. Division One concluded that although the termination statutes "focus on a best interest of the child standard," the State must prove six statutory factors which are "equivalent" to finding harm to the child. Id. at 117. The court thus concluded the statutes are "narrowly drawn," unlike the visitation statutes in In re Custody of Smith, 137 Wn.2d at 15. F.M. respectfully argues I.J.S .'s analysis is predicated on several false premises and is incomplete.

First, the attempt to create an implicit "harm" finding in the termination statutes renders absurd other parts of the statute. I.J.S . states:

> Establishing the child is dependent under RCW 13.34.180(1)(a) and it is unlikely conditions can be remedied so the child can be returned in the near future under RCW 13.34.180(e) is equivalent to finding harm to the child.

I.J.S ., at 118. I.J.S . went on to hold that this implicit finding of harm provides a compelling state interest, and qualifies the statute as narrowly tailored. Id. But the dependency guardianship statute (RCW 13.34.231) reveals the flaw in this reasoning.[8]

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[8] The dependency guardianship statute is quoted in appendix B.

The two factors I.J.S . identified as establishing "harm" are also statutory elements of a guardianship: (1) dependency, and (2) unlikelihood that conditions will be remedied in the near future. I.J.S . fails to explain how termination can be necessary to prevent "harm" to a dependant child when there is little likelihood of reunification -- while a guardianship is permissible when those same two factors are present. If I.J.S . is correct, the statutes permit children to be "harmed" each and every time a guardianship is ordered. Obviously, such a result is absurd -- yet that is the result from the I.J.S . court's reasoning.

Second, I.J.S .'s conclusion that an implicit showing of harm to the child satisfies strict scrutiny conflicts with the Washington Supreme Court's recent decision in C.A.M.A., 154 Wn.2d 52. In C.A.M.A., the Supreme Court held that Smith remains binding precedent:

> We held in Smith that "parents have a fundamental right to autonomy in childrearing decisions," and this "liberty" interest is protected as a matter of substantive due process under the Fourteenth Amendment. We held state interference with this interest "is justified only if the state can show that it has a compelling interest and such interference is narrowly drawn to meet only the compelling state interest." This is strict scrutiny.

Id. at 408, citing Smith, at 13-15 (citations omitted).

In C.A.M.A., the Supreme Court held that RCW 26.09.240,[9] a nonparental visitation statute, was unconstitutional because it applied the "best

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[9] The statute states in relevant part that a court "may order visitation between the petitioner or intervener and the child between whom a significant relationship exists upon a finding supported by evidence that the visitation is in the child's best interests." In re C.A.M.A., 154 Wn.2d at 409-10.

interest of the child standard" rather than a "harm to the child standard," emphasizing the central holding in Smith: "Short of preventing harm to the child, the standard of 'best interest of the child' is insufficient to serve as a compelling state interest overruling a parent's fundamental rights." Id. at 411-13. The C.A.M.A. Court held the statute failed to satisfy strict scrutiny even though it required the petitioner to establish a "significant relationship" with the child and listed factors for the court to consider in determining the child's best interests. Id. at 412-13. The Court concluded that because harm to the child from lack of visitation must be established to order visitation, the statute must explicitly require a showing of harm to withstand strict scrutiny. Id. at 413-14.

Similarly, because harm to the child must be proven before a court can terminate parental rights, the termination statutes must explicitly require the State to show harm. Consequently, even if the Department is implicitly required to show harm by proof of the six statutory factors, as I.J.S . states, the termination statutes fail to satisfy strict scrutiny. As the Supreme Court recognized, "Smith requires more." In re C.A.M.A., 154 Wn.2d at 414.

Finally, I.J.S . also failed to adequately analyze whether the statutes were narrowly tailored when the state has not proved that all recognized less restrictive alternatives would harm the child. I.J.S . held that "strict scrutiny does not require the trial court to consider dependency guardianship as an alternative to termination if a petition has not been filed." Id. at 120. Citing K.S.C., Division One pointed out that the Supreme Court reviewed the guardianship and termination statutes and concluded a court is not required to consider a guardianship when no party has petitioned for one. Id. However,

the court overlooked that K.S.C. only involved a statutory challenge, not a constitutional challenge. 137 Wn.2d 918. The K.S.C. court did not decide this issue.

The I.J.S . court also sought to factually distinguish its decision in A.C., 128 Wn. App. at 119-20. However, in A.C., Division One did not limit its conclusion that dependency guardianships "offer sufficient permanency to present a viable alternative to termination" to the facts of that case. 123 Wn. App. at 251. Observing that "DSHS seems generally skeptical about guardianships, and emphasizes that one objective of the statute is placing children in permanent homes," the court held termination does not necessarily accomplish this goal any better than guardianships. Id. at 252. "Simply put, termination does not insure permanence." Id. at 252. The A.C. court rejected the State's contention that termination is the only way to obtain permanence. This was not a fact-based conclusion; it rejected the state's analytical assumptions. The I.J.S . court's attempt to rewrite that holding lacks persuasive merit.

For the reasons stated above, this Court should reject the I.J.S . court's analysis. This Court also should consider the additional arguments raised herein that were not addressed by the I.J.S . court.

As currently written, the termination statutes do not survive strict scrutiny. They are also unconstitutional as applied to this case. Breaking the existing parent-child bond where the State has not shown that less restrictive alternatives to termination (e.g., guardianship or open adoption) would harm the child violates both F.M.'s and N.M.'s rights to have their family unit

protected from unnecessary and unconstitutional state interference. Smith, 137 Wn.2d at 15-16. Because these statutes do are unconstitutional, the termination order should be reversed and the dependencies reinstated.

3.WHEN THE STATE KNOWS THE PARENT'S LOCATION BUT ALLEGES ABANDONMENT, IT VIOLATES DUE PROCESS TO WAIVE THE STATE'S DUTY TO OFFER SERVICES.

Washington statutes generally permit termination of parental rights only after the state proves it meaningfully offered services to correct parental deficiencies. RCW 13.34.180(1)(d); RCW 13.34.190(1)(a); In re Dependency of T.L.G., 126 Wn. App. 181, 198, 108 P.3d 156 (2005). The statutes make exception in certain "aggravated" circumstances, however. The purpose of these exceptions is to avoid the necessity of services when they would be futile. J.W., 90 Wn. App. at 425. One such circumstance arises where the state proves the parent "abandoned[10]" the child. RCW 13.34.190(1)(b); RCW 13.34.132(h). The trial court relied on this provision to excuse the state's duty to offer F.M. services to correct her alleged parental deficiencies. CP 22, 24 (FOF 8, 9); Ex. 2 at 3. In so doing, the trial court violated F.M.'s due process rights under the state and federal constitutions. U.S. Const. amend. 14; Const. art. 1, § 3; see also C.R.B ., 62 Wn. App. at 616 (under due process, the State may not circumvent the factual showings required under the termination statutes). The question of whether a proceeding violates constitutional due process is reviewed de novo. In re Welfare of J.M., 130 Wn. App. 912, 920, 125 P.3d 245 (2005). This issue appears to be one of first impression, although the courts have narrowly interpreted other parts of the "aggravated" circumstances statute. See J.W., 90 Wn. App. at 428 (declining to decide a similar claim).[11]

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[10] A child is abandoned when "the child's parent, guardian, or other custodian has expressed, either by statement or conduct, an intent to forego, for an extended period, parental rights or responsibilities despite an ability to exercise such rights and responsibilities." RCW 13.34.130(1).

[11] Few Washington cases address RCW 13.34.132, which provides the authority to excuse the state's duty to offer reunification services in "aggravated" situations. See In re Welfare of C.L., 131 Wn. App. 274, 277-78, 126 P.3d 1285 (2006) (trial court applied the "aggravated" circumstances statute to a situation where the father had been convicted of raping a different child; this

Several settled principles govern the analysis of this due process claim. In determining whether a state procedure violates due process, the reviewing court must balance three factors under the classic Mathews test: (1) the parent's interests; (2) the risk of error created by the procedures used and the likely value of additional safeguards; and (3) the State's interests in retaining the procedure despite its risk. Santosky, 455 U.S. at 754 (citing 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. at 615. When the state knows a parent's location, despite an assertion the parent has "abandoned" the child, the state still must be required to meaningfully offer services or due process is violated. Under the first element from Mathews, F.M.'s interest in the care and custody of her child is near to sacred and weighs against any abbreviated procedure. Santosky, 455 U.S. at 761. Second, the State's affirmative duty to offer services is a crucial procedural protection. Without that protection, the risk that F.M.'s parental rights were erroneously terminated is greatly increased. Finally, when the State knows the parent's whereabouts, abandonment does not preclude an offer of services. Nor does it render that offer so burdensome as to outweigh the risk of depriving a parent of a fundamental right.

a. The Parent's Interest is Fundamental.

The right of parentage has been called "far more precious than any property right," Santosky, 455 U.S. at 758, and a right more precious than life itself. In re Luscier, 84 Wn.2d 135, 137, 524 P.2d 906 (1974).

> The right to the custody, control, and companionship of one's children is a fundamental right that the State may not abridge without the complete protection of due process. There can be no doubt that the full panoply of due process safeguards applies to deprivation hearings.

In re Welfare of J.M., 130 Wn. App. 912, 921, 125 P.3d 245 (2005) (citing Luscier, 84 Wn.2d at 138). "If anything, persons faced with forced dissolution

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Court declined to affirm the trial court's apparent misapplication of RCW 13.34.132, instead affirming on other grounds); c.f. In re Welfare of A.T., 109 Wn. App. 709, 716, 34 P.3d 1246 (2001) (the trial court properly relied on RCW 13.34.132 where the father had been convicted of sexually abusing the same child at issue in the dependency proceeding).

of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs." Santosky, 455 U.S. at 753. Washington courts have also "carefully scrutinized deprivation hearings to assure that the interested parties have been accorded the procedural fairness required by due process of law." Luscier, 84 Wn.2d at 137. The Legislature has twice declared that "the family unit is the fundamental resource of American life which should be nurtured and ... remain intact in the absence of compelling evidence to the contrary." RCW 74.14A.010; see also RCW 13.34.020.

A proceeding to terminate parental rights is unusual in its severity and its finality. Santosky, 455 U.S. at 758; J.M., 130 Wn. App. at 931. Thus, F.M.'s private interest weighs in favor of heightened, rather than abbreviated procedural protections. See Santosky, 455. U.S. at 758.

b. The Risk of Erroneous Deprivation is Unconstitutionally High Where the State Fails to Offer Services.

Washington courts have invalidated shortcut termination procedures because of the increased risk of error. See C.R.B ., 62 Wn. App. at 615-16. In C.R.B ., the trial court had assumed the mother was incapable of remedying her situation, saying "I think that if we didn't sign it [the termination order] and continued to the trial date, then we'd probably be in the same position then." Id. On appeal, the court held that a hearing on the merits is required by due process. Id. The use of default proceedings unreasonably increases the risk of erroneous deprivation of parental rights. Id. at 616.

In general, abbreviated procedures in termination proceedings increase the risk of error. See C.R.B ., 62 Wn. App. at 615. When that procedure eliminates the State's duty to offer services, the risk is further elevated. See, e.g., In re Dependency of C.B., 79 Wn. App. 686, 904 P.2d 1171 (1995); In re Dependency of D.A., 124 Wn. App. 644, 102 P.3d 847 (2004).

The most important protection afforded a parent is the state's duty to offer services to support reunification and correct parental deficiencies. See D.A., 124 Wn. App. at 652. In D.A., the court emphasized the State must affirmatively offer services, noting "a parent forced to search out services independently . . . may be undermined in efforts towards re-unification." Id. at 652. The dissent agreed with the majority that the importance of the State's role in providing services aimed at family reunification "cannot be over-emphasized." Id. at 659 (Kennedy, J., dissenting).

Indeed, the court has upheld expedited termination where the court was assured that despite the expedited proceeding, the parent received necessary services. C.B., 79 Wn. App. at 691-92. The parent in C.B. challenged the constitutionality of RCW 13.34.190(2), which permitted termination without services because the father had murdered the child's mother. Id. at 688, 691. In declining to find a violation of due process,[12] the court noted the record showed the procedure "did not prevent him from receiving necessary services." Id. at 691-92.

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[12] The court did not specifically address the three-factor balancing test from Santosky. C.B., 79 Wn. App. at 691-92.

Unlike the parent in C.B., the state did not offer F.M. reasonably available services. The Dependency Order required no services and, aside from visitation, made no mention of any specific services that might be able to help F.M. Ex. 2 at 2-3. Floyd admitted she did not know whether F.M. was ever even informed of services. RP 17.

The failure to offer services greatly increases the risk of error because it adds to the State's already formidable ability to shape the events upon which a termination is based. See Santosky, 455 U.S. at 762-63. In a termination proceeding, the child is already in state custody, which gives the state "the power to shape the historical events that form the basis for termination." Id. at 763. This "unusual ability to structure the evidence" increases the risk of erroneous termination. Id. at 763 n.13. When the State is relieved of its obligation to inform the parent of services, the balance of power shifts even more towards the state because the parent is deprived of information. That parent will not know the State has the duty to offer services that are designed to help the parent. Those services can include: day care for the child, psychological or substance abuse treatment for the parent, parenting classes, visitation with a child in foster care, transportation assistance for visits, in-home training on parenting and house-keeping issues, and perhaps even housing assistance for the family if homelessness is a primary cause of the dependency allegations. See, e.g., Washington State Coalition for the Homeless v. Department of Social and Health Services, 133 Wn.2d 894, 949 P.2d 1291 (1997); In re Dependency of H.W., 92 Wn. App. 420, 426-29, 961 P.2d 963

(1998); In re Dependency of A.J.R., 78 Wn. App. 222, 225 n.2, 896 P.2d 1298, rev. denied, 127 Wn.2d 1025 (1995).

Without an offer of services, other statutory requirements are also cast into doubt and the risk of erroneous deprivation is increased. The termination statute requires the State to show it is highly probable that parental deficiencies will not be remedied in the near future. RCW 13.34.180; C.B., 134 Wn. App. at 952. Terminating a parent's rights without such a finding is error under the statute. RCW 13.34.180(e). This factor in particular is crucial to the statute's constitutionality. C.B., 134 Wn. App. at 952. When there is no required showing that the parent was ever meaningfully informed of the services available, this factor is seriously undermined because parents can meaningfully improve with services. See, e.g., D.A., 124 Wn. App. at 652; C.B., 134 Wn. App. at 953-56 (parent made substantial progress in the months leading up to termination; state accordingly failed to prove little likelihood of remedying parental deficiencies in the "near future").

The record also reveals why the State's failure to offer services essentially dooms the parent's chances for reunification. F.M.'s caseworker would have offered a drug and alcohol evaluation, a parenting assessment, and further services that would be discovered as a result of those inquiries. RP 7. The caseworker admitted that even though Purdy was a "closed facility," RP 10, "there are programs at the prison that they can participate in while they are there." RP 11.

Despite both the availability and the need for such services, the Dependency Order required no services, and, aside from visitation, made no

mention of any specific service that might be able to help F.M. Ex. 2 at 2-3. The caseworker merely offered her opinion, several times, that F.M. was "not engaged in services," RP 14, and as a result, there was no likelihood of reunification in the near future. RP 12-14. The caseworker's entire theme was to shift the burden of identifying and accessing services to F.M., rather than to recognize and comply with the State's burden to meaningfully offer those services. E.g., RP 13 ("She [the mother] has known how to get in contact with the Department."); RP 16-17 (caseworker agrees F.M. "would have had to request services from your Department"). Floyd even implicitly acknowledged the potential impact of services saying, "I think that if [F.M.] did really avail herself of services and get involved and be consistent, that's one thing," but then immediately returned to her refrain: "she has not availed herself of services." RP 25. The trial court compounded the agency's failures, concluding that "at no time did she come forward to avail herself of any reasonable services that the State clearly would have offered her." RP 64. Without clear evidence that F.M. was informed of services, however, it is not highly probable that she could not remedy conditions in the near future. Speculation is not sufficient evidence of this factor, and a process which invites such speculation is too great a risk. See In re J.M., 130 Wn. App. at 925.

The greatly increased risk from excusing the State's duty to offer services is in no way lessened by limiting it to cases of abandonment. Common factual scenarios reveal why broad application of an "abandonment" shortcut unconstitutionally increases the risk of an erroneous termination. A new parent like F.M., facing what seems like hopeless odds, may make the

difficult decision to leave a child in the custody of other seemingly more capable caretakers. In this way, a parent who initially made a pro-social effort to recognize his or her limitations -- and to put the child's interests first -- will never be offered services to correct parental deficiencies. Without a meaningful offer of services, a parent may well develop a permanent, albeit erroneous belief that he or she cannot meet the child's needs. While this may be an accurate self-recognition of temporary parental limitations, the state can instead treat that temporary decision as evidence of a permanent "abandonment." Thus, the parent will have inadvertently set in motion the machinery that will inexorably grind its way to terminate the parent's rights.

In cases such as F.M.'s, the act of abandonment, of foregoing the responsibilities of parenthood, may be a cry for help, showing both a desperate need for, and an unawareness of, the very services which the State is no longer required to offer. F.M. recognized that she could not care for her child, and left her with others who seemed better able to do so. See Ex. 1 at 3. She twice made use of the one service that was offered her, namely, visitation. RP 10. When not incarcerated, she made two attempts to contact her caseworker. RP 9. The record does not show that she declined services. It shows merely that she was never offered services , and that she did not ask for them. RP 7.

A parent who intentionally gives up the care of a child may do so for similar reasons to the parents in In re Welfare of H.S., 94 Wn. App. 511, 973 P.2d 474 (1999), who requested voluntary care for their child after they were hospitalized due to chronic mental illness. Id. at 517-18. Before terminating their parental rights, the court found that the parents had been "saturated with

services." Id. at 521. F.M.'s situation is not unlike that of the parents in H.S . She, too, likely faced mental health problems in the form of addiction, having twice pleaded guilty to possession of methamphetamine. Ex. 8; Ex. 12. She also chose to entrust care of her child to others, albeit to an individual citizen, rather than the State. Ex. 1 at 3. Yet F.M. was not "saturated with services." The State was excused from its duty to offer them. RCW 13.34.190.

Such an act of abandonment simply does not justify the increased risk that results when the burden is shifted to the parent to know of and affirmatively request such services. Other parents, such as those in H.S . and in In re Hall, 99 Wn. App. 842, 664 P.2d 1245 (1983), are not deemed adequately protected by the mere availability of services which are not expressly offered. Hall, 99 Wn. App. at 850 (statute requires the State to affirmatively offer or provide services including a referral list of agencies providing the services). Nor was F.M.

Furthermore, if a court permits the state to misconstrue an early act of "abandonment" as excusing the state's duty to offer services, that early act could essentially become an irrevocable relinquishment of parental rights. The Legislature has determined, however, that relinquishment also requires substantial procedural protections. See RCW 26.33.080 (relinquishment petition must be filed, based on parent's written consent); RCW 26.33.090 (petition for relinquishment cannot be heard and decided less than 48 hours after consent is signed; parent may revoke consent during that period). Those procedures also are not subject to shortcut. In re Marriage of Furrow, 115

Wn. App. 661, 63 P.3d 821 (2003) (setting aside termination based on relinquishment where trial court failed to follow statutory procedures).

The risk of erroneous deprivation is further magnified when this shortcut is applied to incarcerated parents. RP 2. When the State's duty to offer services is waived, the burden shifts to the parent to come forward and request services. See, e.g., RP 7, 8. Particularly when the parent is incarcerated, this unfairly allocates the burden between the parent and the State. See Santosky, 455 U.S. at 758. When not just the child but also the parent is in State custody, the power to "structure the evidence" is even more concentrated in the State's hands, leading to a "gravely increased risk of erroneous factfinding." See Santosky, 455 U.S. at 763, 763 n.13. An incarcerated parent can be prevented from contacting the Department. See, e.g., Heidi Rosenberg, California's Incarcerated Mothers: Legal Roadblocks to Reunification, 30 Golden Gate U. L. Rev. 285, 299-300 (2000) (incarcerated mothers often lack the resources to maintain the required contact with the Department); In re Dependency of M.S., 98 Wn. App. 91, 988 P.2d 488 (1999) (insufficient prison staffing prevented incarcerated father from testifying by phone at termination trial). The record here suggests prison inaction prevented F.M. from testifying telephonically at her trial. See RP 2. It is logical it might also prevent her from contacting the Department. Waiving the State's duty to offer services presents too great a risk of error when applied to incarcerated parents.

The burden of affirmatively requesting services is also too high compared to the burden placed on similarly situated parents. Arguably the

most similar situation is that of a "John Doe" father, whose identity is unknown. Such parent need only come forward and establish paternity, and all reasonable services would be affirmatively offered. RP 13-14. The parent who abandons a child, however, is lumped in with those convicted of murdering the child's parent or sexually assaulting the child. See RCW 13.34.132. In the case of a "John Doe" father, the law does not assume that services would be "futile." See J.W., 90 Wn. App. at 425; RP 13-14. The mother who gives up care of her child, but the state knows her location, should likewise have the benefit of the doubt.

The record shows the State's failure to offer services was a significant factor in terminating F.M.'s parental rights. Although Floyd testified she knew where F.M. was incarcerated, she did not know for certain whether F.M. was ever informed of the services. RP 17. She sent F.M. a plan for services, but did not know if it was received.[13] RP 17. She offered hearsay that the CPS caseworker left a note saying he talked to F.M. about services. RP 17. And she declared without personal knowledge that in prison F.M. had the opportunity to find out about the services. RP 17-18.

Thus, the state did not show that F.M. was ever meaningfully informed of available services. Yet the trial court relied on her alleged failure to request services to justify terminating her parental rights. RP 8, 64. This "Catch-22" process presented a grave risk of error.

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[13] The record provides little basis to support a belief F.M. received any offer of services, since she was incarcerated or living in a motel much of the time. RP 9, 34.

The added safeguard of requiring the State to offer services in cases of abandonment would significantly reduce, if not eliminate the risk that a loving parent may lose her child due to a lack of reasonably available State assistance. See Santosky, 455 U.S. at 764-65. Like the clear and convincing standard of proof required in Santosky, a requirement that services be offered would alleviate the risk that deprivation might be "based solely on a few isolated instances of unusual conduct," such as abandoning a child in a desperate time. 455 U.S. at 764. If services are offered, the parent can make an informed decision whether to participate and whether to oppose termination of her rights.

c. Where the State Knows a Parent's Location, the State's Interest in Refusing to Offer Services is Minimal.

In response, the State can be expected to claim it would cost too much or add little value to require it to offer services in cases of abandonment. The state will claim it cannot meaningfully offer services to a parent who abandons a child because such a parent may leave Washington or refuse to reveal his or her location to child welfare service providers. Those different factual circumstances may well provide the state a legitimate basis to excuse its duty to offer services. This case, however, involves very different facts.

The State knew F.M.'s exact location for at least 7 months during the dependency period because she was in the State's custody at Purdy. RP 34. The state cannot claim its duty during that period could be excused by inability to contact F.M. or lack of knowledge of her whereabouts. Despite this knowledge, the state only established that Floyd sent F.M. a plan for services,

but did not know if it was received, that the caseworker left a note saying he talked to F.M. about services, and that in prison F.M. had the opportunity to find out about the services. RP 17-18. The state did not establish it could not offer or provide services to F.M. during that period. Nor did it show F.M. had refused services, or that services could not assist F.M. See J.W., 90 Wn. App. at 425. Instead, the State's witnesses asserted only that F.M. did not make sufficient efforts to contact the state to request services. RP 13, 34. This is precisely the evil the Santosky court recognized and the termination statutes should avoid. Santosky, 455 U.S. at 762-63 (state seeks to establish a series of historical facts necessitating termination but has great ability to shape those facts); RCW 13.34.180(d). State agents cannot simply sit back and watch a parent attempt to find useful services and then attempt to jump through "hoops" to access those services; the state instead must meaningfully offer services in an honest effort to assist a parent's reunification with a dependent child. See D.A., 124 Wn. App. at 656 ("We emphasize, however, that the responsibility for offering or providing services belongs to the Department, and the Department cannot just point to the efforts of others....").

The State's burden is not unduly increased merely because the parent is incarcerated. Other cases confirm that incarcerated parents can and do access services in prison. In re Dependency of M.S., 98 Wn. App. 91, 988 P.2d 488 (1999). Furthermore, where the State knew that one of F.M.'s parental deficiencies was dependence on controlled substances, RP 7, it seems the prison environment, where controlled substances should not be readily available, presents a prime opportunity to begin treatment. See In re

Dependency of M.S., 98 Wn. App. at 93 (incarcerated parent participated in drug rehabilitation). The state cannot simply waste the time a parent is incarcerated.

The termination statues require the state to offer all reasonable services before termination. RCW 13.34.067; RCW 13.34.180(1)(d). The provision of services is a crucial procedural protection standing between the overwhelming power of the state and the individual parent's fundamental right to the care and custody of her child. See D.A., 124 Wn. App. at 652, 656. When the State knows the parent's location, it is not an undue burden to require the parent be meaningfully informed of services. The state's interest in waiving even the offer of services is minimal and can only be stated as a means to speed the process.

An order of termination, on the other hand, cuts off forever the parents' rights in the child. This is a clear "disparity of consequence ... strongly favor[ing] heightened procedural protections." Santosky, 455 U.S. at 765.[14] When the fundamental liberty interests of Washington parents are balanced against the state's interest in not offering services, the conclusion is inescapable that termination without the offer of services violates due process. The Santosky court explained the State "cannot refuse to provide natural parents

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[14] The state may also argue that such expedited procedures are in the child's best interest. The Supreme Court, however, has rejected this argument: "until the state proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship." Santosky, 455 U.S. at 765 (emphasis added); C.R.B ., 62 Wn. App. at 615. The interests of neither the parent nor the child are served by a rush to judgment. Cf. State v. Santos, 104 Wn.2d 142, 148, 702 P.2d 1179 (1985).

adequate procedural safeguards on the ground that the family unit has already broken down...." Santosky, 455 U.S. at 754 n.7. Services are designed to safeguard the rights of natural parents. See RCW 13.34.180. To deny those services on the basis of abandonment presumes the family unit is already broken beyond repair. This is exactly what the Santosky court did not allow. 455 U.S. at 754 n.7.

In the final analysis, the state must bear the burden of making reasonable efforts to reunite the family before termination. See RCW 13.34.020. The burden to the State of offering services to F.M., whose location was known, is dwarfed by comparison to the grave risk of depriving a potentially fit parent of the care and custody of her child. Therefore, the statute permitting the state to terminate F.M.'s parental rights without reasonable efforts to offer services to reunite her family violated her constitutional right to procedural due process. See C.R.B ., 622 Wn. App. at 615-16; U.S. Const. amend XIV; Const. art. I § 3; RCW 13.34.190(1)(b).

The termination order therefore should be reversed and the dependency reinstated. J.M., 130 Wn. App. at 925; C.R.B ., 62 Wn. App. at 615-16.

4.THE STATE WAS NOT RELIEVED OF ITS DUTY TO OFFER SERVICES BECAUSE N.M. WAS NOT ABANDONED BEYOND A REASONABLE DOUBT.

Even if the statute waiving services in cases of abandonment is constitutional, the State did not meet its burden to show beyond a reasonable doubt that F.M. abandoned her daughter. The trial court therefore erred in

relying on the "aggravated" circumstance to excuse the state's failure to provide services.

There are two ways to show abandonment under RCW 13.34.030(1). First, a child is abandoned if the parent expresses by statement or conduct the "intent to forego, for an extended period, parental rights or responsibilities despite an ability to exercise such rights and responsibilities." Id. Second, a rebuttable presumption of abandonment arises when the Department has exercised due diligence in attempting to locate the parent and no contact occurs between parent and child for three months. Id. Although F.M.'s conduct may have showed intent to forego parenting responsibilities, this is not sufficient under the statute. Ex. 1 at 3. Abandonment also requires the ability to exercise parenting responsibilities. RCW 13.34.030(1). The record shows no indication that F.M. was able to exercise parental responsibilities. Instead, it showed only an uncontroverted statement by F.M. that she was unable to care for her child. Ex. 1 at 3.

The state also did not show abandonment by presumption. Although F.M. was out of contact with her child for long periods, particularly during incarceration, RP 34, the record contains no evidence that during this time the Department exercised due diligence in trying to locate F.M. as required. RP 8; RCW 13.34.030(1). Floyd testified that during that time "no one heard from" F.M. and F.M. never "came forward to request services." RP 8. Since F.M. had been incarcerated, Floyd said, "I have not had any direct contact with her, I have had a phone call from her counselor." RP 9. She later reiterated "I have not heard from her." RP 29. She did not say that anyone from the

Department attempted to contact F.M. RP 8. This implies no effort to contact F.M., despite knowing her exact location. RP 27.

The record shows no evidence that F.M. gave up her parenting responsibilities despite an ability to do so. Ex. 1 at 3. Thus, she did not abandon her child under the first part of RCW 13.34.030(1). The record also shows no evidence the Department exercised due diligence in attempting to locate F.M. during this separation, and thus there is no rebuttable presumption of abandonment under the second part of RCW 13.34.030(1). Substantial evidence is required to support the court's findings. C.B., 134 Wn. App. at 952-53. Given the absence of evidence on either of these two prongs, it was error for the court to find F.M. abandoned N.M. beyond a reasonable doubt. It was, therefore, error to terminate F.M.'s parental rights without showing that services were offered. CP 22 (FOF 9). Where the state fails to prove the prerequisites for termination, the proper remedy is to vacate the termination order and remand for a reinstated dependency. T.L.G., 126 Wn. App. at 198-203, 206.

D. CONCLUSION

The termination statutes are facially unconstitutional and unconstitutional as applied. Additionally, the State failed to provide sufficient evidence to support the termination order. The termination order should be reversed, the dependency reinstated, and the state directed to meaningfully offer services to F.M.

DATED this ___ day of January, 2007.

Respectfully submitted,

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