IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Dependency of T.A.G.-F., dob 2/18/11, A Minor child, STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES, Respondent, v. STACY MALDONADO, Appellant.	No. 71509-7-I DIVISION ONE UNPUBLISHED OPINION FILED: May 26, 2015

SCHINDLER, J. — Stacy Maldonado appeals the order terminating her parental rights to T.A.G.-F. Maldonado asserts the court violated her right to due process by denying the motion to consolidate the guardianship petition action and continue the termination trial and denying her right to present a defense. In the alternative, Maldonado contends insufficient evidence supports finding the Washington State Department of Social and Health Services (Department) offered or provided all necessary services reasonably available and capable of correcting her parental deficiencies or that termination was in the best interests of the child. We hold the court did not abuse its discretion in denying the untimely motion to consolidate the

guardianship petition. Because Maldonado dismissed the guardianship petition before the termination trial and expressly asked the court not to consider the petition, her right to present a defense is not violated. Therefore, we need not address the constitutional challenge to the termination statutes, RCW 13.34.180 and .190. We also conclude the record supports finding the Department offered or provided all necessary services capable of correcting parental deficiencies and termination was in the best interests of the child, and affirm.

FACTS[1]

Stacy Maldonado has a history of substance abuse. During her pregnancy, Maldonado tested positive for opiates and methamphetamine. T.A.G.-F. was born on February 18, 2011. Maldonado was homeless for several weeks in July and August 2011 and her second cousin Amanda Johns took care of T.A.G.-F.

The morning of November 27, 2011, Maldonado's boyfriend gave T.A.G.-F. to Johns. The boyfriend told Johns that Maldonado left T.A.G.-F. with him the previous evening while she went to the casino and she did not return.

On November 28, Maldonado contacted the police to report T.A.G.-F. had been abducted. Maldonado later claimed that her boyfriend took T.A.G.-F. to retaliate against her for breaking up with him. The police placed T.A.G.-F. in protective custody.

On December 2, the Department filed a dependency petition. At the shelter care hearing on December 8, the court placed T.A.G.-F. with Maldonado on condition that she "participate in a drug/alcohol evaluation, follow recommendations, and not have a

[1] Maldonado does not challenge the majority of the findings of fact set forth in the "Hearing, Findings, and Order Regarding Termination of Parent-Child Relationship."

positive, missed or diluted UA[2]." On December 20, Maldonado tested positive for amphetamine and methamphetamine. On December 22, Maldonado tested positive for methamphetamine. On December 23, the Department removed T.A.G.-F. from Maldonado's care. On December 27, the court placed T.A.G.-F. in relative care with Johns.

On March 14, 2012, Maldonado entered into an agreed order of dependency. The order authorizes the Department to place T.A.G.-F. in "[r]elative placement with AMANDA JOHNS" and provides for supervised visitation "[t]wice per week for two hours per visit." The disposition order requires Maldonado to obtain a drug and alcohol evaluation and follow treatment recommendations, participate in UA testing, obtain a parenting assessment and follow treatment recommendations, and begin mental health counseling and parenting classes. The Department provided Maldonado with "written referrals by mail [and] emailed referrals" and gave her "written referrals . . . in person to begin individual mental health counseling."

Maldonado completed a drug and alcohol assessment at La Esperanza Health Counseling Services on April 19. The assessment "noted diagnoses of Cannabis, Opioid, Amphetamine and Poly substance dependence." La Esperanza recommended Maldonado participate in a one-year intensive outpatient treatment program. The report states that Maldonado "denied having a drug problem" and "denied any substance misuse."

Maldonado objected to random UA testing and the "time requirements" for her services. At the hearing on April 30, the court modified the order to allow Maldonado to participate in UA testing "on set days 3 times per week" at CarePlus Medical Center and

[2] Urinalysis.

"to complete her drug and alcohol evaluation and parenting classes at her chosen provider, La Esperanza." The court ordered Maldonado "to begin the parenting assessment within thirty days." The order also states that Maldonado agreed to begin individual counseling at Evergreen Manor.

Maldonado tested positive for morphine on May 2, 7, 11, and 16. On May 17, Maldonado tested positive for morphine and codeine and began outpatient treatment at La Esperanza. On May 18, Maldonado tested positive for morphine; on May 24, she tested positive for morphine and cocaine; and on May 25, she tested positive for morphine. Maldonado did not begin mental health counseling at Evergreen Manor as ordered.

At the dependency review hearing on June 4, the court found Maldonado had made no progress in correcting her parental deficiencies "based on the fact the mother continues to use drugs which is why the child came into care in the first place."

The Department proposed several providers for purposes of conducting a parenting assessment. The parties "eventually agreed" to a "reunification assessment" by the foster care assessment program (FCAP) at Harborview Medical Center. The Department referred Maldonado to FCAP in July. The Department also provided Maldonado with referrals to a number of mental health "providers with a sliding-fee scale."

Maldonado refused to participate in the FCAP assessment and did not begin mental health counseling. In August, Maldonado tested positive for methamphetamine and morphine. Maldonado stopped attending outpatient chemical dependency treatment in late August. La Esperanza discharged her from the program in October for

"lack of attendance." From fall 2012 until early 2013, Maldonado had no contact with the Department.

At the permanency planning hearing on November 19, 2012, the court found the Department had made reasonable efforts to provide services to eliminate the need for out-of-home placement, Maldonado was not in compliance with the court order and had not "engaged in any services," and she had not visited the child on a regular basis. The permanency planning order identifies adoption and return of the child to the mother as the "primary" permanency plan. The order states, "December 2013 is the projected date for . . . placement for adoption (child placed in a home already that is willing to adopt)."

In February 2013, Maldonado participated in another drug and alcohol assessment at La Esperanza. Although Maldonado told the evaluator she had not used drugs since September 2012, her UA showed that she tested positive for cocaine, opiates, and benzodiazepines in February and March 2013. La Esperanza updated the previous assessment. The report states Maldonado "represents a high level of risk to her young child without the appropriate treatment intervention" and recommends participation in a six-month intensive outpatient treatment program.

Maldonado agreed to Sno-King Counseling Services "as her mental health provider." The Department obtained funds for mental health counseling at Sno-King Counseling.

In April, the Johns family moved to California. Maldonado asked the court to place T.A.G.-F. with family friend Pamela Anaya. The Department expressed concerns about Anaya's ability to set boundaries and care for the child because T.A.G.-F.

"displayed some serious tantrums." The Department also expressed concerns about "the relationship between [Maldonado] and Ms. Anaya." Over the objection of the Department and the court appointed special advocate (CASA), the court placed T.A.G.-F. with Anaya.

In late April, Maldonado began treatment with Sno-King Counseling mental health provider Maria Ortiz-Cassity. At the dependency review hearing on April 29, the court found Maldonado was in "partial" compliance with court orders and had made "partial" progress toward correcting parental deficiencies. The dependency review order states, in pertinent part, "Mother is doing her UA's and re-engaged in [chemical dependency] Treatment. She is engaged in some counseling." The order identifies "[a]doption" and "[r]eturn of the child to the home of the . . . mother" as the primary permanency plan for T.A.G.-F.

Maldonado tested positive for morphine in May. On June 3, the court denied her motion for unsupervised visitation. The court ruled that "[d]ue to concerns of mother's UAs, visitation shall remain supervised."

After approximately a month of mental health counseling with Maldonado, Ortiz-Cassity recommended weekly mental health services to treat "possible" post-traumatic stress disorder (PTSD), anger, and depression. But in June, Maldonado stopped attending mental health counseling. On July 1, Sno-King Counseling discharged Maldonado for "lack of attendance."

At the request of the Department, FCAP updated the parenting assessment. The FCAP evaluator interviewed Maldonado; Anaya; Johns; the Department social worker

assigned to the case, Tim Earwood; and the CASA. On July 25, FCAP submitted the "final Services/Permanency Assessment Report" to the Department.

According to the FCAP report, the CASA states that Maldonado loves T.A.G.-F. and wants to have the child in her life "but wants others to do the work of raising [the child]." The CASA opposed "unsupervised contact due to questions of [Maldonado's] sobriety and 'hair-trigger temper.' "

The CASA expressed concerns about Anaya's ability to care for the child. The CASA stated, "Anaya is overwhelmed with the unexpected responsibilities of caring for a two year old." The CASA supported T.A.G.-F. "going to live with Amanda Johns sooner, before more damage is done." The CASA said T.A.G.-F. "is most bonded with the Johns [family], who are [the child's] mother, father, and brothers," and "noted that Mr. Johns commuted from California every week from his work in order for [T.A.G.-F.] to remain in their care."

The FCAP assessment states Maldonado "has a history of difficulty engaging in services, lack of progress, an unpredictable and chaotic lifestyle, inconsistent reporting, and positive urinalysis results." The report states, "With a termination petition now ordered, Ms. Maldonado continues to miss urinalysis tests and be only partially compliant with services." FCAP recommends referring Maldonado to a pain specialist to prescribe medication and, if "there is a continued lack of progress due to concerns of her mental health," refer Maldonado to a psychologist.

> Ms. Maldonado has not been forthright in her engagement regarding this dependency. Despite her love for [T.A.G.-F.] and her consistently high quality care during the weekly visitation, her life remains unstable and unpredictable and returning [T.A.G.-F.] would place [the child] at significant risk. Ms. Maldonado has been under the influence of controlled substances this entire dependency and is generally altered most of the

> time. We do not know what her profile would be un-medicated. Over a year after dependency has been established, the proper documentation for her need for treatment and medications has not been provided. There are numerous inconsistencies, but most concerning is Ms. Maldonado's denial of her continued substance abuse despite repeat positive urinalysis results, missed urinalysis tests, and dropping out of treatment for months. Ms. Maldonado was diagnosed with Cannabis Dependence, Opioid Dependence, Amphetamine Dependence, and Polysubstance Dependence in April 2012, however on February 6, 2013 her medical records indicate her report to hospital staff that she has no history of drug abuse and was subsequently prescribed narcotic pain medication. We can see four emergency room visits at two hospitals in a recent two-month period with narcotic pain medications from multiple doctors and pharmacies, as well as pain medications from a different provider a year prior. She reported not having a primary care physician. Ms. Maldonado has fractured care and a very high misuse of legal and illegal substances. Ms. Maldonado must be seen by a reputable pain specialist and this physician must be the only person who determines medically necessary treatment and prescribes her pain medication. Random urinalysis testing (at least three times per week) will be necessary. Furthermore, all urinalysis results for prescription medication must be considered positive unless Ms. Maldonado received those medications through her pain specialist. It is recommended that the pain specialist be contacted to establish care within two weeks of this final report.

The FCAP report identified Anaya and Johns as possible permanency options and recommended "[c]oncurrent planning" efforts for adoption.

> Anaya . . . is open to remaining caregiver to [T.A.G.-F.] permanently. She reports having two daughters with criminal actions pending. With one daughter residing in her home, it makes a home study for Ms. Anaya less likely to pass. Placement with [T.A.G.-F.]'s previous caregiver, the Johns Family, is possible and should be explored. However, the Johns' [sic] are ambivalent about caring for [T.A.G.-F.] at this time due to the family conflict and the unpredictable emotional roller-coaster they have experienced, and placement may not be an option while parental rights remain intact.

On July 26, 2013, the Department filed a petition to terminate Maldonado's parental rights.[3] The Department alleged Maldonado "ha[s] demonstrated an unwillingness to participate in and/or successfully complete services offered to correct

[3] The court terminated the biological father's rights on October 17, 2013.

parental deficiencies." The petition alleged Maldonado "has not successfully completed treatment or maintained sobriety" and "her urinalysis test results prove use and abuse of a variety of prescription and street drugs."

In September, the court entered an agreed order designating the CarePlus facility in Shoreline as Maldonado's UA provider and requiring Maldonado to "submit to random urinalysis testing three times per week" at CarePlus. In October, Maldonado was not in compliance with the order or UA testing.

On October 11, the CASA filed a report recommending termination of Maldonado's parental rights. The CASA states that "it is in [T.A.G.-F.]'s best interest to be permanently placed in the home of the Johns, the caregivers that cared for [T.A.G.-F.] for well over half of [the child's] life." The report also states that Anaya "should not be considered a suitable placement."

> Anaya has stated to this CASA volunteer that she would only consider being [T.A.G.-F.]'s long-term placement "if she had too." In other words, Ms. Anaya didn't really want to adopt [T.A.G.-F.], but would do so to help the mother continue to have access to [T.A.G.-F.] whenever she feels like it. If so, this will put [T.A.G.-F.] right back into the unsafe and unsuitable environment [the child] was taken out of so long ago.

On October 14, Maldonado filed a motion for concurrent jurisdiction to allow Anaya "to seek non-parental custody of the child." The Department opposed the motion. The Department argued T.A.G.-F. "deserve[s] to have permanency established either through reunification with the mother or adoption." The Department noted, "There is no plan provided by the mother or Ms. Anaya except that they want to do non-parental custody with Ms. Anaya." The Department noted that "the mother continues to assert that she wishes to regain custody."

The parties addressed the motion at the permanency planning hearing on October 28. Maldonado's attorney argued that "just because a nonparental custody petition is granted it doesn't foreclose a modification coming at some further time." In response, the court stated, "And that is my biggest problem with your motion." The attorney acknowledged the concern. "I don't disagree. I know that this court has overall concern for what has now been probably 20 months of concern, for lack of a better description." The court denied the motion for concurrent jurisdiction, ruling that "it is not in [the] best interests of [the] child."

The court changed the primary permanency plan to adoption with an alternative plan of returning "the child to the home of the . . . mother." The order requires the Department to "initiate" an adoption home study for Anaya and to submit a request for out-of-state placement with the Johns family under the "Interstate Compact for the Placement of Children" (ICPC).[4]

On November 10, the Department learned that Anaya allowed Maldonado to have "unsupervised contact" with T.A.G.-F. in violation of the court order. Anaya admitted that "she allowed [T.A.G.-F.] at least on 3 weekends to spend the night with a female friend who is a friend of both the mother's and hers" but claimed Maldonado told her the friend "had been approved" by the Department.

At the pretrial conference on November 13, the court scheduled the termination trial for December 2.

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[4] The order states, in pertinent part:

The court orders the following actions to be taken to move the case toward permanency: With[in the] next 30 days [the Department] shall have ICPC request sent out of Olympia office and [the Department] shall initiate an adoption home study for the current caregiver, Ms. Anaya. This court shall not consider a change in placement until both the ICPC and home study are presented to the court contemporaneously, providing Ms. Anaya is willing to participate in said home study.

On November 21, Maldonado filed a petition to appoint Anaya as the guardian for T.A.G.-F.; King County Superior Court Cause No. 13-7-12511-9 KNT. Maldonado filed a motion to consolidate the guardianship petition action and continue the termination trial. The Department objected to the motion to consolidate and continue the scheduled termination trial as untimely. The Department also argued—"[W]e don't have somebody that we have evidence that is an approved, proposed guardian." In a declaration in opposition, social worker Earwood states the Department "do[es] not believe that Ms. Anaya would protect the best interest of [T.A.G.-F.]," Anaya "is unable to set any kind of boundaries" with Maldonado, and Anaya "would allow unsupervised and/or liberal contact with the mother."

The CASA opposed the motion to consolidate and continue the termination trial as untimely. The CASA argued guardianship was not raised or addressed at the October 28 hearing or at the pretrial conference on November 13. The CASA told the court that T.A.G.-F. "either needs to go home or be adopted, and this does not give [the child] that option." The CASA asserted Anaya said she was interested in adoption only "if needed," and the Johns family are "relatives who are interested in adopting this child."

> Ms. Anaya has said she would adopt this child if needed, and the lower court has determined that until the home study on both of these homes is completed, that the lower court, the commissioner, would not decide where the child would reside, but that did not change the fact that this child needs to be adopted.
>
> . . . .
>
> The other thing is that the mother does not address the issues of Ms. Anaya's apparently hesitation about adoption and her lack of commitment to being the primary parent for the duration of the child's life. That was raised at the last hearing. It wasn't addressed to the court's satisfaction below. I don't believe it's addressed here.

The court denied Maldonado's motion to consolidate and continue the termination trial.

Maldonado renewed her motion to consolidate the guardianship petition action before the termination trial began on January 15, 2014. The court denied the motion to consolidate. Maldonado's attorney stated Maldonado planned to dismiss the petition and expressly asked the court not to consider the guardianship petition as evidence in the termination trial.

A number of witnesses testified during the four-day trial, including social worker Earwood and the CASA. Earwood testified Maldonado's substance abuse affects her ability to parent because "her addiction is more important to satisfy that, than, you know, working towards reunification with her child." Earwood testified he believes T.A.G.-F. would be at risk if placed with Maldonado "because there's no indication that Ms. Maldonado has made any progress." The CASA also testified Maldonado "displayed an explosive anger" on a number of occasions and "has not recovered from or addressed the issues that led to this dependency in the first place." The CASA testified, "I think that the [Department]'s correct, and the parental rights should be terminated. And I don't say that lightly."

The court concluded the Department proved the statutory elements by clear, cogent, and convincing evidence and termination was in the best interests of the child. The court entered lengthy and detailed findings of fact and conclusions of law. The findings of fact state, in pertinent part:

> 2.8 All services ordered under RCW 13.34.136 have been expressly and understandably offered or provided and all necessary services, reasonably available, capable of correcting the parental deficiencies within the foreseeable future have been expressly and understandably offered or provided.

2.9 The mother has substance abuse issues which led to the removal of the child. She has made some efforts to obtain treatment since the child was removed; however, she has not successfully completed treatment or maintained sobriety. The Department began providing the mother with referrals and information for ADATSA[5] funding and drug/alcohol assessment providers in December 2011.

. . . .

2.16 There is little likelihood that conditions will be remedied so that the child can be returned to the mother in the near future. If the mother re-engages in substance abuse and mental health treatment, she will need to start these services over due to the lengths of her absences from these services.

2.17 Ms. Maldonado would at a minimum need six (6) or more months to complete these services. This is too long for [T.A.G.-F.] to wait for the mere possibility of potential re-unification with [the child's] mother.

. . . .

2.20 [T.A.G.-F.] is adoptable and has prospects for adoption. [The child] would be at risk if placed in the mother's care at this time.

2.21 The child's mother is currently unfit to parent this child.

2.22 Ms. Maldonado lacks credibility. She has provided inconsistent and self-serving responses throughout her testimony. These include, but are not limited to, her reasons for not participating in treatment, her willingness to follow court orders and her finances and employment.

2.23 Termination of the parent-child relationship between the child and the mother is in the child's best interest.

. . . .

2.25 The guardianship petition, although allowed as an exhibit, was not a basis for this court to reach its conclusions.

The conclusions of law state, in pertinent part:

3.2 Termination of the parent-child relationship between the above-named minor child and the mother is in the child's best interest. Ms. Maldonado is currently unfit to parent the child.

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[5] Alcoholism and Drug Addiction Treatment and Support Act, chapter 74.50 RCW.

3.3 All services ordered under RCW 13.34.136 have been expressly and understandably offered or provided and all necessary services, reasonably available, capable of correcting the parental deficiencies within the foreseeable future have been expressly and understandably offered or provided. The court concludes that a psychological evaluation was not a necessary service.

3.4 The foregoing findings of fact and the allegations of RCW 13.34.180 and .190 have been proven by clear, cogent and convincing evidence unless otherwise noted.

ANALYSIS

Maldonado contends the court violated her right to due process by denying the motion to consolidate the guardianship petition and continue the termination trial.

Parents have a fundamental liberty and privacy interest in the care and custody of their children. Santosky v. Kramer, 455 U.S. 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982); In re Dependency of K.N.J., 171 Wn.2d 568, 574, 257 P.3d 522 (2011). Because of the fundamental constitutional rights in a termination proceeding, "due process requires that parents have the ability to present all relevant evidence for the juvenile court to consider" before terminating parental rights. In re Welfare of R.H., 176 Wn. App. 419, 425-26, 309 P.3d 620 (2013).

We review a decision to deny a continuance and consolidate for manifest abuse of discretion. In re Dependency of V.R.R., 134 Wn. App. 573, 580-81, 141 P.3d 85 (2006). Under a manifest abuse of discretion standard, "[t]he trial court's decision will be affirmed unless no reasonable judge would have reached the same conclusion." In re Marriage of Landry, 103 Wn.2d 807, 809-10, 699 P.2d 214 (1985). "Denial of a motion to continue violates due process if the parent can show 'either prejudice by the denial or the result of the trial would likely have been different if the continuance was granted.' " R.H., 176 Wn. App. at 425 (quoting V.R.R., 134 Wn. App. at 581).

When determining whether to grant a continuance, the juvenile court must consider " 'diligence, due process, the need for an orderly procedure, the possible effect on the trial, and whether prior continuances were granted.' " R.H., 176 Wn. App. at 424-25 (quoting V.R.R., 134 Wn. App. at 581). In In re Welfare of N.M., 184 Wn. App. 665, 672, 338 P.3d 879 (2014), we emphasized that because termination proceedings are inherently fact-specific, the denial of a parent's motion to continue "for the purpose of exploring a guardianship is not a per se reversible error."

Maldonado relies on R.H. to argue the court erred in denying her motion to consolidate and continue the termination trial. R.H. is distinguishable. In R.H., the father filed a "timely motion to continue the termination trial" to allow the Department to complete a home study of the children's paternal aunt as a potential guardian. R.H., 176 Wn. App. at 423-24. The potential for a guardianship placement had been established for more than four months prior to the termination trial. R.H., 176 Wn. App. at 429. The background check was complete and the Department was already "in the process of approving the aunt for guardianship placement." R.H., 176 Wn. App. at 429. The Department supported permanent placement with the aunt but opposed the motion to continue. R.H., 176 Wn. App. at 429. The Department argued placement of the children with the aunt was not material to whether it could prove the statutory elements of termination at trial. R.H., 176 Wn. App. at 424. The court disagreed.

The court in R.H. held the availability of a guardianship placement is material to the determination of whether the Department can prove continuation of the parent and child relationship clearly diminishes the prospects for early integration into a stable and permanent home under RCW 13.34.180(1)(f). R.H., 176 Wn. App. At 428. Because

due process requires that parents have the ability to present all relevant evidence prior to terminating parental rights, we concluded the court abused its discretion in denying the father's "timely motion to continue the termination trial until after the aunt's home study could be completed." R.H., 176 Wn. App. at 425-26, 423-24.

> [T]he juvenile court abused its discretion by denying [the father]'s timely motion to continue the trial and, as a result, prevented [the father] from being able to present material evidence [to] decide whether the [Department] had met its burden to prove that his continued relationship with his children diminished his children's prospects for early integration into a stable and permanent home as required under RCW 13.34.180(1)(f).

R.H., 176 Wn. App. at 429.

Here, the record establishes the motion to consolidate the guardianship petition and continue the termination trial was not timely. After the CASA filed the report recommending termination and opposing placement with Anaya, Maldonado filed a motion for concurrent jurisdiction to proceed with a third party action to place T.A.G.-F. with Anaya. The court denied the motion at the permanency planning hearing on October 28.[6]

After the pretrial conference on November 13 and less than two weeks before the scheduled trial date, Maldonado filed a petition to establish a guardianship and designate Anaya as the guardian. Maldonado then filed a motion to consolidate the guardianship petition and continue the termination trial.

The Department and the CASA argued the motion was untimely. The Department pointed out that what Maldonado was "asking for here is not just a

[6] On appeal, Maldonado does not challenge denial of her request to proceed with a third party action.

consolidation but a continuance of several months of the termination trial."

> As I know this court is aware, we are really moving for early permanence for this [child], and I don't think that the facts before the court in light of that really warrant — and under the Local Rule I think, as the court is also aware, unless there are extraordinary circumstances after the pretrial conference for a continuance, the court is not to do so. And so we don't believe that that burden has been met. We don't believe these represent extraordinary circumstances. And we would ask the court to deny the consolidation and deny the continuance.[7]

The court denied the motion to consolidate the guardianship petition and continue the termination trial as untimely.

At the beginning of trial, Maldonado renewed her motion to consolidate the guardianship action. The Department argued the same motion was previously denied and there had been no change in circumstances. The CASA asserted the permanency plan "has always been court-ordered to be adoption or return home" and "there's never been a motion before the Court to change the permanen[cy] plan to guardianship."

The court denied the motion. The court ruled, in pertinent part:

> The Court has indicated it's had a chance to review all the submitted documentation. I did . . . read R.H. and I do believe and agree with the [Department] and the CASA that it is distinguishable, and that the parties involved in R.H. did involve requested relative placement, and there was notice given to the [Department] some five months before trial.
>
> Here there have been some recent motions. If I'm not mistaken, I believe that guardianship — the guardianship issue was not raised in a court hearing on October 28th. There was a recent hearing where Judge Clark denied the same motion on December 6th. I do agree that there's been no change in circumstances, and another judge has recently ruled on this issue.

Considering the totality of the circumstances, the court did not manifestly abuse its discretion in denying the untimely motion to consolidate. Maldonado did not timely file or "diligently pursue a guardianship as an alternative to termination." N.M., 184 Wn.

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[7] LJuCR 4.4(b)(2) provides that a motion to continue a termination trial that is filed after the pretrial conference will not be granted absent "extraordinary circumstances."

App. at 674-75; see also In re Termination of A.D.R., 185 Wn. App. 76, 91-92, 340 P.3d 252 (2014) (denial of a motion for a continuance where the parent "simply wanted more time to consider the option as an alternative to contesting termination" is not an abuse of discretion). Further, Maldonado candidly admitted during her testimony at trial that she filed the guardianship petition right before the termination trial for strategic purposes. Maldonado testified the statements she made under oath in the guardianship petition "weren't true and correct then, but they were — that wasn't the purpose of the document. I filed it . . . to not have to go to trial; to not have to do this." Because the court did not err in denying the motion to consolidate and continue, we need not address Maldonado's argument that RCW 13.34.180 and .190 are unconstitutional as applied.

Maldonado also asserts the court violated her due process right to present a defense by refusing to consider evidence of the guardianship petition. The record does not support her argument. Although the standard of proof is different, the first five statutory elements to establish a dependency guardianship under RCW 13.36.040(2) are the same as the first five statutory elements in RCW 13.34.180(1) terminating parental rights.

RCW 13.36.040(2) states that a guardianship shall be established where:

> (c)(i) The child has been found to be a dependent child under RCW 13.34.030;
> (ii) A dispositional order has been entered pursuant to RCW 13.34.130;
> (iii) At the time of the hearing on the guardianship petition, the child has or will have been removed from the custody of the parent for at least six consecutive months following a finding of dependency under RCW 13.34.030;
> (iv) The services ordered under RCW 13.34.130 and 13.34.136 have been offered or provided and all necessary services, reasonably

available, capable of correcting the parental deficiencies within the foreseeable future have been offered or provided;

(v) There is little likelihood that conditions will be remedied so that the child can be returned to the parent in the near future; and

(vi) The proposed guardian has signed a statement acknowledging the guardian's rights and responsibilities toward the child and affirming the guardian's understanding and acceptance that the guardianship is a commitment to provide care for the child until the child reaches age eighteen.

RCW 13.34.180(1) provides, in pertinent part:

A petition seeking termination of a parent and child relationship may be filed in juvenile court by any party, including the supervising agency, to the dependency proceedings concerning that child. Such petition shall conform to the requirements of RCW 13.34.040, shall be served upon the parties as provided in RCW 13.34.070(8), and shall allege all of the following unless subsection (3) or (4) of this section applies:

(a) That the child has been found to be a dependent child;

(b) That the court has entered a dispositional order pursuant to RCW 13.34.130;

(c) That the child has been removed or will, at the time of the hearing, have been removed from the custody of the parent for a period of at least six months pursuant to a finding of dependency;

(d) That the services ordered under RCW 13.34.136 have been expressly and understandably offered or provided and all necessary services, reasonably available, capable of correcting the parental deficiencies within the foreseeable future have been expressly and understandably offered or provided;

(e) That there is little likelihood that conditions will be remedied so that the child can be returned to the parent in the near future. . . .

(f) That continuation of the parent and child relationship clearly diminishes the child's prospects for early integration into a stable and permanent home.

At the beginning of the termination trial, Maldonado dismissed the guardianship petition and specifically requested the court not consider evidence of the guardianship petition. The attorney stated, in pertinent part:

[T]he conundrum that we're in — I talked to my client about this before — is we've got this guardianship petition hanging out there now . . . right? Which declares under oath certain things. . . .

. . .

> . . . [W]e're looking to withdraw that petition, as anybody can do prior to . . . following-through on the lawsuit. We would ask to withdraw that petition and not have that be a part of this case . . . .
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> . . . .
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> . . . Circumstances have changed. It was obviously used for whatever purposes that my client and I deemed were appropriate, and those circumstances have now changed. And so I would ask this Court not consider that petition.

The court granted Maldonado's motion to dismiss and not consider the guardianship petition during the termination trial. The unchallenged findings of fact state that "[t]he guardianship petition, although allowed as an exhibit, was not a basis for this court to reach its conclusions" in determining termination of parental rights.

In the alternative, Maldonado contends the court erred in finding the Department met its burden of proving it timely provided all necessary services capable of correcting her parental deficiencies under RCW 13.34.180(1)(d). And, as a result, Maldonado argues the Department also did not meet its burden of proving there is little likelihood conditions will be remedied in the near future under RCW 13.34.180(1)(e), that continuation of the parent-child relationship diminishes prospects for early integration into a stable and permanent home under RCW 13.34.180(1)(f), or that termination is in the best interests of the child under RCW 13.34.190(1)(b).

The Department has the burden of proving the six statutory elements set forth in RCW 13.34.180(1) by clear, cogent, and convincing evidence. K.N.J., 171 Wn.2d at 576-77; see also RCW 13.34.190(1)(a)(i). Evidence is clear, cogent, and convincing " 'when the ultimate fact in issue is shown by the evidence to be highly probable.' " In re Dependency of K.D.S., 176 Wn.2d 644, 653, 294 P.3d 695 (2013) (quoting In re Dependency of K.R., 128 Wn.2d 129, 141, 904 P.2d 1132 (1995)). We must affirm an order terminating parental rights if substantial evidence supports the findings of fact by

clear, cogent, and convincing evidence. In re Dependency of M.S.R., 174 Wn.2d 1, 9, 271 P.3d 234 (2012); In re Dependency of T.R., 108 Wn. App. 149, 160-61, 29 P.3d 1275 (2001). Substantial evidence is the quantum of evidence sufficient to persuade a rational fair-minded person the premise is true. In re Custody of A.F.J., 179 Wn.2d 179, 184, 314 P.3d 373 (2013). The deference paid to the trial court's advantage of observing witnesses is "particularly important" in a termination proceeding. In re Welfare of Aschauer, 93 Wn.2d 689, 695, 611 P.2d 1245 (1980). Consequently, this court will not weigh evidence or the credibility of the witnesses. In re Welfare of Sego, 82 Wn.2d 736, 739-40, 513 P.2d 831 (1973). Unchallenged findings are verities on appeal. M.S.R., 174 Wn.2d at 9.

Maldonado challenges the following findings of fact:

> 2.8 All services ordered under RCW 13.34.136 have been expressly and understandably offered or provided and all necessary services, reasonably available, capable of correcting the parental deficiencies within the foreseeable future have been expressly and understandably offered or provided.
>
> . . . .
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> 2.15 The mother has parental deficiencies related to her history of substance abuse and concerns about her mental health. She has not completed, and presently is not participating, in services ordered to address these deficiencies. The social worker testified that he believed a psychological evaluation was needed from the inception of the case. The mental health counselor at Sno-King testified that a psychological evaluation would have helped in crafting a treatment program. The CASA testified that he thought a psychological evaluation would have been helpful during his tenure on the case. The [Department] social worker testified that a psychological evaluation was offered to the mother early in the case and through her attorney in late 2013, but was declined.

Maldonado challenges the conclusion that "[a]ll services ordered under RCW 13.34.136 have been expressly and understandably offered or provided and all

necessary services, reasonably available, capable of correcting the parental deficiencies within the foreseeable future have been expressly and understandably offered or provided," and that "a psychological evaluation was not a necessary service."

Under RCW 13.34.180(d), the Department has the burden of proving:

> That the services ordered under RCW 13.34.136 have been expressly and understandably offered or provided and all necessary services, reasonably available, capable of correcting the parental deficiencies within the foreseeable future have been expressly and understandably offered or provided.

A service is necessary within the meaning of the statute if it is needed to address a condition that precludes reunification of the parent and child. In re Welfare of C.S., 168 Wn.2d 51, 56 n.3, 225 P.3d 953 (2010). The services offered must be individually tailored to a parent's specific needs. In re Dependency of D.A., 124 Wn. App. 644, 651, 102 P.3d 847 (2004). However, even if the Department fails to offer or provide necessary services, this element may still be met if there is evidence in the record from which the trial court could have concluded that such services would not have remedied parental deficiencies "in the 'foreseeable future.' " In re Welfare of Hall, 99 Wn.2d 842, 850-51, 664 P.2d 1245 (1983) (quoting RCW 13.34.180(d)). The Department is not required to offer or provide services that would be futile. T.R., 108 Wn. App. at 163.

Maldonado asserts clear, cogent, and convincing evidence does not support the finding that the Department timely offered or provided psychological testing. We disagree.

Social worker Earwood testified that Maldonado objected to a psychological evaluation at the beginning of the dependency. Earwood testified he e-mailed Maldonado's "current counsel about a psychological eval" and spoke with "Maldonado's

prior counsel for a psychological eval to be done. I believe that was in July of 2013." Earwood said that he sent Maldonado two letters in October 2013 recommending that she speak with her attorney about getting a referral for a psychological evaluation.[8]

On cross-examination, Earwood testified that he did not follow up with a psychological evaluation because Maldonado objected and did not agree to start mental health counseling until April 2013. Earwood also testified he was unaware of any evidence or documentation of mental health disorders.

Mental health provider Ortiz-Cassity testified that although she thought a Millon Clinical Multiaxial Inventory (MCMI) assessment would have been "helpful," she did not ask the Department to provide funding for an MCMI assessment before Maldonado stopped attending counseling sessions and was terminated from the program in July 2013. Ortiz-Cassity also said that in her "experience in working with other clients," it was "not the norm" to have an MCMI assessment.

After Maldonado began participating in services again in April 2013, the Department asked FCAP to update the assessment with "input from the mother." FCAP completed the update in summer 2013. FCAP recommended the Department refer Maldonado for a psychological evaluation, but only after "she has a period free of drug abuse" and "if concerns persist regarding her mental health functioning." The recommendation was conditioned on Maldonado first "maintain[ing] 45 days of clean random urinalysis three times weekly." The unchallenged findings state that Maldonado had not "completed 45 days of consistently clean UAs since the completion of the FCAP evaluation."

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[8] The letters state, in pertinent part, "**Psychological Evaluation (TBD)**: We would like to refer you to one of our providers but speak to your attorney about this." (Emphasis in original.)

Substantial evidence supports finding the Department timely offered or provided all necessary services capable of correcting Maldonado's parental deficiencies but she did not successfully complete drug treatment or other services that were offered. Where the Department offers services "but the parent refuses to participate, RCW 13.34.180(1)(d) is satisfied." In re Welfare of M.R.H., 145 Wn. App. 10, 26, 188 P.3d 510 (2008).

The unchallenged findings of fact also support the determination that a psychological evaluation would not have remedied parental deficiencies in the foreseeable future. The findings state, in pertinent part:

> 2.9 The mother has substance abuse issues which led to the removal of the child. She has made some efforts to obtain treatment since the child was removed; however, she has not successfully completed treatment or maintained sobriety. The Department began providing the mother with referrals and information for ADATSA funding and drug/alcohol assessment providers in December 2011.
>
> 2.10 In 2012, the mother chose La Esperanza as her provider. The Department was not in agreement with this selection, however, the court allowed it, and memorialized this in the contested disposition order. The mother completed a drug/alcohol assessment at La Esperanza on April 19, 2012. This assessment noted diagnoses of Cannabis, Opioid, Amphetamine and Poly substance dependence, and recommended a one-year intensive outpatient treatment program. The mother began treatment at La Esperanza on May 17, 2012. She attended three treatment groups in May 2012, and then attended fairly regularly through August 2012. She stopped attending all services at La Esperanza after August 29, 2012. She was eventually discharged from the outpatient program in October 2012. The mother ceased participation in any substance abuse treatment for several months, and then re-engaged by completing a new chemical dependency assessment on February 22, 2013, at La Esperanza. In her self-report, the mother stated she had not used any drugs since September 2012. In response, the Department provided La Esperanza with the mother's urinalysis test results showing she had in fact tested positive for cocaine and benzodiazepines in February and March 2013. Her evaluation was updated April 15, 2013. Her diagnoses include Opioid, Amphetamine and Poly substance dependence. The evaluator recommended that she complete a six month intensive outpatient

program. The mother presumed that her treatment was complete in September 2013, however, the testimony of the provider indicated that the mother had not completed her drug/alcohol treatment and her file was closed at La Esperanza for lack of participation. The court finds that the mother's account of her presumed completion is not credible.

2.11 Beginning in December 2011, the mother has been offered numerous opportunities to engage in urinalysis testing. She has been provided referrals in person, via correspondence and verbally. Since January 2012, the Department has continually authorized urinalysis testing for the mother through Care Plus in Kenmore. The mother has done urinalysis tests sporadically since December 2011. She denies illegal substance abuse for the past use; however her urinalysis test results show a positive for cocaine on February 6, 2013 and a positive for opiates on May 10, 2013 (not explained by her listed/prescribed medications). She has had numerous missed tests, and has not completed the required ninety days of clean, undiluted urinalysis tests with no missed appointments. Exhibit No. 8 is an agreed order entered at the mother's request on September 16, 2013 moving the site of her UA collections to Shoreline as it was more convenient to the mother's home. She has not provided a UA at that site since the order was entered. The mother did provide a clean UA on September 30, 2013 as indicated in exhibit 124 through her treatment provider, La Esperanza. This UA was not provided pursuant to the court order at the agreed site and there was no evidence that it was done at random.

2.12 The Department has proposed several providers to complete a parenting assessment of the mother. The parties eventually agreed to a FCAP reunification assessment. The Department made this referral in July 2012; however the mother refused to participate. The evaluator, Paula Solomon, was unable to reach mother despite numerous attempts. Ms. Solomon completed a Services/Permanency Assessment Report on [T.A.G.-F.] in October 2012, without input from the mother. Ms. Solomon recommended [T.A.G.-F.]'s primary permanency plan be changed to adoption with an alternative of reunification. In April 2013, after the mother began participating in services again, the Department contacted the FCAP program to update the reunification assessment with input from the mother. This assessment was completed on July 25, 2013. The recommendations for services for the mother from this assessment include a referral to a pain specialist to manage her pain and prescribe all her medications and, if after 45 days of clean UAs, there is a continued lack of progress due to concerns of her mental health, then a referral for a psychological evaluation. Ms. Maldonado has not begun treatment with a pain specialist, nor has she completed 45 days of consistently clean UAs since the completion of the FCAP evaluation. Ms. Maldonado received the referrals for a pain specialist on October 23, 2013, and scheduled an

> appointment for December 31, 2013, that had to be rescheduled for after the first of the year 2014, as a result of her insurance coverage beginning in 2014. By the time [of] trial, no appointment had been had, but she testified that she had an appointment for January 24, 2014.
>
> 2.13 The mother has been provided written referrals by mail, emailed referrals and written referrals given in person to begin individual mental health counseling. Evergreen Manor was court ordered as her mental health provider in the contested disposition hearing; however she never began services there. By July 2012, she had no medical coverage so the Department offered her referrals to numerous providers with a sliding-fee scale. The mother did not begin services with any of these providers. She was out of contact with the Department from the fall of 2012 into early 2013. When she began participating in services again, Sno-King Counseling was agreed as her mental health provider. The Department secured funds for the mother's mental health treatment. She began seeing Maria Ortiz-Cassity in late April 2013. After approximately one month of sessions, Ms. Ortiz-Cassity noted a therapeutic relationship is being established and there appears to be some trauma, possible PTSD and anger and irritability possibly related to depression. Ms. Ortiz-Cassity recommended weekly mental health counseling. The mother stopped attending counseling at Sno-King in June, 2013. Ms. Maldonado attempted to re-enroll in Sno-King Counseling in November 2013, but had not resumed counseling at the time of trial.

We conclude the record shows the Department met its burden of proving it offered or provided necessary services reasonably capable of correcting parental deficiencies under RCW 13.34.180(1)(d). Accordingly, Maldonado's argument that the Department did not meet its burden under RCW 13.34.180(1)(e) and (f) fails.

Maldonado also challenges the court's determination that termination is in the child's best interests. If the Department meets its burden of proving the statutory elements under RCW 13.34.180(1), the court must determine whether termination is in the best interests of the child. K.N.J., 171 Wn.2d at 577; see RCW 13.34.190(1)(b). The Department must prove termination is in the best interests of the child by a preponderance of the evidence. M.R.H., 145 Wn. App. at 24. Where the needs of the

child and the rights of the parent conflict, the needs of the child must prevail. In re Dependency of J.W., 90 Wn. App. 417, 427, 953 P.2d 104 (1998).

Maldonado argues substantial evidence does not support the finding that she has not maintained sobriety. But the record shows that during the two-year dependency, Maldonado repeatedly tested positive for controlled substances, including methamphetamine, morphine, and cocaine. The unchallenged findings establish that Maldonado never completed a substance abuse treatment program and never "completed the required ninety days of clean, undiluted urinalysis tests with no missed appointments." Where a parent has been unable to rehabilitate over a lengthy dependency period, a court is fully justified in finding termination in the child's best interests rather than leaving the child in limbo for an indefinite period. T.R., 108 Wn. App. at 167.

We affirm the order of termination.

Schindler, J.

WE CONCUR:

Trickey, J

Cox, J.