IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Dependency of K.M.	)	No. 65571-0-I
	)	
STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES,	)	DIVISION ONE
	)	UNPUBLISHED OPINION
Respondent,	)	
	)	
v.	)	
KATHRYN KAY MINKS,	)	
Appellant.	)	FILED: July 5, 2011
	)	
	)	
	)	
	)	

Appelwick, J. — Minks appeals the termination of her parental rights concerning her child, K.M. Minks contests the juvenile court's findings that she was currently unfit to parent, that she was unlikely to correct conditions in the near future, and that her continued relationship with her daughter would impair her daughter's chances of early integration into a stable home. She also argues that the juvenile court erred in admitting hearsay evidence. Additionally she alleges that she received ineffective assistance of counsel, that RCW 13.34.190 violates her right to substantive due process, and that the juvenile court erred

when finding the best interests of the child factor by a preponderance of the evidence. We find that this matter is appropriate for accelerated review under RAP 18.13A. Because substantial evidence supports the challenged findings of fact and we find no other error, we affirm.

FACTS

K.M. was born to Kathryn Minks and Brent Starr in 2002. Starr is currently incarcerated for first degree murder and will be incarcerated for K.M.'s entire minority.[1] Minks's older children, A.J.H. (born 4/28/90) and A.R.H. (born 08/11/92), share the same father, Robert Hohlstein.[2] Minks's older children lived with her at the time of trial.

In 2007, while then 15 year old A.R.H. was living with her father, A.R.H. became sexually involved with Derek Nix, a 27 year old neighbor of her father. Minks reported Nix. Nix was convicted of third degree rape of a child.

In April 2008, after Nix had been charged but before his conviction, police officers found Nix at Minks's home while A.R.H. and K.M. were present. Minks was regularly allowing Nix to have contact with A.R.H. and K.M. K.M. was removed from the home and placed with her father. In July 2008, K.M. was removed from her father's care when he was arrested on murder charges. After a shelter care hearing, the court declined to place K.M. with her mother. The Department of Social and Health Services (Department) filed a dependency

[1] On January 27, 2009, Starr entered an agreed order of dependency. He subsequently voluntarily relinquished his parental rights as to K.M.

[2] Minks's older children have not been found to be dependent as to their mother and the Department of Social and Health Services (Department) is not seeking the termination of her parental rights as to those children.

petition on July 8, 2008. At the shelter care hearing review on September 29, 2008, the court denied Minks's motion to have K.M. returned to her home.

K.M. was placed in several successive foster homes. Finally, during the summer of 2009, K.M. was placed with her paternal grandparents in Michigan. K.M. returned to Washington with her paternal grandmother and lived with relatives from about September to December 2009, at which point K.M. returned to Michigan and remained placed with her grandparents through trial. At the time of trial, K.M. was happy living with her grandparents and had adjusted well to her new life.

After the shelter care hearing, Minks was assigned to a social worker and began the process of working toward reunification. In July 2008, Minks was evaluated for chemical dependency by Fire With Fire. That evaluation was not accepted as approved by the Department. Catholic Community Services (CCS) then evaluated Minks for chemical dependency in August 2008. CCS recommended inpatient treatment and detoxification, among other orders. Minks declined when those services were offered to her by the Department on the grounds that her medications were prescribed and therefore no detoxification was necessary.

Psychologist Faulder Colby assessed Minks in the fall of 2008. He concluded that Minks likely had a hypochondriacal condition and may have had a dependency on opioid medications. He recommended a psychiatric evaluation and further recommended that she detoxify off of her opiate medication.

At the time of the dependency fact finding, Minks continued to have

contact with Nix, writing to him in prison. Minks, through letters and phone calls, fostered a relationship between Nix and her family. She facilitated phone contact between Nix and A.R.H. She also sent Nix photos of A.R.H. and K.M.

The court entered an order of dependency as to Minks on February 9, 2009. The court found that Minks was completely unbelievable. The court focused on her lack of judgment in dealing with Nix and her conduct at visitations. The court expressed concern with Minks's use of prescribed narcotics, but concluded that there was not sufficient evidence to find that she did not need those medications or that she did not suffer from any particular medical condition. The court concluded that no parent was available to adequately care for K.M. and a manifest danger existed that she would suffer serious abuse or neglect if not removed from the home. The order required the Department to provide casework services, to make referrals for service providers, and to monitor case progress. Minks was to maintain safe and suitable housing, not engage in any illegal activities, not allow people to enter her home who might pose a safety risk, participate in a mutually approved psychiatric evaluation and follow all recommendations. Minks appealed and this court affirmed in a commissioner's ruling. The Supreme Court denied review.

Pursuant to the dependency order, the Department offered Minks a psychiatric evaluation. Dr. Joanne Solchany, PhD, ARNP, conducted a psychiatric evaluation of Minks in the summer of 2009 and submitted reports on June 2, 2009 and August 2, 2009. Solchany diagnosed Minks with opiate dependence, a somatization disorder, and an axis II histrionic personality

disorder with narcissistic features. Solchany recommended that Minks seek inpatient detoxification and cognitive behavioral therapy. She testified that in order to treat Minks's mental health issues, Minks had to resolve her opiate dependence.

SeaMar of Everett also evaluated Minks and determined that she represented a high level of risk to K.M. without appropriate treatment in a co-occurring disorder group for her chemical dependency and mental health issues. In the fall of 2009, Minks entered treatment in a co-occurring group at SeaMar of Everett. She was subsequently discharged for lack of attendance and lack of progress in treatment. Minks appealed her discharge from SeaMar of Everett. As a result, SeaMar referred her to their Seattle program. At the termination trial, Minks had just begun treatment in a co-occurring treatment program at SeaMar of Seattle. In the evaluation occurring closest to trial, on March 24, 2010, SeaMar of Seattle recommended that Minks receive inpatient and long term treatment. The Department offered inpatient detoxification, which Minks declined. She also declined dialectical behavioral therapy.

On September 25, 2009, the Department filed a petition to terminate Minks's parental rights concerning K.M. At a dependency review hearing in November 2009, the court found that Minks had failed to sign releases of information. The court also found that Minks had failed to follow the recommendations of her psychiatric evaluation which included inpatient chemical dependency treatment as well as cognitive behavioral therapy. Finally, the court found that Minks had made little to no progress toward correcting her

parental deficiencies.

In addition, Minks was placed in the Patient Review and Coordination program via an administrative order dated October 30, 2009. In the related administrative hearing, an administrative law judge found that in one 90 day period, Minks made 4 visits to an emergency department and had 17 office visits. She filled 46 prescriptions written by 12 different prescribers at 7 different pharmacies. She had 4 separate prescribers of controlled substances. The administrative law judge also found that Minks over-utilized medical resources. At the time of trial, Minks's appeal of that administrative decision was ongoing.

An eight day termination trial was held from March 24 to April 2, 2010. Numerous service providers and social workers testified at trial. Janell Berger, the social worker for the Department on Minks's case, testified in favor of termination, along with Delia Leary, the guardian ad litem. Their testimony centered on several similar themes: Minks's parental deficiencies, including her opiate dependency, her mental health issues, and her lack of parental judgment; Minks's failure to follow guidelines for visitation; the difficulty of working with Minks and her lack of cooperation; and Minks's resistance to providing necessary releases in order to allow service providers to perform full evaluations or to independently verify Minks's statements. Those witnesses also testified to the effects of continued visitation on K.M., including in person visits before she left for Michigan and video visits and telephone visits once she left. Witnesses testified that K.M. experienced anxiety, vomiting, nightmares, stomach aches in relation to the visits with her mother. In comparison, visits with her father, either

in person or by telephone, did not cause these impacts.

Solchany testified consistent with her report. Shauna Owen testified to Minks's placement in the Patient Review and Coordination program.

Jennifer Kachmar, the SeaMar of Everett mental health therapist who served Minks, testified that co-occurring therapy was necessary for Minks due to the interplay of her chemical dependence and mental health issues. She testified that Minks had been dismissed from the SeaMar of Everett's co-occurring therapy program due to excessive absences and failure to engage. She finally testified that SeaMar recommended inpatient detoxification for thirty to sixty days and then participation in an outpatient co-occurring group and individual counseling.

Minks's primary care physician, Sergey Kukhotsky, a physician's assistant at the Snohomish County Community Health Center, testified that Minks needed her prescriptions for her painful medical conditions, including fibromyalgia and chronic neck pain. He testified that Minks was currently on a pain contract and that Minks had never violated that contract to his knowledge. But, he also testified that as part of that contract he needed to approve all of her prescriptions, and that he had not been aware of prescriptions Minks had received through the Veterans Administration. He agreed that he had recommended to SeaMar that Minks taper down her medications, but testified that the recommendation was normal for almost all patients on such medications.

Scott Johnson, a behavioral health program manager for SeaMar of Seattle, also testified. Johnson had evaluated Minks and was providing her with

individual counseling at the time of trial. He testified that Minks had no mental health issues except for the stress of the dependency proceeding. He disputed Solchany's diagnosis of a personality disorder. He testified that SeaMar recommended long term treatment for Minks's chemical dependency and that she was compliant with her treatment at the time of trial.

Minks testified on her own behalf. She testified that she could care for K.M., that she had no parental deficiencies, that she needed no additional services, that she did not need drug and alcohol treatment, and that she did not have a personality disorder and did not require behavioral therapy. She testified that she took both hydrocodone and morphine as prescribed, as she had done daily since before K.M. was born. But, she testified that those medications were taken only under the supervision of her primary care provider. When asked about whether or not she would detox completely off her medications if the court ordered it, she equivocated and said she would want to talk to her primary care provider first. She testified that she loved K.M.

At the end of the hearing, Minks argued that there was no risk of physical harm to K.M., that she had consistently engaged in services, and that she had complied with her pain contract and the order of the Patient Review and Coordination program. She also argued that she had ended her relationship with Nix, and that K.M. needed her mother in her life. She argued that any deficiencies could be corrected. She argued that the Department acted in a biased manner in favor of adoption and caused K.M. to believe that she was frightened of her mother and anxious about visits.

The juvenile court found that termination was appropriate and entered findings of fact and conclusions of law. The juvenile court found that Minks had parental deficiencies resulting from opiate dependence, mental health issues, and lack of parental judgment. The juvenile court found that there was little likelihood that Minks would change in the near future, in fact, "[b]ased on her demeanor and actions in this courtroom, [Minks] will never willingly change." The juvenile court found that K.M. was in crisis and needed immediate resolution of her status, meaning within six months. The written order terminating Minks's parental rights as to K.M. was entered on April 13, 2010.

Minks appeals.[3]

DISCUSSION

I. Overview

It is well established that parents have a fundamental liberty and property interest in the care and custody of their children. U.S. Const. amends. V, XIV; Wash. Const. art. I, § 3; Santosky v. Kramer, 455 U.S. 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982); In re Custody of Smith, 137 Wn.2d 1, 13-14, 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). Although parental rights enjoy constitutional protection, a parent does not have an absolute right to the custody and care of a child; the paramount consideration in a termination proceeding is the welfare of the child. In re Welfare of Young, 24 Wn. App. 392, 395, 600 P.2d 1312 (1979). Where the rights of a child conflict with the legal rights of a parent, the rights of the child

[3] Minks moved for accelerated review under RAP 18.13A.

should prevail. RCW 13.34.020. A child's right to basic nurturing includes the right to a safe, stable, and permanent home and to a speedy resolution of dependency proceedings. RCW 13.34.020; In re Welfare of H.S., 94 Wn. App. 511, 530, 973 P.2d 474 (1999); In re Dependency of C.R.B., 62 Wn. App. 608, 615, 814 P.2d 1197 (1991).

To terminate a parent-child relationship, the Department must establish by clear, cogent, and convincing evidence the six statutory elements set forth in RCW 13.34.180(1). RCW 13.34.190(1)(a)(i). Those elements are:

> (a) That the child has been found to be a dependent child;
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> (b) That the court has entered a dispositional order pursuant to RCW 13.34.130;
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> (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;
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> (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;
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> (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. A parent's failure to substantially improve parental deficiencies within twelve months following entry of the dispositional order shall give rise to a rebuttable presumption that there is little likelihood that conditions will be remedied so that the child can be returned to the parent in the near future. The presumption shall not arise unless the petitioner makes a showing that all necessary services reasonably capable of correcting the parental deficiencies within the foreseeable future have been clearly offered or provided. In determining whether the conditions will be remedied the court may consider, but is not limited to, the following factors:

> (i) Use of intoxicating or controlled substances so as to render the parent incapable of providing proper care for the child for extended periods of time or for periods of time that present a risk of imminent harm to the child, and documented unwillingness of the parent to receive and complete treatment or documented multiple failed treatment attempts; or
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> (ii) Psychological incapacity or mental deficiency of the parent that is so severe and chronic as to render the parent incapable of providing proper care for the child for extended periods of time or for periods of time that present a risk of imminent harm to the child, and documented unwillingness of the parent to receive and complete treatment or documentation that there is no treatment that can render the parent capable of providing proper care for the child in the near future; and
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> (f) That continuation of the parent and child relationship clearly diminishes the child's prospects for early integration into a stable and permanent home.

RCW 13.34.180(1) (as amended by Laws of 2009, ch. 520, § 34).[4] Clear, cogent and convincing evidence exists when the ultimate fact in issue is shown to be highly probable. In re Dependency of T.L.G., 126 Wn. App. 181, 197, 108 P.3d 156 (2005). The court must also find that the termination is in the best interests of the child.[5] RCW 13.34.190(1)(b); T.L.G., 126 Wn. App. at 197. Finally, parental rights may not be terminated in the absence of evidence that the parent is currently unfit to parent the child. In re Welfare of A.B., 168 Wn.2d 908, 919-20, 232 P.3d 1104 (2010).

If substantial evidence supports the juvenile court's findings in light of the

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[4] RCW 13.34.180 was amended twice during the 2009 legislative session, each without reference to the other. See Laws of 2009, ch. 477, § 5; Laws of 2009, ch. 520, § 34. Neither amendment materially affected the language cited here.

[5] The standard of proof for the best interest element is challenged by K.M. and discussed below.

degree of proof required, an order terminating parental rights must be affirmed. In re Dependency of T.R., 108 Wn. App. 149, 161, 29 P.3d 1275 (2001). An appellate court will not weigh the evidence or the credibility of witnesses. Id. Evidence is substantial if, viewed in the light most favorable to the prevailing party, a rational trier of fact could find the fact by the necessary degree of proof. In re Dependency of E.L.F., 117 Wn. App. 241, 245, 70 P.3d 163 (2003). We do not weigh the evidence or credibility of the witnesses. Id. Rather, we pay deference to the juvenile court's advantage in directly observing witness testimony. In re Welfare of Aschauer, 93 Wn.2d 689, 695, 611 P.2d 1245 (1980). Unchallenged findings of fact are verities on appeal. In re Welfare of C.B., 134 Wn. App. 336, 349, 139 P.3d 1119 (2006) (C.B. I).

Minks argues that the State failed to prove two of the six statutory elements[6] by clear, cogent, and convincing evidence. She also argues that the State failed to prove that she was currently unfit.

II. Substantial Evidence: Current Unfitness

Minks contends that the Department failed to prove that she is currently unfit.

First, Minks contends that the juvenile court did not make an explicit finding of current unfitness and that the record does not clearly demonstrate that the court intended to do so. When an appellate court is faced with a record that

[6] Minks did not challenge three elements at trial: that the child is dependent; that a dispositional order was entered; that the child has been removed from the parent for at least six months pursuant to a finding of dependency. On appeal, Minks also did not contest that the State offered or provided all necessary services.

omits an explicit finding of current parental unfitness, the appellate court can imply or infer the omitted finding only if all the facts and circumstances in the record (including but not limited to any boiler plate findings that parrot RCW 13.34.180) clearly demonstrate that the omitted finding was actually intended, and thus made, by the juvenile court. A.B., 168 Wn.2d at 921.

The record here clearly demonstrates an implied finding that Minks is currently unfit. Several findings of fact indicate the court's intention to find unfitness, including that Minks has "mental health issues that interfere with her ability to parent," that Minks's "dependency on opiates is a currently existing parental deficiency," that Minks's lack of parental judgment and insight "is an existing parental deficiency," that Minks had deficiencies that could not be remedied in the near future, that Minks "cannot provide a safe environment," and that "her mental health issues and lack of parental judgment are independent parental deficiencies that cannot be remedied in the near future." The court also made a conclusion of law that the Department established each element of RCW 13.34.180(a) through (f), which supports the inference that the court intended to find unfitness. See id. at 921. This is sufficient to show an implied finding that Minks is currently unfit.

The juvenile court found three independent deficiencies which each alone could not be remedied within the near future: use of narcotics, mental health issues, and lack of parental judgment. We need only find substantial evidence for one deficiency in order to find substantial evidence for the finding that Minks is currently unfit to parent.

Substantial evidence supports the juvenile court's finding that Minks's lack of judgment was an independent parental deficiency. Solchany testified that Minks has boundary issues that result in harm to K.M. and that Minks is unable to put K.M.'s needs above her own. Janell Berger, the social worker, testified that Minks showed a lack of parental judgment at visits, including hostile interactions with K.M. and verbal abuse to K.M. and K.M.'s siblings. Multiple witnesses testified that Minks's interactions with Nix shows a lack of judgment.

Minks asserts that she ended her connection to Nix, demonstrating that she had learned to make better choices. But, it is well established that "past history is a factor that a court may consider in weighing a parent's current fitness." In re Dependency of J.C., 130 Wn.2d 418, 428, 924 P.2d 21 (1996). Also, Berger testified that although Minks had ended her relationship with Nix, she failed to acknowledge any responsibility in facilitating the relationship between her daughter and Nix. This indicates that although Minks ended the relationship, the lack of judgment that led to the original problems had not yet been resolved.

Minks argues that the Department failed to prove that the parent-child relationship, and Minks's parenting style, created a risk of harm to K.M. But, several witnesses testified that K.M. was detrimentally impacted by her mother's parenting style as exhibited during the visits. K.M. experienced anxiety, vomiting, nightmares, and stomach aches in relation to the visits with her mother. K.M. was diagnosed with an attachment disorder and posttraumatic stress disorder when she arrived in Michigan. Minks was unable to see the impact that

her behavior had on her daughter or change her behavior, despite discussion with the social worker and taking parenting classes.

Minks argues that no witness testified that her parenting style was "outside the range of permissible styles." We disagree. The fact that her parenting had a severely negative impact on her daughter's mental and physical health constitutes testimony that her parenting style was impermissible.

Even if the Department had failed to prove Minks's lack of judgment, there would also be substantial evidence to show that Minks's opiate dependence constituted a parental deficiency.

Minks argues that her medically sanctioned opiate dependence was not alone sufficient to disqualify her from parenting adequately. She argues that her two older children currently live with her, showing that she is capable of parenting.[7] She also argues that no testimony suggested that Minks could not parent while going through the treatment process. But, even if Minks resolved her deficiency relating to her medications, she still needed to resolve her mental health and parental judgment deficiencies in order for reunification to occur.

Minks argues that she was participating in treatment by the time the termination trial commenced and that no evidence was produced that she would be unable to benefit from treatment. But, it is a verity on appeal that Minks refused to comply with the recommendations of the chemical dependency

[7] The other children in her care were 16 and 18 at the time the dependency was filed. K.M. was 7. The risks to the children are different. We decline to accept any inference that, because a dependency was not started for the older children, no basis existed for this dependency action.

treatment providers. Also, immediately before trial, SeaMar of Seattle recommended that Minks receive inpatient and long term treatment for her chemical dependency. She was not engaging in inpatient treatment at the time of trial. In fact, she had previously declined this treatment and indicated at trial that she had no intention to engage in inpatient detoxification. Therefore, the juvenile court properly found that it was unlikely that she would cure this deficiency if she declined to participate in the necessary treatment.

Substantial evidence supports the juvenile court's findings that Minks's opiate dependence and lack of parental judgment constitute parental deficiencies. We need not consider whether substantial evidence also supports the juvenile court's finding that Minks's mental health constitutes an independent parental deficiency. Substantial evidence supports the juvenile court's implied finding that she is currently unfit to parent.

III. Substantial Evidence: Little Likelihood That Conditions Will Be Remedied So That The Child Can Be Returned to the Mother in the Near Future

The statute requires that the State to prove that "there is little likelihood that conditions will be remedied so that the child can be returned to the parent in the near future." RCW 13.34.180(1)(e). The focus of the little likelihood statutory factor is whether the identified deficiencies have been corrected. In re Welfare of M.R.H., 145 Wn. App. 10, 27, 188 P.3d 501, review denied, 165 Wn.2d 1009, 198 P.3d 512 (2008), cert. denied, Hurd v. Washington, 129 S. Ct. 1682, 173 L. Ed. 2d 1046 (2009).

Minks contests several of the juvenile court's findings supporting the

conclusion that this element was satisfied:

> 40. With respect to [K.M.], the near or foreseeable future is within the next six months. [K.M.] is in crisis and needs an immediate resolution of her status.
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> 42. [Minks] cannot remedy her deficiencies within [K.M.'s] foreseeable future.
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> 48. As a result of her refusal to acknowledge any deficiency, there is little likelihood that [Minks] will change in the near future. Based on her demeanor and actions in this courtroom, [Minks] will never willingly change.
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> 49. There is little likelihood that conditions will be remedied so that [K.M.] can be returned to [Minks] in the near future.
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> . . . .
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> 56. It is just now that [K.M.] is starting to reach stability in her life. Her current situation, given all of the anxiety she is suffering, is untenable. She needs to have a decision made regarding her future now.

She does not contest the finding that:

> 41. The necessary drug and alcohol treatment program will take at least a year, and certainly more than six months. After [Minks] detoxifies, she will need a new mental health evaluation. Her services cannot be completed within the next six months.

Therefore it is a verity on appeal. C.B. I, 134 Wn. App. at 349.

Minks argues that the Department failed to provide testimony establishing the near future for K.M. What constitutes near future depends on the age of the child and the circumstances of the child's placement.[8] In re Welfare of C.B., 134

[8] See, e.g., T.R., 108 Wn. App. at 153, 164-65 (one year not in the foreseeable future for six year old child, who had never lived with mother, and

Wn. App. 942, 954, 143 P.3d 846 (2006) (C.B. II), cert. denied Hurd v. Washington, 129 S. Ct. 1682, 173 L. Ed. 2d 1046 (2009). Minks argues that the juvenile court's use of a six month timeframe was not supported by the evidence.

The juvenile court reasoned in its oral argument that "[K.M.'s] future is now." The juvenile court then went on to state its finding that the foreseeable future is "six months or less." This is supported by substantial evidence. Several witnesses testified that K.M. was in crisis. Delia Leary, the guardian ad litem, testified that although K.M. had adjusted well to her new life, the visits with her mother caused K.M. anxiety, nightmares, and stomach aches. She testified K.M. needs termination to complete her adjustment to her new life. Janell Berger, the social worker, also testified to K.M.'s anxiety surrounding her visits with her mother, K.M.'s requests to end visits, and K.M.'s diagnoses of posttraumatic stress disorder and attachment disorders. Berger testified that K.M. needed termination. Danielle DeVoe, K.M.'s social worker in Michigan, and Linda Lewis, K.M.'s mental health specialist in Michigan, similarly testified. Substantial evidence supported the juvenile court's finding that K.M. needed termination within six months or less.

Even if substantial evidence did not support the juvenile court's finding that the "near future" for K.M. was six months, it is a verity that Minks was unlikely to complete the necessary services for at least a year. Testimony

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mother had been receiving services for six years); In re Dependency of P.D., 58 Wn. App. 18, 20-21, 27, 792 P.2d 159 (1990) (six months not in the near future for 15 month old child, when mother had been hospitalized with schizophrenia for the duration of the dependency and six months was the earliest possible date for release from a secure environment).

suggested that treatment for her personality disorder would require multiple years of therapy. Solchany testified that even if Minks had a change of heart that day, her deficiencies would not resolve in the near future. Even if K.M. could withstand waiting a year or more, Minks would not complete her services in that time.

Minks argues that termination was inappropriate because she has engaged in services and steadily improved since the petition was filed. She relies on C.B. II. In that case, the mother presented evidence that she was improving in her deficiencies, the State agreed, and the juvenile court found that the mother would likely improve. 134 Wn. App. at 959.

This is in stark contrast to the facts here. We acknowledge that Minks participated in at least one psychiatric evaluation, a drug and alcohol evaluation, co-occurring chemical dependency treatment, cognitive behavioral therapy, and mental health counseling. She also completed a parenting class through Providence, a dependency process workshop, and a non-offending parent class. We acknowledge the evidence that Minks had at least reduced her use of hydrocodone at the time of trial. But, there is substantial evidence that her opiate dependency must be resolved before she can address her mental health issues and other parenting deficiencies. Previous attempts at treatment had failed due to Minks's failure to acknowledge that her chemical dependency creates a deficiency. Although every chemical dependency professional who has evaluated Minks recommended drug treatment and some sort of detoxification, at trial Minks refused to agree that she would participate in

detoxification even if ordered to do so by the court. As found by the juvenile court, any future services are unlikely to be successful.

Minks argues that the Department's contention that she had not completed the services improperly presumes that services must be fully completed before the mother can resume custody. Minks is incorrect. The juvenile court did not presume that she would be unable to resume custody, but relied on specific testimony that Minks would not be able to resolve her other independent deficiencies, specifically her mental health issues, until she received treatment for her opiate dependency. Therefore in this case completing her drug and alcohol treatment was in fact a prerequisite for resuming custody.[9]

Substantial evidence supported the juvenile court's finding that there is little likelihood that conditions will be remedied so that K.M. can be returned to

[9] Minks argues for the first time in her reply that the time that elapsed between the finding of dependency and the termination petition, 13 months, was shorter than generally contemplated under RCW 13.34.145(1)(b). RCW 13.34.145(1) sets out deadlines for the occurrence of a permanency planning hearing for a child placed in out-of-home care. It does not require that a minimum amount of time must pass before termination can be ordered. RCW 13.34.145. In fact, the Department may file a termination petition at any time following the establishment of dependency. RCW 13.34.145(10). Minks does not contest that the required six months after the removal of a child pursuant to a finding of dependency has passed. RCW 13.34.180(1)(c). No additional time is required.

Minks also argues that good cause existed to delay the termination because K.M. was placed with a relative. She did not raise this argument at trial. RCW 13.34.145(3) requires the court to order the Department to file a termination petition if the child has been placed outside his or her home for 15 of the last 22 months. But, if good cause exists, including if the child is placed with a relative, the court may find an exception. RCW 13.34.145(3). RCW 13.34.145(3)'s requirement is not at issue here, therefore the good cause exception to that requirement is not applicable here.

Minks in the near future.

IV. Substantial Evidence: Continuation of the Parent-Child Relationship Clearly Diminishes the Child's Prospects for Early Integration Into a Stable and Permanent Home

Minks next contends that the Department did not prove that allowing her relationship with her daughter to continue would diminish K.M.'s prospects for early integration into a stable and permanent home. RCW 13.34.180(1)(f). Minks argues that K.M. was already successfully integrated into a stable and permanent home, with her paternal grandparents, where she had resided for some time.

The grandparent's home, even though a stable home for K.M., was not as a matter of law a permanent home for K.M. at that point. The theoretical possibility that Minks could someday sufficiently correct conditions to provide a safe and stable home is not enough to delay K.M.'s right to permanency in her parental relationship. See T.R., 108 Wn. App. at 166. An adequate showing that there is "'little likelihood that conditions will be remedied so that the child can be returned to the parent in the near future'" establishes that early integration to a permanent home element cannot be achieved. See J.C., 130 Wn.2d at 427 (quoting former RCW 13.34.180(5)(1998), amended by Laws of 2000, ch. 122, § 25, now codified as RCW 13.34.080 (1)(e)). Minks disputes this interpretation of J.C. Minks argues that permitting a presumption that the early integration factor is established by a showing of the little likelihood factor renders the early integration factor superfluous and excuses the Department from establishing an element of the termination statute. But, courts have

continued to follow the logic in J.C.. See C.B. I, 134 Wn. App. at 349; T.R., 108 Wn. App. at 166. We will do so here as well.

Because we have already determined that sufficient evidence supports the juvenile court's finding that there is little likelihood that conditions will be remedied so that K.M. can be returned to Minks in the near future, we need not independently review the early integration factor for substantial evidence.

V. Hearsay

Minks argues that the juvenile court abused its discretion in admitting exhibits 17, 45, 46, 50, and 75 because the exhibits contained hearsay. "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). A juvenile court has broad discretion in dependency and termination proceedings to receive and evaluate evidence in light of a child's best interest. In re Dependency of C.B., 61 Wn. App. 280, 287, 810 P.2d 518 (1991). We review for abuse of discretion. In re Det. of Post, 170 Wn.2d 302, 309, 241 P.3d 1234 (2010). A juvenile court abuses its discretion if the exercise of its discretion is manifestly unreasonable or based upon untenable grounds or reasons. Id. An evidentiary error is not harmless if, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected. Id. at 314.

Exhibit 50 is the August 24, 2009 SeaMar evaluation completed by Master Addiction Counselor Linda Schauer. Schauer did not testify. The Department offered the exhibit under the testimony of Jennifer Kachmar, Minks's mental

health therapist at SeaMar. Minks objected only on the grounds that the exhibit was incomplete. Minks may not make a new argument regarding its admission here unless Minks can show a constitutional violation under RAP 2.5(a)(3). See In re Welfare of L.N.B.-L., 157 Wn. App. 215, 254, 237 P.3d 944 (2010). Minks does not allege any such violation here, therefore we decline to review this assignment of error.

Exhibit 45 is Solchany's preliminary report from her psychiatric evaluation of Minks. Solchany indicated that she relied on reports that Minks had pursued inappropriate topics of conversation at visitations. In the document, she summarized her initial observations, but explained that Minks had resisted providing the necessary medical releases and that she was unable to complete the report until she had reviewed the medical documentation. Minks objected to the exhibit on hearsay grounds, and the objection was overruled.

Exhibit 45 was admitted to allow the court to follow the testimony, not for the truth of the matter asserted. In nonjury cases, liberal admission of evidence is ordinarily encouraged, and where a court perceives the distinction between admissible and inadmissible purposes for which evidence is offered, and rules accordingly, there is no error in its admission. In re Welfare of Henderson, 29 Wn. App. 748, 751, 630 P.2d 944 (1981) (citing In re Welfare of Noble, 15 Wn. App. 51, 547 P.2d 880 (1976); Town of Selah v. Waldbauer, 11 Wn. App. 749, 525 P.2d 262 (1974)). Here the trial judge made clear that it was not admitting the exhibit as proof of the contents thereof, but rather as a guide to the testimony. The juvenile court did not abuse its discretion it admitting the

evidence for that purpose.

Exhibit 75 constitutes the notes taken by Kukhotsky during Minks's office visit on December 29, 2008. Of concern is the portion where Kukhotsky notes that "[Patient's] case was reviewed by Thomas Tocher, MD (our medical director) who determined that [patient] violated pain agreement [with] our clinic, because she had 2 [prescriptions] for controlled substances from Virginia Mason in Jan[uary] while she was getting [the] same meds from Dr. Williams at this clinic." Minks objected to admission of the exhibit on hearsay grounds. The court admitted exhibit 75 as a statement made for the purpose of medical diagnosis or treatment under ER 803(a)(4).[10] Even if that was incorrect, admission of any hearsay in exhibit 75 was harmless. Kukhotsky testified that it was later determined that the conclusion that Minks had violated her pain contract at that time was in error. There is no evidence that the juvenile court relied on this erroneous statement at trial.

Exhibit 17 is a letter from the social worker, Janell Berger, to Minks. The letter addresses "ongoing issues" related to Minks's visits with K.M. Berger addressed Minks's lateness and repeated inappropriate conversations. She explained, "The foster parent stated [K.M.] was in tears last night because you told her she was going home in two days, and the foster parent had to tell her that she was not." Attached to the letter was a sheet explaining the guidelines

[10] ER 803(a)(4) provides a hearsay exception for statements "made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external sources thereof insofar as reasonably pertinent to diagnosis or treatment."

for supervised visits. The juvenile court admitted the evidence over Minks's objection that the exhibit was testimonial. Berger testified at trial to everything in the letter except for the information allegedly provided by the foster parent. But, admission of that evidence was also harmless. Several witnesses testified that Minks behaved inappropriately during visits, including raising inappropriate topics of discussion relating to the dependency and making K.M. cry and feel anxious. The admission of the foster mother's statements did not materially affect the outcome of the trial.

Exhibit 46 is Solchany's final report. In the report, Solchany summarized Minks's mental health status, family and relationship history, abuse history, health history, education and work history, legal history, and emotional availability. She also detailed two observations of visits between Minks and K.M. She then put forth her diagnosis. In the report, Solchany reported many of the things Minks had described to her. Minks objected to the testimonial nature of the exhibit at trial. The Department argued that the expert witness was entitled to testify about information she received from professionals in her field. The court admitted the exhibit.

Much of the information in Solchany's final report was also before the court in the form of testimony that was properly admitted. Solchany testified at length at trial. She testified in detail to her observations of Minks and K.M.'s interactions, to her diagnosis and the reasons for the diagnosis, and her conclusions that Minks was not capable of meeting K.M.'s needs for emotional stability. She testified that Minks needed to get off her medications in order to

reveal the full extent of her mental health issues, and that there was no treatment for Minks's personality disorder in the near future. Although Solchany did not testify in detail to the background information in her report, including Minks's personal history, as argued by the Department on appeal, Solchany's testimony alone provided substantial evidence for the termination order. Admission of her report did not materially affect the outcome of trial.

Minks fails to show an evidentiary error that materially affected the outcome of her trial, therefore we decline to reverse on these grounds.

VI. Ineffective Assistance

Minks argues that she received ineffective assistance of counsel during the termination trial. She argues that her counsel lacked knowledge of the relevant law and that her counsel so infuriated the juvenile court that she lost all credibility and was unable to successfully advocate on Minks's behalf.

Minks had a right to effective legal representation. RCW 13.34.090(2); In re Welfare of J.M., 130 Wn. App. 912, 921, 125 P.3d 245 (2005). To establish ineffective assistance of counsel, Minks must show deficient performance and resulting prejudice.[11] In re Dependency of S.M.H., 128 Wn. App. 45, 61, 115

[11] This standard is based on the standard set out in Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Both parties note that the law in Washington is unsettled as to the proper standard for evaluating a due process claim alleging that a parent did not receive effective legal representation in a proceeding under chapter 13.34 RCW. In J.M., Division Three of this court noted that no published case has expressly held that the Strickland test applies as compared to the test set out in In re Dependency of Moseley, 34 Wn. App. 179, 184, 660 P.2d 315 (1983). J.M., 130 Wn. App. at 920. Moseley held that the proper test for whether a parent received effective assistance of counsel asks whether the attorney was not effective in providing a meaningful hearing. 34 Wn. App. at 184-85. K.M. advocates that this court

P.3d 990 (2005). Counsel's performance is deficient if it falls "'below an objective standard of reasonableness based on consideration of all of the circumstances.'" Id. at 61 (quoting State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987)). There is a strong presumption of effective representation of counsel, and the defendant has the burden to show that based on the record, there are no legitimate strategic or tactical reasons for the challenged conduct. State v. McFarland, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995). If counsel's conduct can be characterized as legitimate trial strategy, it cannot provide a basis for a claim of ineffective assistance of counsel. State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999).

Counsel's representation of Minks at the termination trial was undoubtedly poor. Counsel displayed ignorance of the standards applicable in termination cases. She repeatedly attempted to present irrelevant evidence. She was unprepared for trial, including not having reviewed exhibits until the State sought to offer them and not having witnesses available at the proper time.

Assuming without deciding that Minks's counsel's performance fell below an objective standard of reasonableness, no prejudice resulted from that deficient performance. As discussed above, there was ample evidence to

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adopt a standard of requiring reversal whenever counsel is ineffective under either standard. This division has applied the Strickland test, In re Dependency of S.M.H., 128 Wn. App. 45, 61, 115 P.3d 990 (2005), and will continue to do so here.

This approach is not contrary to In re Dependency of G.A.R., where this court found ineffective assistance on the same reasoning as the reasoning applied in J.M. 137 Wn. App. 1, 7-9, 150 P.3d 643 (2007). G.A.R. did not clearly adopt the Moseley test or some hybrid of the Moseley and Strickland tests. We follow S.M.H. here.

support the termination order. Minks shows no argument her counsel could have made, exculpatory evidence her counsel failed to present, or any other method by which effective counsel could have prevented termination of Minks's parental rights.

Minks argues that she lost the opportunity to make an offer of proof. That offer of proof related to evidence relating to a challenge to Minks's eviction at the time of trial. The evidence of eviction ultimately played no part in the juvenile court's order of termination, therefore counsel's ability to make that offer of proof would not have affected the outcome of the trial.

She also argues that counsel was forced to withdraw several witnesses out of fear of angering the judge. The witnesses were withdrawn after the trial court indicated frustration with counsel for continuing to present irrelevant testimony. Counsel stated that the additional witnesses would have been cumulative or irrelevant when she withdrew them. Minks has presented no evidence to the contrary. She also made no argument as to why withdrawing the witnesses prejudiced her.

Minks has failed to show prejudice. Because Minks has failed to establish prejudice, Minks's claim of ineffective assistance fails.

VII. Appearance of Fairness

Minks contends that the juvenile court violated the appearance of fairness doctrine when it made several disparaging comments about her attorney during proceedings.

To prevail under the appearance of fairness doctrine, the claimant must

provide some evidence of the judge's actual or potential bias. State v. Dugan, 96 Wn. App. 346, 354, 979 P.2d 885 (1999). We do not presume prejudice. State v. Dominguez, 81 Wn. App. 325, 328-29, 914 P.2d 141 (1996). After the claiming party presents sufficient evidence of potential bias, we consider whether the juvenile court violated the appearance of fairness doctrine. Id. at 330. The test is whether a reasonably prudent and disinterested observer would conclude that the claimant obtained a fair, impartial, and neutral trial. Id. We consider allegedly improper or biased comments in context. See, e.g., In re Dependency of O.J., 88 Wn. App. 690, 697, 947 P.2d 252 (1997) ("When the judge's comments are placed in context, however, his impartiality is clear.").

The juvenile court became increasingly frustrated with counsel, making several comments suggesting that the court believed that counsel was not serving her client's interests well. For example, the juvenile court repeatedly stopped counsel in lines of questioning and inquired into the relevance, suggested that the constitutional right of counsel's client "aren't being served very well at this particular moment in time," asked counsel if she had read the applicable statute and reading it aloud for her benefit, and noted at one point that it was a "complete waste of time what you're doing here." The juvenile court finally told counsel, "You know, I'm not inclined to take an offer of proof from you, Counsel. You've used up your credibility in my court." Minks's attorney ultimately withdrew several witnesses that she planned to present on the grounds that the testimony would be cumulative or unhelpful.

Minks received a fair, impartial, and neutral trial here. Although

vehement, the juvenile court's discussions with Minks's counsel properly focused on the relevance of the evidence introduced and the efficiency in the trial process. At no point did the juvenile court become an advocate for the Department or otherwise reveal any actual or potential bias. In fact, the juvenile court worked to ensure that Minks received a fair trial. For example, despite his misgivings and counsel's inability to justify the need for it, the juvenile court permitted bringing in an expert witness that the State declined to call for Minks's case at Snohomish County's expense. The juvenile court judge did not violate the appearance of fairness doctrine.

VIII. Substantive Due Process

Minks argues that Washington's termination statute violates substantive due process by interfering with her fundamental liberty interests as a parent. She argues that the statute is unconstitutional because it does not require the juvenile court to reject all less restrictive alternatives before terminating parental rights. She argues that the parent-child relationship should be viewed by the court as a "bundle of component parts, each of which may be terminated or maintained independently of the others." As an example she argues that, the juvenile court could terminate the right to live together while maintaining the right to weekly visitation.

We review a challenge to a statute's constitutionality de novo. In re Parentage of C.A.M.A., 154 Wn.2d 52, 57, 109 P.3d 405 (2005). A statute is presumed constitutional, and the party challenging it has the burden of proving beyond a reasonable doubt that it is unconstitutional. In re Det. of C.W., 147

Wn.2d 259, 277, 53 P.3d 979 (2002).

A parent has a fundamental liberty interest in the care and custody of her children. In re Dependency of J.H., 117 Wn.2d 460, 473, 815 P.2d 1380 (1991). The State may only interfere with this interest if it "'has a compelling interest and such interference is narrowly drawn to meet only the compelling state interest involved.'" C.A.M.A., 154 Wn.2d at 57 (quoting Smith, 137 Wn.2d at 13). The best interest of the child standard is not a compelling state interest that overrules a parent's fundamental right to raise her children. Smith, 137 Wn.2d at 20. The State may only interfere with a parent's protected right to raise her children where the State seeks to prevent harm or risk of harm to the child. Id. at 18.

Every division of this court has rejected similar arguments that the termination statute violates a parent's fundamental liberty interest in the care and custody of her children. See L.N.B.-L., 157 Wn. App. at 256-57 (rejecting the argument that the statute is unconstitutional because it does not require the juvenile court to consider less restrictive alternatives such as a temporary continuation of the dependency, dependency guardianship, third-party custody, return home or open adoption prior to termination); M.R.H., 145 Wn. App. at 31 (rejecting the argument that the statute is unconstitutional because it does not require the juvenile court to consider guardianships or open adoptions as a less restrictive alternatives where no such petition or request was filed); In re Dependency of T.C.C.B., 138 Wn. App. 791, 797-800, 158 P.3d 1251 (2007) (rejecting the argument that the termination statutes are not narrowly tailored to achieve a compelling state interest because they do not require only that degree

of regulation necessary to prevent harm); C.B. I, 134 Wn. App. at 343-46 (rejecting the argument that the termination statutes are not narrowly drawn because the statutes allow the courts to terminate a protected fundamental right without first showing that no less restrictive alternatives exist, namely dependency guardianship); In re Dependency of I.J.S., 128 Wn. App. 108, 118, 119-21, 114 P.3d 1215 (2005) (rejecting the argument that the State must prove that dependency guardianship is not a viable alternative to termination, regardless of whether a dependency guardianship has been filed). This court's rationale in I.J.S. is representative: "[T]he termination statutes are narrowly drawn because the State must prove that the relationship with the parents harms or potentially harms the child before the court can terminate parental rights." Id. at 118; accord M.R.H., 145 Wn. App. at 31; C.B. I, 134 Wn. App. at 345. Minks's novel argument depicting the parent-child relationship as a "bundle of component parts" fails to suggest a reason to reconsider these prior decisions, and we decline to do so. The juvenile court need not consider alternatives without an actual petition for that alternative plan being put before the court. I.J.S., 128 Wn. App. at 121.

IX. Standard of Proof for Best Interests Factor

RCW 13.34.190(1)(b) authorizes the juvenile court to enter an order terminating all parental rights only if the court finds that termination is in the child's best interests. Minks argues that the juvenile court's best interests finding must be supported by clear, cogent and convincing evidence, rather than by a preponderance of the evidence.[12]

Washington case law requires only a preponderance of the evidence to support the juvenile court's determination of what would be in the child's best interests. See A.B., 168 Wn.2d at 911 ("[T]he child's best interests . . . need be proved by only a preponderance of the evidence."); L.N.B.-L., 157 Wn. App. at 255; In re Welfare of A.J.R., 78 Wn. App. 222, 228, 896 P.2d 1298 (1995).

Minks argues that our Supreme Court established a clear, cogent, and convincing standard in In re Welfare of Sego, 82 Wn.2d 736, 513 P.2d 831 (1973), and Aschauer. In Sego, our Supreme Court held that:

> A synthesis of our cases, as well as some from other jurisdictions convinces us of the logic that clear, cogent and convincing evidence is necessary to sustain an order permanently depriving a parent of the care, custody and control of his children.

82 Wn.2d at 739 (footnotes omitted). Sego did not explicitly discuss the best interest standard, but it did state that "[b]efore a natural parent can be permanently deprived of the right to care, custody and control of his minor children the facts supporting permanent deprivation must 'clearly show that the welfare of the children will be substantially subserved by such action.'" Id. at 738 (quoting State ex rel. Cummings v. Kinne, 8 Wn.2d 1, 111 P.2d 222 (1941)).

In Aschauer, the Supreme Court stated:

> This court has repeatedly said that the goal of a dependency hearing is to determine the welfare of the child and his best interests. In re Becker, 87 Wn.2d 470, 553 P.2d 1339 (1976); In re Sego, 82 Wn.2d 736, 513 P.2d 831 (1973). While the criteria

[12] We exercise our discretion to address this issue even though Minks did not raise this error in the juvenile court. RAP 2.5(a).

Minks appears to challenge only the Department's burden of persuasion with regard to the child's best interests. She does not appear to challenge the finding itself.

> for establishing the best interests of the child are not capable of specification, each case being largely dependent upon its own facts and circumstances (see In re Becker, supra), the proof necessary in order to deprive a person of his or her parental rights must be clear, cogent and convincing. Sego, [82 Wn.2d] at 739.

93 Wn.2d at 695; see also id. at 697-98 ("We have repeatedly said that the welfare of the child is the goal of a dependency hearing and we have required that proof be made by evidence that is clear, cogent and convincing." (citation and footnote omitted)).

But the Supreme Court recently stated in A.B.:

> By virtue of RCW 13.34.180(1) and RCW 13.34.190, a Washington court uses a two-step process when deciding whether to terminate the right of a parent to relate to his or her natural child. The first step focuses on the adequacy of the parents and must be proved by clear, cogent, and convincing evidence. The second step focuses on the child's best interests and need be proved by only a preponderance of the evidence. Only if the first step is satisfied may the court reach the second.

168 Wn.2d at 911 (footnotes omitted). For authority, the Supreme Court cited RCW 13.34.190. A.B., 168 Wn.2d at 911. That statute sets the standard of proof for various elements of RCW 13.34.180, including that the elements of RCW 13.34.180(1) be established by clear, cogent, and convincing evidence. RCW 13.34.190(1)(a). RCW 13.34.190(1)(b) also requires that the juvenile court find that the order terminating parental rights is in the best interests of the child, without specifying a standard of proof.

Minks argues that the Supreme Court's articulation of the standard is dictum because the Supreme Court did not examine the origins of the standard of proof or actually hold that the preponderance standard applies. Minks is correct that the Supreme Court did not directly make a holding on this issue.

But, it is appropriate for this court to follow the test as outlined by the Supreme Court.

Minks argues that Santosky requires that the best interests of the child be proven by the higher standard of proof. In that case, the United States Supreme Court held that the Due Process Clause of the Fourteenth Amendment requires states to support allegations of parental unfitness by "at least clear and convincing evidence" before terminating parental rights. Santosky, 455 U.S. at 747-48. The Court of Appeals has already rejected the contention that Santosky requires that the best interests of the child be proven by the higher standard of clear, cogent, and convincing evidence in L.N.B.-L., 157 Wn. App. at 255-56. The Santosky Court did not mandate that states use a particular standard of proof when applying a best interests test to the issue of termination after the State has proven parental unfitness. Id. at 256. We agree that because the Department must support its allegations of parental unfitness by proving each of the six elements of RCW 13.34.180 by clear, cogent, and convincing evidence, as required by Santosky, Washington's termination statute passes constitutional scrutiny.

X. Conclusion

Substantial evidence supports the juvenile court's findings. These findings in turn support the juvenile court's conclusions that termination is in the child's best interest. We find no legal error in the proceedings.

This matter is appropriate for accelerated review under RAP 18.13A. The termination of the parental rights of Minks as to K.M. is affirmed.

WE CONCUR: