IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Dependency of T.L.G., b.d. 04/20/99, and C.L.G., b.d. 05/22/00, Minor Children.	)	Nos. 65655-4-I, (consolidated w/65656-2-I, 65752-6-I, 65753-4-I, 65754-2-I 65756-9-I)
STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES, Respondent,	)	DIVISION ONE
v.	)	UNPUBLISHED OPINION
Bonnie Lee Dunlavy and William Keith Gilfillen, Appellants.	)	FILED: July 18, 2011

Becker, J. — During the course of this nearly 10 year dependency, this court reversed one order of termination on direct appeal and intervened again on discretionary review to ensure that services were being offered to address parental deficiencies. In 2007, a change of venue placed the dependency under the supervision of a new trial judge, who essentially began anew to oversee efforts to reunify the family. Substantial evidence supports the trial court's conclusion that all necessary and reasonably available services have been offered, and the parents' mental health issues are so intractable it is unlikely either child can be returned to either parent within the foreseeable future. We

affirm the trial court's order of termination.

TG (age 12) and CG (age 11) are the biological children of Bonnie Dunlavy and Keith Gilfillen. TG was born healthy in April 1999. CG was born in May 2000 with significant medical problems. The parents proved unable to provide their children with adequate care. The children were removed from home in August 2001 when TG was two years old and CG just one. They have remained in out-of-home placements ever since.

An agreed order of dependency was entered on January 3, 2002. Visitation with the children was suspended in February 2002. In July 2003, the Department of Social and Health Services petitioned to terminate Dunlavy's and Gilfillen's parental rights as to both children. The trial court granted the petition. In 2005, this court reversed the order of termination. In re Dependency of T.L.G., 126 Wn. App. 181, 108 P.3d 156 (2005). The grounds for the reversal were the Department's failure to establish all necessary services had been provided and parental deficiencies were not remediable in the near future, and to follow the requirements of the Indian Child Welfare Act of 1978.

Visitation to attempt to reunify the family did not resume, leading to an order issued by this court on discretionary review in which we ordered the Department to begin visitation immediately. In re Dependency of T.L.G., 139 Wn. App. 1, 156 P.3d 222 (2007). Visitation between the children and both parents then began on March 14, 2007. Our two previous opinions detail the events leading up to the renewed visitation, and we shall not repeat them here.

Both parents underwent psychological evaluations in October 2003 and anger management evaluations in September 2005. Based on their evaluations, the Department referred the parents to numerous services, including psychiatric evaluation, couples counseling, parenting classes, anger management counseling and long term psychotherapy. Both Dunlavy and Gilfillen refused these services, with the exception of one course of parenting classes.

On July 18, 2007, venue was transferred to Island County where the parents were living. On October 10, 2007, the Island County court entered a dependency review order relieving the parents of the obligation to participate in previously ordered services. The court noted the parents disputed the need for the services and ordered them to resume supervised visitation and engage in reunification support services.

The trial court's unchallenged findings support the following version of events. As parent-child visitation resumed and progressed, the visits proved troublesome for the children. The parents cancelled numerous visits and acted out inappropriately at supervisors or other adults during visits. The parents also acted inappropriately with their children. For example, they would make disparaging comments about the children's foster parents or threaten to tell the judge about the children's alleged misbehavior.

Both children's mental health declined significantly. TG developed symptoms such as nightmares, sleeplessness, flat affect, stomachaches and other bodily complaints, behavioral changes at school, and a lack of focus. Her

foster parent reported an increase in lying, stealing, setting a fire in the home and throwing scissors. CG had nightmares and more temper tantrums, was more defiant, was aggressive with animals and more aggressive at school, became destructive, began wetting the bed and wetting his pants at school, vomiting, and having stomachaches. The children's mental health providers opined the deterioration was due to visits with their parents, fear of their parents, and the parents' angry outbursts during visits.

Visitation was ultimately suspended after a particularly disastrous visit on May 3, 2008. Both children improved once visitation was cancelled. Meanwhile, following court orders, the Department continued to refer the parents to more mental health and parenting services. For the most part, they resisted or refused the services. They intimidated a number of service providers into withdrawing from the case.

On October 12, 2009, the Department once again petitioned for termination of Dunlavy's and Gilfillen's parental rights. The Island County Superior Court, the Honorable Judge Alan Hancock presiding, held a hearing lasting 16 days over March to May 2010. The court granted the petition. Both parents appeal the termination of their rights as to both children.

"An order terminating parental rights may be entered when the six statutory elements set forth in RCW 13.34.180 are established by clear, cogent and convincing evidence, and the court finds that termination is in the best interests of the child." T.L.G., 126 Wn. App. at 197 (footnote omitted). Clear,

cogent and convincing evidence exists when the ultimate fact in issue is shown to be "highly probable." T.L.G., 126 Wn. App. at 197. "If substantial evidence supports the trial court's findings in light of the degree of proof required, an order terminating parental rights must be affirmed. An appellate court will not weigh the evidence or the credibility of witnesses." In re Dependency of T.R., 108 Wn. App. 149, 161, 29 P.3d 1275 (2001) (footnote omitted). Unchallenged findings of fact are verities on appeal. In re Welfare of C.B., 134 Wn. App. 336, 349, 139 P.3d 1119 (2006).

PROVISION OF NECESSARY SERVICES

One of the statutory criteria the State must prove is 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." RCW 13.34.180(1)(d). Both parents challenge the finding that this element was proved, albeit on different grounds.

1. Gilfillen

Gilfillen argues that the Department failed to provide services that could successfully reunify him with his children. He says the Department was required to provide reunification services in the manner recommended by Dr. Michael O'Leary, the psychologist who evaluated the children in November and

December 2008 for the potential of reunification. At the hearing, the State asked Dr. O'Leary what he would recommend if reunification were attempted "from this point forward" from the time of the hearing. Report of Proceedings (March 24, 2010) at 651. He responded that it should start with therapeutic contact only. The parents should be in consultation with an experienced therapist and visits should take place in a neutral setting. He said it would probably take six to eight months just to establish regular visitation. Gilfillen contends the Department failed to provide therapeutic visitation services in a neutral setting as recommended by Dr. O'Leary.

Gilfillen's argument is not persuasive. The Department did provide services consistent with Dr. O'Leary's recommendations. Referrals were provided to home visits by at least three family therapists and a reunification specialist to consult with the parents on a reunification plan and further services.[1] Supervised visitations were provided in neutral settings of the parents' choosing.

According to unchallenged findings of fact, the parents created significant obstacles to visitation. They refused visits when the foster parent was to transport the child. Finding of Fact 2.50. They refused to attend visits where the children lived, forcing their children to be transported several hours each way to visits. Finding of Fact 2.51, 2.56. They refused visits because they would be supervised by a social worker. Finding of Fact 2.52. Visitations occurred where

[1] Findings of Fact 2.61, 2.67, 2.71, 2.73, 2.99.

the parents chose and in the family home. Finding of Fact 2.56.

The court ordered reunification services specifically tailored to the family's needs. But Gilfillen refused to work with the service provider organization and demanded services be provided by an organization that did not offer reunification. Finding of Fact 2.57, 2.58. Nevertheless, two therapists were assigned to begin reunification services. The parents refused to allow one of those therapists to return to their home. The parents either refused other visits to their home by therapists or scheduled conflicting medical appointments. Finding of Fact 2.63, 2.64, 2.65. The parents eventually refused to allow any therapist into their home for a visit. They also refused to allow Nancy Franklin, a parenting expert with the Division of Children and Family Services, to supervise visits with their children. Finding of Fact 2.73.

In June 2009, over a year after visitation had been suspended, the Department again offered the parents reunification services. Elizabeth Kettlewell with Service Alternatives prepared a report for a reunification plan and offered to work with the parents towards reunification. Neither parent attempted to contact her or return her calls. "In essence, the parents refused services with Ms. Kettlewell." Finding of Fact 2.101.

Gilfillen says another deficiency was that the family did not have counseling together and he was not allowed to attend his children's visits with their psychologists. The unchallenged findings contradict his contention. The Department tried to arrange visits with the children's therapists, Christin LaRue and Beth Latimer, on numerous occasions from spring to fall of 2008. The

parents attended only one visit with each therapist in late 2008. Finding of Fact 2.85, 2.86.

Finally, Gilfillen argues that the court frustrated reunification efforts by putting an end to visits after the catastrophic visit of May 3, 2008. We disagree. The record fully supports the decision to stop the visitation and shows that it came after Gilfillen had a full year of visiting opportunities to show that he was capable of learning how to parent his children.

The record demonstrates that Gilfillen refused and resisted the very services he requests on appeal. We conclude he does not present a basis for overturning the trial court's finding that all necessary services were provided.

2. Dunlavy

Dunlavy claims that not all necessary services were provided to her because she was not offered psychotherapy or psychiatric medication services until shortly before trial. She claims these were the only services capable of correcting her deficiencies and were provided too late.

Services offered must be tailored to each individual parent's needs. T.R., 108 Wn. App. at 161. "When a parent is unwilling or unable to make use of the services provided, DSHS is not required to offer still other services that might have been helpful." T.R., 108 Wn. App. at 163.

Psychotherapy and psychiatric evaluation services were offered in 2005 after this court's order reversing the first order of termination. Department social worker George Nelson testified that he made referrals for individual mental

health counseling and psychiatric evaluation in summer of 2005. The letters he sent to Dunlavy to that effect were introduced as exhibits.

Dunlavy argues that the only referrals that can be considered are those made after October 2007, when the court in Island County relieved her of the obligation of complying with previously ordered services. Assuming that to be so, the present findings, supported by substantial testimony of case social workers, establish that Dunlavy was offered further opportunity for psychotherapy or psychiatric evaluation after that time. Dr. Evan Freedman, a psychologist, evaluated Dunlavy in April 2009. He concluded that Dunlavy had borderline cognitive function and a life-long intractable personality disorder. He said she would benefit from long term psychotherapy. He stated, however, that "it is not possible to imagine an intervention powerful enough to alleviate Ms. Dunlavy's mental health and cognitive impairments to the extent that she could effectively parent and create a positive relationship with her children." Exhibit 217. Nevertheless, based on this evaluation, the Department referred Dunlavy for psychotherapy and psychiatric evaluation. According to case social worker Cindy Lepell, Dunlavy denied the need for any mental health services and did not participate.

At some point, Dunlavy told the Department she did not have insurance to cover any mental health visits. The Department responded on December 18, 2009, with a letter directing her how to obtain medical coupons. There is no evidence that Dunlavy then tried to obtain a coupon or engage in therapy or a

psychiatric evaluation.

After October 2007, Dunlavy was referred to the following services: anger management evaluation, anger management counseling, psychological evaluation, psychiatric evaluation, individual mental health counseling, visitation supervision, in home therapist reunification assistance, therapist assisted reunification planning, other reunification services, parenting advice from a family therapist, meetings with the children's therapists, and parent coaching. Dunlavy turned down or resisted these services.

Dunlavy argues that the services offered were not what she needed. She contends psychotherapy and psychotropic medication were the only services capable of correcting her parental deficiencies and enabling her to benefit from the other services offered. She compares her situation to that of the developmentally disabled mother in In re Dependency of H.W., 92 Wn. App. 420, 961 P.2d 963, 969 P.2d 1082 (1998). In that case, we decided that the Department had not provided all necessary services to a developmentally disabled mother because it had not referred her to readily available specialty services for the developmentally disabled. Because the mother had participated willingly in the services that were offered, had made progress, and was described as eager for more services, we concluded that the Department's assumption that future services would be futile was inadequate to support termination.

By contrast, Dunlavy's social workers, psychological evaluators, and

service providers testified she was resistant to services and was incapable of benefitting from them. She does not challenge the finding that "the parents' denial of any parenting issues interferes with their ability to change."[2]

In our decision in the first appeal in 2005, we concluded that evidence did not show that the parents had resisted or refused services. Further, "Dunlavy's and Gilfillen's parental deficiencies were not identified, no treatment services were offered, and there is no finding they would have been unable to benefit." T.L.G., 126 Wn. App. at 203. Dunlavy claims those statements are still true. We disagree. Dr. Freedman and Cindy Lepell testified to Dunlavy's parental deficiencies, and Dunlavy does not challenge the finding that there is "a high risk for the children in their mother's care and a high potential for abuse and neglect." Finding of Fact 2.111. The record contains substantial evidence that Dunlavy resisted and refused nearly all services offered by the Department since 2007. The evidence provided by Dr. Freeman and social workers George Nelson, Ben Rogers, and Cindy Lepell support the trial court's finding that Dunlavy's mental health problems and cognitive impairment are intractable and that further attempts at reunification would be futile.[3] And even if there were more psychotherapeutic services that could have been provided, the record does not support a conclusion that such services could make Dunlavy an able parent in the children's "foreseeable future." See In re Welfare of Hall, 99

[2] Finding of Fact 2.120.
[3] Finding of Fact 2.113, 2.114, 2.115, 2.131.

Wn.2d 842, 850-51, 664 P.2d 1245 (1983); T.R., 108 Wn. App. at 164-65. The trial court found Dunlavy had failed to overcome the 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."[4] Dunlavy does not challenge this finding, and it is an important one. The children have been in foster care for 10 years, nearly their entire lives. They currently have stable homes where they are attached to their foster parents. Dr. O'Leary, after examining the children, opined that they have been traumatized by the uncertainty of their placement. He said the children are very fragile and are devastated by even contemplating returning to their parents' care. There is no basis in the record upon which to find hope that Dunlavy will become able to parent these children in time to avoid more damage.[5]

Accordingly, we conclude that substantial evidence supports the trial court's finding that the Department provided all necessary services, reasonably available, capable of correcting Dunlavy's parental deficiencies within the foreseeable future.

DUE PROCESS

The State notified Gilfillen before the hearing that it intended to take his testimony in the State's case. Under CR 43(f), a party may compel the testimony

[4] Finding of Fact 2.122.

[5] Dunlavy has also challenged the finding that termination of parental rights is in the best interests of the children. Finding of Fact 2.135. Dr. O'Leary's assessment of the present fragility of the children substantially supports this finding.

of an adverse party by giving notice, in lieu of a subpoena, to opposing counsel of record. CR 43(f)(1). If a party refuses to attend and testify at the trial after notice has been properly served, "the complaint, answer, or reply of the party may be stricken and judgment taken against the party." CR 43(f)(3).

Gilfillen left the courtroom on the first day of trial and did not return for the entirety of the hearing. The trial court discussed the situation with Gilfillen's counsel on six different days of the hearing and encouraged counsel to bring Gilfillen back to court to testify. Counsel's answer was that Gilfillen was not feeling well and was taking medication. Eventually, the court asked for evidence supporting Gilfillen's claim of illness. None was provided. The State moved to strike Gilfillen's pleadings and for judgment on the State's pleadings. The State also requested that Gilfillen not be allowed to testify if he did return. After discussing several remedies with counsel, the trial court decided to bar Gilfillen from testifying based on his violation of court rules. After all parties had rested, Gilfillen moved to reopen the case and to testify. The court denied the motion.

Gilfillen argues that the trial court's decision to exclude him from testifying on his own behalf violated his due process rights under the Fourteenth Amendment.

"A parent has a right to a meaningful opportunity to be heard at a hearing to terminate parental rights. But that right is not self-executing. A parent must take reasonable and timely steps to exercise the right to be heard." In re Dependency of M.S., 98 Wn. App. 91, 92, 988 P.2d 488 (1999). "Although 'due

process' cannot be precisely defined, the phrase requires 'fundamental fairness.'" In re Dependency of K.N.J., No. 83516-1, 2011 WL 2076495 at *2 (Wash. May 26, 2011), quoting In re Pers. Restraint Petition of Blackburn, 168 Wn.2d 881, 885, 232 P.3d 1091 (2010). The proper process to ensure protection of the parent's due process rights depends on the balancing of three factors: "the private interests affected by the proceeding; the risk of error created by the State's chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure." Santosky v. Kramer, 455 U.S. 745, 754, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982); M.S., 98 Wn. App. at 94.

Gilfillen has a fundamental liberty interest in the care, companionship, and custody of his children, but the right is not absolute. The State has a vital interest in protecting the welfare of children. M.S., 98 Wn. App. at 94-95. These are both vital and compelling interests. It is the second factor, the lack of risk of error presented by the procedure followed here, that is dispositive.

The notice requirement of due process was satisfied when the State notified Gilfillen under CR 43(f) that it intended to take his testimony at trial. He was given several opportunities to testify, all of which he refused without providing any evidence documenting the reasons for his unavailability. Further minimizing the risk of error, the court took the least severe remedy and allowed Gilfillen to continue to be represented at the hearing by counsel and to present and cross-examine witnesses. Gilfillen made no offer of proof or other statement

indicating what testimony he would have provided to change the outcome of the trial. Gilfillen did not request to testify until after all parties had rested and evidence was closed. The process was fundamentally fair. Under these circumstances, the trial court did not violate Gilfillen's due process rights by excluding him from testifying.

ADMISSION OF MENTAL HEALTH RECORDS

At trial, the State submitted records of Gilfillen's mental health treatments with Compass Health in Island County. The exhibit is a voluminous compilation of activity logs and visit notes detailing the dates Gilfillen received treatment, persons involved, his various diagnoses, descriptions of matters discussed on his visits, summaries of his condition, and treatment plans and goals. Exhibit 585. Gilfillen objected on grounds that foundation had not been laid for admission as business records, that the records were privileged under RCW 5.60.060(9) (mental health counselor privilege), and that the counselor who created the records was not called to testify. The court admitted the records into evidence.

We review a trial court's decision to admit business records into evidence for a manifest abuse of discretion. State v. Ziegler, 114 Wn.2d 533, 538, 789 P.2d 79 (1990). Under the Uniform Business Records as Evidence Act, chapter 5.45 RCW, business records are admissible as evidence of an act, condition, or event. RCW 5.45.020. "The rule was not adopted to permit evidence of the

recorder's opinion, upon which other persons qualified to make the same record might have differed. Nor was it intended to admit into evidence conclusions based upon speculation or conjecture." Young v. Liddington, 50 Wn.2d 78, 83, 309 P.2d 761 (1957). "Progress notes, evaluations, test results, and reports by nontestifying witnesses are, then, not admissible as business records." In re Welfare of J.M., 130 Wn. App. 912, 924, 125 P.3d 245 (2005).

This court has previously affirmed the admission of business records containing evidence both admissible and inadmissible under the rule. Sturgis Co. v. H.D. Baker Co., 11 Wn. App. 597, 600-01, 524 P.2d 413 (1974). During a bench trial, the trial court in Sturgis admitted business records containing both admissible and inadmissible evidence. We determined that there was no abuse of discretion because there was no indication that the trial court had in any way relied on the inadmissible portions of the records. By contrast, the court in J.M. found that counsel was ineffective for not challenging psychiatric opinions offered as business records. The court determined the records would have been inadmissible and that prejudice was present because the trial court entered the reports into its findings verbatim. J.M., 130 Wn. App. at 923-25.

The present matter, similar to Sturgis, was heard before a judge without a jury. The findings of the trial court do not rely on any diagnosis, opinion, or other inadmissible evidence from the disputed Compass Health records. Gilfillen points to one finding where the trial court appears to have quoted from the activity log of Gilfillen's Compass Health therapist, Blake Kaiser:

> As of January of 2010, Mr. Gilfillen was no longer being provided services through Compass Health with Ms. Kaiser. As far back as June 19, 2009, Ms. Kaiser had noted in her activity log that she had told Ms. McDougall that she would not be talking with Mr. Gilfillen unless he called specifically to make an appointment and that she "felt he had no intention of working toward his goals, but, rather, is working toward proving that he is not capable of doing what is asked of him in an effort to prove that the Department has overstressed him and been too demanding."

Finding of Fact 2.104. Read in context, the quote from the activity log supports the finding concerning the date that service with Compass Health was suspended—admissible evidence of an event. It is not a finding that Gilfillen had refused Department offered services or had no intention of fixing his parental deficiencies. Even if the trial court erred by quoting this portion of the activity log for an improper purpose, the finding is irrelevant to Gilfillen's challenge that he was not provided with reunification services. Further, the sentiment he objects to is overwhelmingly conveyed by Gilfillen's refusal to engage in Department and court ordered mental health services and Dr. Freedman's analysis that Gilfillen's condition is intractable. Thus, his case is not like J.M., where inadmissible reports formed the basis of the trial court's decision.

Further, Gilfillen was given an opportunity to seek reconsideration if he could point out any evidence the court was relying on "over and above factual matters that are the proper subject of business records." Report of Proceedings (March 25, 2010) at 909. He did not do so. The records were admitted for the proper purpose of showing the dates that Gilfillen received treatment at

Compass Health. We find no manifest abuse of discretion.

Finally, Gilfillen argues that the Compass Health records contained attorney work product and attorney client privileged information. He did not raise this objection at trial, and we will not consider the argument for the first time on appeal. RAP 2.5(a).

DISCRETIONARY REVIEW

On the first day of the hearing, Gilfillen moved the court to void the original 2002 agreed order of dependency. He claimed that the order of dependency was based on his failure to perform on a services contract and that his signature to that contract had been forged. The court denied the motion as barred by collateral estoppel. Gilfillen moved this court for discretionary review. His motion was consolidated with his appeal of the termination order.

Gilfillen agreed to the dependency order and did not raise this challenge for nearly eight years after the order was entered. The record supplies no basis for a conclusion that the facts he now alleges could not have been known at the time he agreed to the dependency order. Because Gilfillen presents no basis on which to conclude probable error by the trial court, we deny the motion for discretionary review. See RAP 2.3(b)(2) (grounds for granting discretionary review).

Affirmed.

Becker, J.

WE CONCUR:

Grosse, J.

Ellington, J.