

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Dependency of	)	No. 67767-5-I
J.D.A., III, dob 09/26/09,	)	
	)	(Consolidated with No. 67768-3-I)
A minor child,	)	
	)	DIVISION ONE
STATE OF WASHINGTON,	)	
DEPARTMENT OF SOCIAL AND	)	
HEALTH SERVICES,	)	
	)	UNPUBLISHED OPINION
Respondent,	)	
	)	
v.	)	
	)	
James Allen, II,	)	
	)	
Appellant.	)	FILED: August 13, 2012

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Schindler, J. — James Allen appeals the decision to terminate his parental rights to J.D.A. Because the findings support the conclusion that Allen had notice of his parental deficiencies, the Department of Social and Health Services (DSHS) offered or provided all necessary services capable of correcting parental deficiencies, and termination was in the best interest of the child, we affirm.

FACTS

J.D.A. was born on September 26, 2009. J.R. is the mother of J.D.A. and another child, O.A. James Allen is the father of J.D.A.

Allen has an extensive criminal history, including felony convictions for

possession of methamphetamine and assault in the second degree. Allen and J.R. have a history of domestic violence and drug abuse. Allen has been arrested at least six or seven times where J.R. is the alleged victim.

In November 2008, DSHS placed five-month-old O.A. in foster care. In April 2009, J.R. entered into a residential substance abuse treatment program at Autumn Leaf. After J.D.A. was born on September 26, DSHS filed a dependency petition. The petition alleged there was no parent capable of caring for J.D.A.

Following a shelter care hearing on September 29, the court placed J.D.A. with J.R. on the condition that she remain in the program at Autumn Leaf. Over the next few months, DSHS social worker George Nelson provided Allen with information about how to establish paternity and obtain services. Allen agreed to obtain genetic testing but refused to participate in services.

On December 11, the mother completed the program at Autumn Leaf and moved into an apartment with J.D.A. and Allen. In January 2010, DSHS returned O.A. to J.R.'s care. Despite the court order prohibiting Allen from having contact with O.A., Allen lived with J.R. and the two children.

Allen's mother and Allen's sister frequently visited the parents and the two children at the apartment. Allen's mother testified that J.D.A. was always in his car seat and never smiled. Allen's sister testified that J.D.A. was left in his car seat so long that his head was turned to the left and would not straighten. In February 2010, genetic testing established Allen is the biological father of J.D.A.

On March 10, 2010, a Providence Hospital health care provider contacted Child Protective Services (CPS) about a " 'very chaotic' " incident that occurred while the

parents were seeking treatment for J.D.A. Allen accused the mother of child neglect and the mother accused Allen of child abuse.

On March 11, DSHS filed a second dependency petition alleging that J.D.A. was abused or neglected and there was no parent capable of caring for the child. DSHS asserts “significant concerns” about Allen “given his history of drug use, violence towards the mother, criminal activity and generally erratic behaviors.”

At a contested shelter care hearing on March 15, the court placed J.D.A. in foster care. But the court ordered DSHS to “investigate the character and suitability of the proposed relative or other suitable person to determine if the placement is in the child’s best interests.”

The court ordered Allen to complete a drug and alcohol evaluation and treatment, participate in an anger management and a domestic violence assessment, attend and participate in parenting classes, submit to random urinalysis (UA) testing, and attend weekly self-help groups. The court allowed Allen to have supervised visitation with J.D.A. twice a week for a minimum of two hours.

On March 31, Nelson sent Allen a letter offering to assist him in obtaining services and providing contact information for service providers. On April 9, Nelson met with Allen. Allen confirmed that he received the March 31 letter, but refused to participate in services until he consulted with his attorney.

On April 26, Nelson referred Allen to Catholic Community Services for a drug and alcohol evaluation. On April 29, Nelson met with Allen about the referral to Catholic Community Services, and discussed the drug and alcohol evaluation process. Allen did not obtain a drug and alcohol evaluation.

On May 4, Allen entered into an agreed order of dependency.<sup>1</sup> Allen stipulated that J.D.A. had “no parent, guardian, or custodian capable of adequately caring for the child, such that the child is in circumstances which constitute a danger of substantial damage to the child's psychological or physical development.” RCW 13.34.030(6)(c). Allen also stipulated that he needed to “address anger issues and substance abuse issues prior to being a placement option for his child.”

The court ordered Allen to successfully complete a dependency workshop, obtain a drug and alcohol evaluation and follow treatment recommendations, submit to random UA testing, obtain an anger management and a domestic violence assessment, obtain a parenting assessment and participate in parenting classes, and attend twice weekly self-help groups. The court allowed Allen a minimum of four hours of supervised visitation each week with J.D.A. Allen did not participate in any services. Between March 29 and July 26, Allen canceled or failed to show up for scheduled supervised visitations with J.D.A. nine times.

Judy Davis supervised the visitation with J.D.A. Davis said that during the visitations in June, Allen told her that he attempted to steal copper wire and sold food stamps to raise money for bail. Davis said that at the visitation on July 15, Allen told her that “ ‘someone pulled a gun on me, so I shot him. Shit happens.’ ” Davis testified that she asked Allen to “watch his language” but Allen “kept swearing and swearing.” Davis said “there were other children around besides [J.D.A.] and [Allen’s] voice was more upset. He was upset that day.”

Because Allen was intimidating, Davis contacted Nelson. When Nelson arrived,

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<sup>1</sup> J.R. denied J.D.A. was dependent. Following a contested fact-finding hearing, the court found J.D.A. was dependent.

Allen called him a “ ‘loser’ ” and a “ ‘bitch’ ” and threatened to punch him in the face.

Davis testified that Allen told Nelson “ ‘you better check your ignition.’ ”

Afterwards, Nelson sent Allen a letter outlining expectations for his behavior during scheduled visitation with J.D.A. Allen canceled the next two visits. Allen’s final visit with J.D.A. was on July 26.

At the dependency review hearing on August 19, the court ordered DSHS to complete the home study of Allen’s mother as a possible “long term placement willing to adopt.”

On August 28, the police executed a warrant to search Allen’s home, and found a revolver and a “ ‘sawed off’ ” shotgun. Allen was arrested. On September 17, the State charged Allen with two counts of unlawful possession of a firearm in the first degree. On October 18, the federal government charged Allen with one count of felon in possession of a firearm and one count of possession of a weapon, and placed him in custody.

On October 29, DSHS filed a petition to terminate the parental rights of J.R. and Allen to J.D.A. The petition alleged that “[t]here is little likelihood that conditions will be remedied so that the child can be returned to the parents in the near future.” The petition also alleged Allen failed to comply with court-ordered services. The petition states, in pertinent part:

The father has failed to comply with attending a dependency process workshop, completing a drug/alcohol evaluation, participating in random UA testing, completing an anger management/domestic violence assessment, participating in parenting classes, and participating in a parenting assessment.

In February 2011, the court appointed a volunteer guardian ad litem (VGAL) to

represent J.D.A. On February 23, J.R. stipulated to termination of her parental rights as to O.A. and J.D.A.

On May 2, Allen pleaded guilty to the charge of felon in possession of a firearm and possession of the handgun and sawed off shotgun. Allen faced a sentence of up to ten years in federal prison.

On May 13, Allen filed a petition to appoint his mother as J.D.A.'s guardian. DSHS adoption home study specialist Sonja DeWitt concluded Allen's mother would not be a suitable guardian for J.D.A.

The four-day termination trial began on August 1. A number of witnesses testified, including DSHS social worker Nelson, visitation supervisor Davis, the VGAL, DeWitt, Allen's mother and sister, and Allen.

DeWitt testified that as part of the home study, she interviewed Allen's mother and sister and reviewed information, including the CPS history of Allen's mother. Dewitt testified that Allen's mother was not a suitable guardian because she "demonstrated a clear pattern of making poor decisions resulting in neglect of her children." The VGAL also recommended against appointment of Allen's mother as J.D.A.'s guardian.

Nelson testified that he met with Allen on several occasions and provided referrals for services, as well as sending him a letter with information on services and contact information for service providers. Nelson said that other than to request a bus pass, Allen never contacted him to indicate he had trouble accessing services.

Nelson testified that Allen was unfit to parent because of his criminal history, anger management and domestic violence, as well as his untreated drug and alcohol

addiction.

He has untreated drug and alcohol issues, untreated anger management issues, possible mental health issues, questionable parenting skills given the length of time he has been out of his son's life. He has obviously a lengthy criminal history that suggests that he will be unavailable for the foreseeable future and just a generally dysfunctional and chaotic lifestyle.

Allen admitted that he had a "substance abuse problem" and he was a "recovering addict." Allen testified that DSHS provided no information or other assistance to access services, and he never received a letter from Nelson with information on service providers.

The court denied the petition to appoint the paternal grandmother as the guardian of J.D.A. The court terminated Allen's parental rights to J.D.A. The court found that the father "has parental deficiencies that have not been remedied, and that render him currently unfit to parent." The court entered a lengthy order, including 129 findings of fact.

#### ANALYSIS

Allen argues he did not have notice that unstable housing and unemployment were parental deficiencies, and because DSHS did not offer or provide necessary services under RCW 13.34.180(1)(d) and (3) to correct those deficiencies, the termination was not in the best interest of J.D.A.

Parents have a fundamental liberty 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, 26-27, 969 P.2d 21 (1998). In order to terminate parental rights, the six statutory elements set forth in RCW 13.34.180(1) must be established by clear, cogent,

and convincing evidence. RCW 13.34.190(1)(a)(i); In re Dependency of K.R., 128 Wn.2d 129, 140-41, 904 P.2d 1132 (1995). Proof of the six statutory elements establishes that the parents are currently unfit and satisfies due process. In re Dependency of K.N.J., 171 Wn.2d 568, 576-77, 257 P.3d 522 (2011). If DSHS establishes the statutory elements of RCW 13.34.180 by clear, cogent, and convincing evidence, the court then considers whether termination of the parent-child relationship is in the best interests of the child. RCW 13.34.190(1). Whether termination is in the best interests of the child must be proved by a preponderance of the evidence. In re Welfare of Aschauer, 93 Wn.2d 689, 695, 611 P.2d 1245 (1980).

RCW 13.34.180(1) provides, in pertinent part:

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

Evidence is clear, cogent, and convincing “when the ultimate fact in issue is shown by the evidence to be ‘highly probable.’ ” K.R., 128 Wn.2d at 141<sup>2</sup> (quoting In re



Welfare of Seago, 82 Wn.2d 736, 739, 513 P.2d 831 (1973)). 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).

The deference paid to the trial court's advantage of having the witnesses before it is particularly important in a parental termination proceeding. Consequently, the appellate court will not weigh the evidence or the credibility of the witnesses. Seago, 82 Wn.2d at 739-40. "If there is substantial evidence which the lower court could reasonably have found to be clear, cogent and convincing, an appellate court should not disturb the trial court's findings." Aschauer, 93 Wn.2d at 695. Unchallenged findings are verities on appeal. In re Interest of J.F., 109 Wn. App. 718, 722, 37 P.3d 1227 (2001).

A parent has a "due process right not to have his or her relationship with a natural child terminated in the absence of a trial court finding of fact that he or she is currently unfit to parent the child." In re Welfare of A.B., 168 Wn.2d 908, 920, 232 P.3d 1104 (2010). "Due process requires notice that is 'reasonably calculated, under all the circumstances,' to apprise the parties of the pendency of the action and enable them to present a defense." In re Welfare of H.S., 94 Wn. App. 511, 525, 973 P.2d 474 (1999) (quoting Duskin v. Carlson, 136 Wn.2d 550, 557, 965 P.2d 611 (1998)).

Allen asserts that DSHS did not identify unstable housing and unemployment as parental deficiencies and did not offer or provide services to address those deficiencies. Contrary to Allen's argument, the unchallenged findings identify Allen's parental deficiencies as untreated substance and drug abuse, anger problems, a

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<sup>2</sup> (Internal quotation marks and citation omitted.)

history of domestic violence, a lack of parenting experience, a lack of insight and judgment as to the needs of the child and how to keep the child safe, and an “unstable lifestyle” related to his extensive criminal history. The findings also note that in the agreed dependency, Allen stipulated that he needed to address his substance abuse issues “prior to being a placement option for his child.” In addition, the court identifies untreated anger management and domestic violence as a risk to the child. The findings state, in pertinent part:

- 2.18 The father has parental deficiencies that have not been remedied, and that render him currently unfit to parent.
- 2.19 The father’s parental deficiencies include untreated substance abuse and/or drug addiction.
- 2.20 In the agreed order of dependency as to the father, the father stipulated he must address substance abuse issues prior to being a placement option for his child.
- 2.21 The father admits to drug use and says he is a recovering addict. His drug of choice is marijuana and he has used methamphetamine.
- 2.22 The father continued to use drugs after the child was removed.
- .....
- 2.27 The father’s parental deficiencies include untreated anger problems and domestic violence that place the child at risk.
- 2.28 There is a history of allegations of domestic violence between the father and the mother.
- 2.29 The father has been arrested at least six to seven times for assault or other incidences where the mother was the alleged victim, although the arrests did not lead to convictions.
- .....
- 2.40 The father’s parental deficiencies include a lack of parenting experience, and a lack of insight and judgment as to the needs of the child and how to keep the child safe.
- .....
- 2.51 The child has special needs. He has been diagnosed with mixed developmental delay and a sensory processing disorder. He participates in weekly occupational therapy. He qualifies for services through DSHS’s Division of Developmental Disabilities.
- 2.52 Due to his lack of involvement in the child’s life, the father has little knowledge of the child’s diagnoses and needs. In June 2010, the DSHS social worker and the father discussed a needed medical procedure for the child. The father has otherwise not contacted the

DSHS social worker to ask about the child's special needs.

- 2.53 The father's parental deficiencies include an unstable lifestyle that places the child at risk of harm.

In the context of identifying his "unstable lifestyle" as a parental deficiency, the court found that because of his extensive criminal history, Allen had been unemployed "since at least 2008" and had a "history of unstable residences." The unchallenged findings state, in pertinent part:

- 2.54 The father has been unemployed since at least 2008.
- 2.55 The father has a history of unstable residences. . . .
- 2.56 The father has an extensive criminal history. He has been arrested at least 20 times and cannot recall how much time he has spent in jail.
- 2.57 The father has eight convictions as a juvenile beginning at age 10. These include two convictions for misdemeanor assault, two convictions for misdemeanor malicious mischief, two convictions for misdemeanor theft, one conviction for misdemeanor possession of drug paraphernalia, and one felony conviction for taking a motor vehicle without permission.
- 2.58 The father has 17 state convictions as an adult. These include two misdemeanors for driving with no valid/expired license, two misdemeanors for driving with . . . a suspended/revoked [license], a misdemeanor conviction for theft, three misdemeanor convictions for minor in possession, three misdemeanor convictions for malicious mischief, one misdemeanor conviction for criminal mischief, a misdemeanor conviction for two counts of disorderly conduct, one misdemeanor conviction for violation of a no contact order-DV, one misdemeanor conviction for violation of an anti-harassment order, a felony conviction for possession of methamphetamine, and a felony conviction for 2<sup>nd</sup> assault. The father has a pending assault charge from 2009.
- 2.59 In May 2011, the father was convicted on federal charges for being a felon in possession of a firearm. The father admitted to possessing a stolen handgun and a "sawed off" shotgun. At the time of trial, the father was awaiting sentencing. He faces up to ten years in federal prison.
- 2.60 The father continued to engage in criminal activity after the dependency petition was filed. During a visit on June 10, 2010, the father explained to the visit supervisor how he attempted to steal 500 feet of copper wire. During that same visit, he told the visit supervisor he planned to obtain food stamps and sell them to raise bail money. During a visit on June 14, 2010, the father told the

visit supervisor he received the food stamps and sold them to the paternal grandmother . . . .

2.61 The father was incarcerated in January 2010, from August to September 2010, and has been in federal detention since October 2010.

The court found that Allen “has been offered remedial services but has done nothing to access or participate in them,” and the “current unavailability of services to the father is due to his incarceration which is the result of the father’s own actions and choice to engage in criminal behavior.” The unchallenged findings establish that DSHS offered Allen all necessary services reasonably available and capable of correcting parental deficiencies within the foreseeable future.

The case Allen relies on, In re Welfare of C.S., 168 Wn.2d 51, 225 P.3d 953 (2010), is distinguishable. In C.S., although the mother successfully addressed her substance abuse, the court terminated her parental rights based on her alleged inability to address her child’s special needs. C.S., 168 Wn.2d at 55. Because DSHS provided the foster parents with training “deemed necessary” to effectively deal with the child’s special needs without ever offering the mother the same training, the court reversed. C.S., 168 Wn.2d at 55-56.

Because the findings are supported by substantial evidence, and DSHS proved each of the statutory factors, the court did not err in concluding that termination of Allen’s parental rights is in the child’s best interests. We affirm the order terminating Allen’s parental rights to J.D.A.

A handwritten signature in black ink, appearing to read "Schivelle, J". The signature is written in a cursive style with a large, looping initial "J" at the end.

WE CONCUR:

*Appelwick, J*

*Edenfor, J*