IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Dependency of T.M.L., DOB: 11/05/2000, a minor child. HEATHER LEMIEUX, Appellant, v. STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES, Respondent.	)	DIVISION ONE No. 68254-7-I UNPUBLISHED OPINION FILED: November 13, 2012

Dwyer, J. — Heather Lemieux appeals from the trial court's order terminating her parental rights to her daughter, T.M.L. Lemieux asserts that the order terminating her parent-child relationship with T.M.L. must be reversed because (1) the Department of Social and Health Services (the Department) did not prove that all reasonably available, necessary services were offered or provided to Lemieux, (2) the Department did not prove that termination is in T.M.L.'s best interests, and (3) Lemieux received ineffective assistance of counsel during the termination proceeding. However, substantial evidence

supports the trial court's findings that Lemieux was offered or provided all necessary, reasonably available services capable of correcting her parental deficiencies and that termination is in T.M.L.'s best interests. Moreover, the record does not support Lemieux's contention that she did not receive effective assistance of counsel. Accordingly, we affirm the trial court's order terminating Lemieux's parental rights to T.M.L.

I

In November 2009, T.M.L., who was then nine years old, was removed from the custody of her mother, Lemieux, due to Lemieux's long history of substance abuse and neglect of T.M.L. Both T.M.L.'s father and Lemieux had used drugs in front of T.M.L. and had brought her along when they searched for drug dealers. Numerous reports concerning the neglect of T.M.L. had been filed with Child Protective Services.

The Department filed a dependency petition on November 20, 2009. An agreed order of dependency and dispositional order as to Lemieux were entered on March 9, 2010. Lemieux agreed that her substance abuse problem prevented her at that time from parenting T.M.L. T.M.L. was placed in the custody of her aunt, Rebecca Booker, who is Lemieux's sister. The trial court ordered Lemieux to complete multiple services to address her parental deficiencies. Lemieux was ordered to complete a dependency process workshop, a drug and alcohol evaluation, parenting classes, a mental health

assessment, and a parenting assessment. She was also ordered to take weekly random urinalysis drug tests (UAs) and to attend domestic violence support groups.

Shelia Koenig, the social worker assigned to Lemieux's case, contacted Lemieux repeatedly regarding the services of which Lemieux had been ordered to avail herself. On January 26, 2010, Koenig sent a letter to Lemieux, informing Lemieux that she had been scheduled for a drug and alcohol evaluation the next month. On March 24, 2010, Koenig provided Lemieux with a referral list for each of the ordered services. Then, in November 2010, Koenig visited Lemieux while Lemieux was in jail. During the visit, Koenig discussed the ordered services with Lemieux and again provided her with the referral list. The list provided referrals for parenting classes, the dependency process workshop, the drug and alcohol evaluation, and a mental health evaluation. At review hearings held in April 2010, September 2010, March 2011, and August 2011, the status of the ordered services remained primarily unchanged. At each of these hearings, Lemieux was determined to be out of compliance with the dispositional order.

Lemieux did not complete the court-ordered services. In particular, she failed to complete the substance abuse treatment recommended following her drug and alcohol assessment. In June 2010, Lemieux attended the ordered drug and alcohol assessment and was diagnosed with alcohol abuse and opioid dependence. The evaluator recommended intensive outpatient treatment.

Lemieux did not seek treatment until December 2010. Because of the amount of time between her initial assessment and her attempt to seek treatment, Graham Buckley, a chemical dependency counselor, advised that Lemieux participate in an updated assessment. Following the updated assessment, Buckley also recommended intensive outpatient treatment. Because Lemieux failed to attend her initially scheduled meeting with Buckley, she was not officially admitted into treatment until March 2011. That month, Lemieux reported the use of heroin, alcohol, and prescription opiates. Two of Lemieux's UAs tested positive for opiates. She was informed that another positive UA result would lead to discharge from treatment. In April 2011, Lemieux failed to attend the majority of her required recovery support group meetings. She was determined by the treatment facility to be out of compliance with the agreed treatment and was discharged from the program on April 28, 2011.

On May 16, 2011, Lemieux attended another drug and alcohol assessment. Robert McCullough, a chemical dependency professional, completed the assessment. Initially, McCullough recommended intensive outpatient treatment with a strict contract requiring Lemieux to abstain from the use of narcotics and to attend all group meetings. However, after Lemieux tested positive for opiates, it was determined that she needed inpatient treatment. Lemieux was scheduled to enter inpatient treatment on June 20, 2011; in the meantime, she was required to attend interim support group

meetings. Lemieux missed required group meetings, indicating to staff at the treatment facility that she was not committed to treatment. Although Lemieux's treatment entry date was rescheduled multiple times to accommodate her, she failed to enter inpatient treatment. Thus, her treatment providers determined that she should seek treatment elsewhere. Lemieux did not thereafter seek substance abuse treatment.

On June 16, 2011, Lemieux was served with the Department's petition for termination of her parental rights to T.M.L. Following service of the termination petition, Lemieux finally attended the dependency process workshop on September 24, 2011. Lemieux had similarly failed to avail herself of other ordered services prior to the Department's filing of the petition for termination. For instance, although Lemieux had received a referral to attend parenting classes in March 2010, she had participated in those classes for only a short time and had not completed the classes.

The trial court held a four-day termination hearing in October 2011. T.M.L.'s volunteer guardian ad litem (VGAL), Carolyn Anderson, recommended that Lemieux's parental rights be terminated. She strongly recommended that T.M.L. be adopted by Booker, with whom she had lived since November 2009. Buckley and McCullough testified regarding Lemieux's failure to complete substance abuse treatment. Koenig, the Department social worker, testified that, although all recommended services had been offered to Lemieux, Lemieux had

not completed any treatment during the dependency period.

On November 18, the trial court issued an oral ruling, terminating Lemieux's parental rights to T.M.L. In its findings, the court determined that all necessary, reasonably available services capable of correcting Lemieux's parental deficiencies had been offered or provided. The court additionally found that Lemieux was not fit to parent T.M.L. and that it was in T.M.L.'s best interests to terminate the parent-child relationship. Thus, the trial court granted the Department's termination petition.

Lemieux appeals.

II

Lemieux first contends that the order terminating her parent-child relationship with T.M.L. should be reversed because, she asserts, the Department did not prove that all reasonably available, necessary services had been offered or provided to her. According to Lemieux, the Department failed to provide all such services by withholding mental health counseling until Lemieux's substance abuse problem had been resolved. However, the record does not support this assertion. Rather, substantial evidence supports the trial court's determination that the Department offered or provided all reasonably available, necessary services capable of correcting Lemieux's parental deficiencies.

"Parents have a fundamental right to the care and custody of their children, and a trial court asked to interfere with that right should employ great care." In re Welfare of M.R.H., 145 Wn. App. 10, 23, 188 P.3d 510 (2008). "[T]ermination of parental rights should be allowed 'only for the most powerful [of] reasons.'" In re Welfare of S.J., 162 Wn. App. 873, 880, 256 P.3d 470 (2011) (alteration in original) (internal quotation marks omitted) (quoting In re Welfare of A.J.R., 78 Wn. App. 222, 229, 896 P.2d 1298 (1995)). Pursuant to RCW 13.34.180(1) and RCW 13.34.190, Washington courts use a two-step process in determining whether to terminate parental rights. In re Welfare of A.B., 168 Wn.2d 908, 911, 232 P.3d 1104 (2010). "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 only by a preponderance of the evidence." A.B., 168 Wn.2d at 911. The second step is reached only if the first step is satisfied. A.B., 168 Wn.2d at 911.

A trial court may terminate a parent-child relationship only if the Department proves, by clear, cogent, and convincing evidence, the six termination factors set forth in RCW 13.34.180(1).[1] M.R.H., 145 Wn. App. at 24. One such factor requires the Department to prove 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). Such services "must be tailored to each individual's needs." In re Dependency of T.R., 108 Wn. App. 149, 161, 29 P.3d 1275 (2001). "Clear, cogent, and convincing evidence exists when the ultimate fact in issue is shown by the evidence to be

[1] The six termination factors 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;
>
> (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. . . .

RCW 13.34.180(1).

'highly probable.'" In re Dependency of K.R., 128 Wn.2d 129, 141, 904 P.2d 1132 (1995) (internal quotation marks omitted) (quoting In re Sego, 82 Wn.2d 736, 739, 513 P.2d 831 (1973)).

Where the trial court has weighed the evidence, our review is limited to determining whether the court's findings of fact are supported by substantial evidence and whether those findings support the court's conclusions of law. In re the Dependency of P.D., 58 Wn. App. 18, 25, 792 P.2d 159 (1990). "'Substantial evidence' is evidence in sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise." In re Welfare of T.B., 150 Wn. App. 599, 607, 209 P.3d 497 (2009). The determination of whether the findings of fact are supported by substantial evidence "must be made in light of the degree of proof required." P.D., 58 Wn. App. at 25. Where, as here, the proof required is clear and convincing, "the question on appeal is whether there is substantial evidence to support the findings in light of the highly probable test." P.D., 58 Wn. App. at 25. Moreover, we defer to the trial court's credibility determinations on appeal from an order terminating parental rights. T.B., 150 Wn. App. at 607.

Here, Lemieux asserts that the Department required her to complete substance abuse counseling and exhibit sobriety before it would provide mental health counseling. She contends that the Department was required to provide concurrent, rather than sequential, services and, by not so doing, failed to

provide all reasonably available, necessary services capable of correcting her parental deficiencies within the foreseeable future. In so contending, Lemieux cites to In re the Termination of S.J., 162 Wn. App. 873. There, T.H. appealed from the trial court's order terminating her parental rights to her son, S.J. S.J., 162 Wn. App. at 875. During the dependency, T.H., who would later be diagnosed with bipolar disorder and borderline intellectual functioning, had been ordered to participate in, among other services, substance abuse evaluation and treatment and mental health services. S.J., 162 Wn. App. at 876. However, "the court order specifically stated that the [psychological] evaluation was not to be conducted" until T.H. successfully completed substance abuse treatment. S.J., 162 Wn. App. at 878. Accordingly, the Department did not refer T.H. for a psychological evaluation until late in the dependency period. S.J., 162 Wn. App. at 878.

On appeal, T.H. asserted that the Department had failed to tailor the services to her needs, because "despite knowing she suffered from a mental illness, [the Department] took a sequential approach and failed to refer her to mental health services until December 2005." S.J., 162 Wn. App. at 881-82. T.H. further contended that this sequential approach resulted in a delay in treatment, leading to the deterioration of her bond with S.J. S.J., 162 Wn. App. at 882. We held that, by not integrating the ordered services, the Department had failed to tailor T.H.'s services to her "co-occurring problems." S.J., 162 Wn.

App. at 882. Thus, we reversed the trial court's order terminating the parent-child relationship. S.J., 162 Wn. App. at 884.

However, the facts here do not support Lemieux's assertion that the Department required her to complete substance abuse treatment prior to engaging in mental health services. Each of the referral letters provided to Lemieux by Koenig—including the March 24, 2010 letter, which was sent to Lemieux in the same month that the order of dependency and dispositional order were entered—referred Lemieux to each of the services ordered by the trial court. The letters referred Lemieux to, among other services, both a drug and alcohol evaluation and a psychological evaluation or mental health evaluation.[2] Moreover, Koenig testified regarding her efforts to provide Lemieux with a mental health assessment. In April 2011, Lemieux had lost her medical insurance coverage due to not contacting the appropriate office regarding that coverage. Koenig worked with Lemieux's attorney to obtain funding for the mental health assessment, but Lemieux did not respond to messages regarding the appointment. The Department agreed to pay a private therapist to do the mental health assessment, but Lemieux did not attend the assessment.

Nevertheless, Lemieux appears to argue on appeal that the Department was required to provide mental health counseling, not simply a mental health assessment, to Lemieux. However, Koenig testified that a mental health

[2] Koenig testified that the ordered service was a "mental health assessment"—not a "psychological evaluation"—but that she had incorrectly indicated that a psychological evaluation was required in one of the referral letters. Koenig further testified that this was corrected in the subsequent referral letter.

evaluation is a precursor to counseling. She stated that she believed that a mental health assessment, not a psychological evaluation, was the proper service to provide Lemieux. The mental health assessment, she explained, was a precursor to counseling, and she believed that "the mother getting into counseling was the most important thing." She further testified that a psychological evaluation could be performed after sobriety had been established, but that the Department "didn't wait on the mental health assessment because it's important for the mother to address maybe what's causing her to have a sobriety problem." Thus, contrary to Lemieux's assertion, the Department did not delay mental health counseling until Lemieux completed substance abuse treatment. Rather, the Department attempted to provide a mental health assessment, which was required to determine the focus of counseling. The record does not support Lemieux's assertion that the Department failed to provide the necessary services.

Furthermore, S.J. is inapposite. Unlike in S.J., the trial court's order here did not state that the services provided to Lemieux be provided sequentially. Rather, it simply listed the services in which Lemieux was ordered to participate. Moreover, as described above, there is no indication that the Department withheld mental health services until Lemieux successfully completed substance abuse treatment. Rather, Koenig testified that she did not wait to provide the mental health assessment, which is a precursor for mental health counseling,

because she believed that mental health treatment may be important to address the cause of Lemieux's substance abuse problem.[3] Finally, unlike in S.J., the record does not indicate that a lack of mental health treatment—which, in any event, the Department attempted to provide—prevented Lemieux from addressing her parental deficiencies. Rather, McCullough testified that, although he believed that Lemieux had "emotional issues," he did not believe that such issues would interfere with her substance abuse treatment.[4]

Even had the Department failed to provide the necessary services, there is sufficient evidence that such services, had they been provided, would not have corrected Lemieux's parental deficiencies in the foreseeable future. See P.D., 58 Wn. App. at 27. "'[A] parent's unwillingness or inability to make use of the services provided excuses the State from offering extra services that might have been helpful.'" P.D., 58 Wn. App. at 26 (quoting In re Ramquist, 52 Wn. App. 854, 861, 765 P.2d 30 (1988)). Moreover, "[w]here the record establishes that the offer of services would be futile, the trial court can make a finding that the Department has offered all reasonable services." M.R.H., 145 Wn. App. at 25. Here, the trial court found that "[i]t would be futile to require a psychological

[3] Lemieux testified that she had, in fact, obtained a mental health assessment. However, she admitted that she had not been referred to that assessment by the Department. The order of dependency required that all ordered services be approved by the Department, thus explaining the conflicting testimony of the Department and Lemieux regarding whether she had obtained a mental health assessment.

[4] On appeal, Lemieux challenges numerous of the trial court's findings of fact, including the court's finding that "[i]t was determined [that] the mother could and should attend treatment despite the emotional issues." We have determined that substantial evidence supports this and the other findings challenged on appeal.

evaluation since the mother has not followed the recommendations of the drug and alcohol assessment."[5]

The record does not support Lemieux's contention that the Department failed to offer concurrent, rather than sequential, services, thus failing to tailor the necessary services to her individual needs. Rather, substantial evidence supports the trial court's finding that the Department offered or provided all necessary, reasonably available services capable of correcting Lemieux's parental deficiencies.

III

Lemieux next contends that the Department failed to prove that termination is in T.M.L.'s best interests, thus necessitating reversal of the termination order. Because substantial evidence supports the trial court's finding, we disagree.

"[T]he goal of a dependency hearing is to determine the welfare of the child and his [or her] best interests." In re Welfare of Aschauer, 93 Wn.2d 689, 695, 611 P.2d 1245 (1980). Accordingly, in order to terminate a parent-child relationship, the trial court must find not only that the statutory elements set forth in RCW 13.34.180(1) are met; in addition, the court must determine, by a preponderance of the evidence, that termination is in the best interests of the child. RCW 13.34.190(2). See also S.J., 162 Wn. App. at 880; P.D., 58 Wn.

[5] The court additionally found that, "[t]he necessary service was a mental health assessment, which was offered[,] and not a psychological evaluation." Again, substantial evidence supports these findings.

App. at 25. "[T]he factors involved in determining the 'best interests' of a child are not capable of specification; rather, each case must be decided on its own facts and circumstances." In re Dependency of A.V.D., 62 Wn. App. 562, 572, 815 P.2d 277 (1991).

Here, Lemieux asserts that termination is not in T.M.L.'s best interests because her placement with her aunt was stable and because Lemieux was interested in a guardianship rather than termination. Moreover, Lemieux contends that termination is not in T.M.L.'s best interests because Lemieux loved T.M.L., T.M.L. and her mother were bonded, and T.M.L. had a need for Lemieux. However, multiple witnesses testified at the termination hearing regarding T.M.L.'s need for permanency and stability, opining that this could be achieved only through termination of Lemieux's parental rights.

T.M.L. had resided with Booker, her maternal aunt, for almost 23 months at the time of the termination hearing. Booker testified that Lemieux had asked her to agree to a guardianship because Lemieux did not want to lose her parental rights. She expressed concern that Lemieux might attempt to get custody of T.M.L. in the future, and that T.M.L. would get "yanked" out of her stable home, even if T.M.L. did not want to be in her mother's custody. Thus, Booker explained that she supported adoption, and, thus, termination, over guardianship because of T.M.L.'s need to feel that she belonged and because "she deserves a childhood and safety and stability."

Carolyn Anderson, T.M.L.'s VGAL, testified that, although she believed that it would not be in T.M.L.'s best interests to be prevented from having contact with her mother, she did believe that termination of Lemieux's parental rights was in T.M.L.'s best interests. Anderson explained that visits between Lemieux and T.M.L., which she had observed, were chaotic and, although T.M.L. exhibited a need for her mother, it was a "grasping" "show me that you love me kind of need." She expressed a belief that adoption, rather than guardianship, is in T.M.L.'s best interests because of the "permanence" and "finality" that it would provide. Finally, Anderson testified that, assuming there would be no contact between Lemieux and T.M.L. following termination, she still believed termination to be in the best interests of T.M.L.

Koenig, the Department social worker, additionally testified that she believed termination to be in T.M.L.'s best interests. Adoption, she explained, would provide T.M.L. with stability, permanency, and a feeling of belonging. She testified that this was especially important for T.M.L. because "she hasn't felt like she really belonged even when she was with her own parents." Koenig additionally explained that T.M.L. was confused by Lemieux's comments that she would regain custody of T.M.L., thus preventing T.M.L. from feeling as though she belonged with Booker.

The trial court found that T.M.L. was believed to be a special education student while in Lemieux's care and that, following her placement with Booker,

T.M.L. is performing above her current grade level. The court additionally found that, when T.M.L. first came into her aunt's care, "she was very emotional and unsettled" and that, now, she is "becoming a more confident young lady." Finally, the court found that T.M.L. "has been progressing and developing well in her placement" and that she "would continue to blossom at an even faster rate when there are no divided loyalties between [T.M.L.], her aunt and her mother."

Booker, Anderson, and Koenig all testified regarding the importance of permanence and stability for T.M.L. Each also testified that the termination of Lemieux's parental rights was the only way to achieve such permanence and stability. Moreover, the record supports the court's findings regarding T.M.L.'s emotional and academic progress since being placed in Booker's care. Thus, substantial evidence supports the trial court's finding that "[i]t is in [T.M.L.'s] best interest to terminate the parent-child relationship."

IV

Lemieux finally contends that she did not receive effective assistance of counsel during the termination proceeding. She asserts that her trial counsel failed to provide effective assistance by (1) not timely filing a guardianship petition, (2) not contesting the State's purported failure to provide services for her co-existing mental health and substance abuse disorders, and (3) calling only three witnesses, presenting no expert testimony, and introducing no exhibits. Each of these assertions is without merit.

At all stages of a dependency proceeding, parents have a statutory right to be represented by counsel. RCW 13.34.090(2). This right to counsel includes the right to effective legal representation. In re Welfare of J.M., 130 Wn. App. 912, 922, 125 P.3d 245 (2005). "To establish ineffective assistance of counsel, a party must show deficient performance and resulting prejudice."[6] In re Dependency of S.M.H., 128 Wn. App. 45, 61, 115 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.'" S.H.M., 128 Wn. App. at 61 (quoting State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987)). To demonstrate prejudice, a party must show that "'there is a

[6] This standard, applicable in criminal appeals, is set forth 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 regarding the proper standard for determining whether a parent received effective assistance of counsel in a dependency proceeding. Division Three has applied the less stringent standard set forth in In re Mosley, 34 Wn. App. 179, 184, 660 P.2d 315 (1983); J.M., 130 Wn. App. at 920. We, however, have applied the Strickland test in determining whether effective legal representation was rendered in a termination proceeding. S.M.H., 128 Wn. App. at 61. We continue to apply that test here.

reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" Thomas, 109 Wn.2d at 226 (quoting Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). "Courts engage in a strong presumption counsel's representation was effective." State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

Lemieux first contends that she received ineffective assistance of counsel because her trial counsel did not file a guardianship petition prior to the termination trial. She asserts that, although her counsel requested that the court consider a guardianship placement with Booker at the termination proceeding, counsel "did not submit a proper, timely petition." However, the record indicates that the trial court did not decline to consider guardianship as an alternative to termination due to untimely filing of the petition. Rather, the court relied on RCW 13.36.040 in deciding that the petition could not be considered.

RCW 13.36.040 provides that, in order for a guardianship to be established, either all parties must agree to the guardianship order or, among other requirements, the proposed guardian must sign "a statement acknowledging the guardian's rights and responsibilities toward the child and affirming the guardian's understanding and acceptance" of the guardianship requirements. RCW 13.36.040(2)(b), (c)(vi). The Department contended that, because Booker did not support guardianship and had not signed such a statement, any petition for guardianship could not proceed. The trial court

questioned Lemieux's counsel: "At this time . . . you do not have a document that's signed by the proposed guardian; is that correct?" Counsel answered in the affirmative. The court then allowed counsel to speak with Booker to see if she might change her mind regarding a guardianship, in which case, the court stated, it would revisit the issue. Booker did not agree to sign a statement. Because counsel did not have a signed statement by the proposed guardian, which, the court determined, was required by statute, the court did not permit the guardianship petition to be filed.[7] In addition, the trial court stated that it would not be "fair to the proposed guardian for that petition to go forward unless she specifically endorses it."

Thus, contrary to Lemieux's assertion on appeal, the trial court declined to consider guardianship not because the petition was untimely filed; rather, the court determined that the petition had not been perfected and, therefore, could not be considered.[8] Thus, even had counsel's performance been deficient, Lemieux cannot demonstrate that she was thereby prejudiced. It was because Booker did not support guardianship—not because the petition had been untimely filed—that the trial court declined to consider guardianship as an

[7] Because we need not do so in order to resolve this case, we do not address the merits of the trial court's reasoning that it could not consider the guardianship petition because Booker did not support guardianship and had not signed a statement pursuant to RCW 13.36.040(2)(c)(vi). Here, the relevant fact is that the trial court did not, contrary to Lemieux's contention, decline to consider guardianship due to untimely filing of the petition.

[8] The trial court did note that the petition had not been timely filed. Nevertheless, the court considered whether to consolidate the guardianship petition and termination proceeding. It was because Booker did not support guardianship that the court ultimately determined that the petition could not move forward.

alternative to termination.

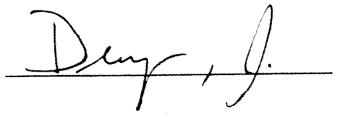
Lemieux next contends that her trial counsel was deficient because counsel did not contest the Department's alleged failure to provide services for Lemieux's "co-existing mental health and chemical dependency disorders." However, substantial evidence supports the trial court's finding that the Department offered or provided to Lemieux all necessary, reasonably available services capable of correcting her parental deficiencies. As explained above, the case upon which Lemieux relies on appeal, S.J., is inapposite—here, the court did not order that services be provided sequentially, and the Department did not prevent Lemieux from engaging in necessary services. Lemieux did not receive ineffective assistance of counsel. Lemieux's counsel was under no professional obligation to raise arguments unsupported by the facts or the law.

Finally, Lemieux asserts that her counsel's presentation of evidence at trial fell below the objective reasonableness standard because "counsel called only three witnesses, presented no expert testimony and introduced no exhibits." Further, she asserts that counsel's questioning of one of the three witnesses resulted in the introduction of damaging evidence and that counsel failed to call Lemieux as a witness. "The decision to call a witness is generally a matter of legitimate trial tactics and will not support a claim of ineffective assistance of counsel." State v. Byrd, 30 Wn. App. 794, 799, 638 P.2d 601 (1981). However, this presumption of competence "'can be overcome by showing, among other

things, that counsel failed to conduct appropriate [legal or factual] investigations.'" Byrd, 30 Wn. App. at 799 (quoting State v. Jury, 19 Wn. App. 256, 263, 576 P.2d 1302 (1978)).

The brief submitted by Lemieux's counsel in the trial court demonstrates that counsel performed adequate factual and legal investigations and was aware of the likely testimony of proposed witnesses. Moreover, counsel explicitly informed the trial court that she had decided not to call Lemieux back to the stand "as a matter of strategy." "[L]egitimate trial strategy or tactics cannot be the basis for an ineffectiveness of counsel claim." State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). The record does not support Lemieux's assertion that counsel's presentation of the evidence fell below an objective standard of reasonableness.

Affirmed.



We concur:

Spearman, A.C.J.

Leach, C.J.