IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re Dependency of A.L., STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES, Respondent, v. L.V., Appellant.	No. 40365-0-II UNPUBLISHED OPINION

Quinn-Brintnall, J. — L.V. appeals a trial court order that reduced his visitation rights with his daughter, A.L. L.V. claims that the trial court abused its discretion because it did not determine that reduced visitation was necessary to protect A.L.'s health, safety, and welfare as required by RCW 13.34.136(2)(b)(ii). The State concedes that the trial court failed to satisfy the statutory requirements before it entered its reduced visitation order. We accept the State's concession. Accordingly, we reverse and vacate the trial court's order and remand for further proceedings.

FACTS

Dependency Orders and Permanency Plan

On March 6, 2008, the Washington State Department of Social and Health Services (DSHS) filed a dependency petition seeking protection of A.L., a minor child.[1] The petition alleged that A.L.'s father, L.V., demonstrated long-term addiction to controlled substances resulting in his neglect of A.L.'s basic needs. The trial court ordered that A.L. be placed in foster care and DSHS placed A.L. with her maternal grandparents. The trial court also ordered L.V. to take steps toward rehabilitation by adopting DSHS's proposed dependency and permanency plan (the Plan).

DSHS designed the Plan to help L.V. rebuild a safe, sober, and stable home environment sufficient to meet A.L.'s needs. DSHS's goal, if L.V. complied with the Plan's requirements, was to eventually return A.L. to his care.[2] If L.V. did not meet the Plan's requirements, DSHS alternately planned to place A.L. with adoptive parents. The Plan required L.V. to participate in substance abuse treatment, counseling sessions, and parenting classes. It also initially provided L.V. with weekly two-hour supervised visits with A.L. DSHS maintained discretion to change L.V.'s visitation provisions with respect to location, frequency, duration, and supervision.

The trial court monitored L.V.'s progress and compliance with the Plan's requirements through semiannual dependency review hearings. After the February 2009 dependency hearing, the trial court noted that L.V. had consistently visited A.L. and had partially complied with the

[1] A.L. was born May 6, 1999.

[2] The Plan does not set forth a clear time line or intended date for L.V.'s recovery and reunification with A.L.

Plan's requirements. In July 2009, DSHS increased L.V.'s visitation rights to unsupervised overnight visits every other weekend; it also provided L.V. with telephone contact privileges between the in-person visits. The trial court's July 2009 order adopted these amended visitation provisions. In addition, the trial court found that L.V. was complying with the Plan's requirements and noted that he made progress toward "**correcting the problems that necessitated the child's placement in out-of-home care**." Clerk's Papers (CP) at 275.

On November 12, 2009, the DSHS Child Protection Team held a foster care meeting to discuss A.L.'s future living arrangements; L.V. and A.L.'s grandparents attended. Because A.L. had been very anxious about learning where she would live permanently, DSHS, L.V., and A.L.'s grandparents agreed to keep the meeting discussion confidential.[3] At the meeting, DSHS decided that A.L. would not move in with L.V. while he lived at a halfway house, and DSHS determined that A.L. should remain with her grandparents until it completed a full foster care assessment.

Shortly after the foster care meeting, A.L. became very upset after speaking with L.V. on the phone.[4] Danielle Fisher, a social worker on L.V.'s case, asked L.V. if he had discussed the foster care meeting with A.L.; he denied doing so. Fisher then asked L.V. not to call A.L. until Fisher could discuss the phone incident with A.L. Fisher learned from A.L. that L.V. had discussed the meeting with her and that he told her that he was in the process of getting a house. A.L. explained that the conversation had been upsetting because she was skeptical about her father's plans to get a house after her grandmother told her that DSHS decided that she would

[3] Aside from the prior instability in her life, A.L. suffers from depression and anxiety.

[4] A.L.'s grandmother reported that A.L. went to bed at 8 pm with a stomach ache and that she was curled up on the floor outside her grandparents' bedroom at 5 am.

remain with her grandparents for the time being.

After this November phone incident, L.V. continued calling A.L., though none of these additional calls caused A.L. anxiety. In December 2009, when Fisher learned of the additional calls, she again asked L.V. not to call A.L. at her grandparents' home and he ceased calling.[5] DSHS then amended the visitation provision in the Plan to state, L.V. "has been asked not to call" the grandparents' home. CP at 297. The trial court adopted this amended visitation provision in its December 30, 2009 order. The amended visitation provision, however, did not specifically prohibit L.V. from calling A.L., and it did not alter L.V.'s in-person visitation rights. In fact, the amended visitation plan states that "[A.L.] reports that visits with her dad go well[,] . . . she enjoys [her] visits and that she thinks her dad does, too." CP at 297. In addition, as it did in July 2009, the trial court found that L.V. was complying with the Plan's requirements and noted that he continued to make progress toward "**correcting the problems that necessitated the child's placement in out-of-home care**." CP at 321.

January 13, 2010 Dependency Hearing and Order

L.V. challenged the trial court's adoption of the Plan's amended phone visitation provision at a January 13, 2010 hearing. At the hearing, Fisher testified about the November phone incident. She explained that L.V.'s November 12, 2009 phone discussion had caused A.L. anxiety about her future living arrangements. But she also testified that previous and subsequent phone conversations between L.V. and A.L. had not appeared to be problematic. She further explained

[5] There is some confusion in the record regarding whether Fisher's December 2009 request of L.V. not to call A.L. was temporary. Fisher's report states that she asked L.V. not to call the grandparents' home until she talked to A.L. about the November phone incident. Although, when Fisher confronted L.V. in December about his additional calls, it is clear that she did not want L.V. calling the grandparents' home even after she talked to A.L. about the incident.

that L.V. and A.L.'s unsupervised overnight visits were going well.

L.V. corroborated Fisher's testimony with respect to his positive visits with his daughter. He testified that he and A.L. "get along great" during phone conversations and that his first visit with A.L. at his new apartment "went awesome." Report of Proceedings (RP) at 29. L.V.'s attorney then explained that A.L.'s anxiety from the November phone call was a one-time incident and that L.V. was now being very careful on the phone. His attorney also explained that L.V. and A.L.'s visits had been very appropriate given all of the circumstances.

The trial court, however, found the November phone incident problematic, and it determined that L.V. was not capable of exercising appropriate judgment in his visits with A.L. And although the trial court noted that L.V. was working hard and maintaining sobriety, the trial court stated,

> But [L.V.] has years and years of history of instability, of moving from house to house, living in travel trailers, not being employed, having relapses in his sobriety. And while I'm glad he's doing well now, a few months does not convince me that . . . we're dealing with a changed person.
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> . . . I have significant concerns based upon the facts as I find them to exist right now that [L.V.] is capable of exercising appropriate judgment regarding his daughter and his ability to overcome his urges to act selfishly. There will be no telephone contacts at all. Visitations until further notice will be supervised and not at [L.V.'s] home.

RP at 35. In addition to its oral ruling, the trial court entered a written order that suspended L.V.'s right to initiate phone contact with A.L. and reduced his visitation rights to weekly one-hour supervised visits. L.V. appeals.

ANALYSIS

L.V. argues that the trial court abused its discretion when it reduced his visitation rights

because it did not determine that reduced visitation was necessary to protect A.L.'s health, safety, and welfare as required by RCW 13.34.136(2)(b)(ii). L.V. requests that we reverse the trial court's reduced visitation order and reinstate his previously ordered visitation rights. DSHS agrees that the trial court's order does not meet the standard necessary to limit L.V.'s visitation rights and asks this court to reverse the trial court's order. We agree that the trial court failed to satisfy the statutory requirements of RCW 13.34.136(2)(b)(ii) before it entered its reduced visitation order. We reverse and vacate the trial court's order.

"Early, consistent, and frequent visitation is crucial for maintaining parent-child relationships and making it possible for parents and children to safely reunify." RCW 13.34.136(2)(b)(ii). A court may not limit a parent's visitation rights "as a sanction for a parent's failure to comply" with court orders or services. RCW 13.34.136(2)(b)(ii). A parent's visitation rights "may be limited or denied *only* if the court determines that such limitation or denial is necessary to protect the child's health, safety, or welfare." RCW 13.34.136(2)(b)(ii) (emphasis added). An express finding of harm is not required if the evidence supports the conclusion that visitation is harmful to the child. *In re Dependency of T.H.*, 139 Wn. App. 784, 794-95, 162 P.3d 1141 (2007), *review denied*, 162 Wn.2d 1001 (2008). But the harm must be "an actual risk, not speculation based on reports." *In re Dependency of T.L.G.*, 139 Wn. App. 1, 17, 156 P.3d 222 (2007). And "[s]omething more than opinions based on a single incident is necessary to support a finding of risk of harm." *T.L.G.*, 139 Wn. App. at 18.

Here, the trial court's January 13, 2010 order limited L.V.'s visitation rights. The order limited L.V.'s in-person visitation rights with respect to supervision and duration because the order provided that L.V. could only have weekly one-hour supervised visits. Previously, under

the Plan's amended visitation provision, L.V. could have unsupervised overnight weekend visits every other weekend. The trial court's order also reduced L.V.'s phone visitation rights by suspending L.V.'s right to initiate all telephone contact.[6] Previously, under the Plan's amended visitation provision, L.V. could initiate phone contact with A.L.[7]

RCW 13.34.136(2)(b)(ii) requires that the trial court determine that reduced visitation rights are necessary to protect a child's health, safety, or welfare before it can issue an order limiting a parent's visitation rights. Here, the trial court made no such determination.

Although the trial court opined that L.V. was not capable of exercising appropriate judgment with respect to his interaction with his daughter, it did not mention specific evidence indicating that reduced visitation was necessary to protect A.L. from harm. Instead, the trial court pointed to L.V.'s years of instability, unemployment, and insobriety to support its order. Had the trial court made express findings of harm, it would have discussed whether L.V.'s visitation rights, as adopted by its December 30, 2009 order, presented a risk to A.L.'s health, safety, or welfare. This it did not do. And, therefore, we find its analysis insufficient to satisfy RCW 13.34.136(2)(b)(ii)'s requirements.

Moreover, although an express finding of harm is not required if the evidence supports the conclusion that visitation is harmful to the child, the evidentiary record here does not support such a conclusion. In fact, the evidentiary record supports the opposite conclusion; that is, that A.L.

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[6] Telephone contact qualifies as a visitation right under Washington law. *See Halsted v. Sallee*, 31 Wn. App. 193, 194, 639 P.2d 877 (1982).

[7] The amended visitation provision does not expressly prevent L.V. from initiating contact with A.L. because it states that L.V. "has been asked not to call" the grandparents' home. CP at 297. While the provision is somewhat ambiguous as to what L.V.'s actual phone visitation rights are, this provision does not completely limit L.V.'s right to initiate phone contact with A.L.

benefitted from the unsupervised visitation and telephone contact with her father.

At the January 13, 2010 hearing, Fisher testified that L.V. and A.L.'s unsupervised overnight visits were going well and that she did not notice any changes in A.L.'s behavior after the visits. Shortly before the hearing, A.L. told Fisher that her visits with her father were going well and that they both enjoyed their visits. And two weeks prior to entering its January 13, 2010 order, the trial court[8] found that L.V. had complied with the Plan's provisions and noted that he was making progress toward "**correcting the problems that necessitated the child's placement in out-of-home care**."[9] CP at 321. L.V. had been working for six months at an auto shop, moved from the halfway house into a two-bedroom apartment, and complied with urinary analysis testing. Other than the November 2009 phone incident, Fisher, A.L., and the trial court all reported positive experiences from A.L. and L.V.'s interactions.

Further, the isolated November 2009 phone incident does not indicate that reduced visitation was necessary to protect A.L. from harm. DSHS had already taken action with regard to this incident by asking L.V. not to call the grandparent's house. And the trial court, adopted the DSHS amended phone provision in its December 30, 2009 order. This November phone incident, therefore, does not support the conclusion that *further* reduced visitation was necessary to prevent A.L from harm.

Given that neither the trial court's express findings nor the evidentiary record support the conclusion that reduced visitation was necessary to protect A.L.'s health, safety, or welfare, the trial court's order did not satisfy the statutory requirements set forth in RCW 13.34.136(2)(b)(ii).

[8] The December 30, 2009 findings were made by a different trial judge.

[9] No testimony at the January 13, 2010 hearing indicated that L.V.'s progress had regressed in the two weeks between December 30, 2009 and January 13, 2010.

Accordingly, we reverse and vacate the trial court's January 13, 2010 reduced visitation order and remand for further proceedings consistent with the trial court's December 30, 2009 order.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, J.

We concur:

ARMSTRONG, P.J.

HUNT, J.