

No. _____

Arizona Supreme Court No. CV-18-0237-PR
Arizona Court of Appeals No. 1 CA-JV 17-0443
Yavapai County Superior Court No. P1300JD201500090

IN THE
Supreme Court of the United States

DAISY T.,

Petitioner,

v.

ARIZONA DEPARTMENT OF CHILD SAFETY; I.W. & T.K. (minors),

Respondents.

**On Petition For Writ of Certiorari
From The Arizona Supreme Court**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether The State Of Arizona Failed To Terminate Mother's Parental Rights By At Least Clear & Convincing Evidence As Required By The Due Process Clause Of The Fourteenth Amendment?
2. Whether The Termination Of Mother's Parental Rights Was Erroneously Predicated Solely Upon The Children's Best Interests In Violation Of The Due Process Clause Of The Fourteenth Amendment?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page. There is no corporate disclosure statement required in this case under Rule 29.6.

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IN THE SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner/Mother, Daisy T. (hereinafter "Mother"), respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

A copy of the Order of the Arizona Supreme Court denying Mother's Petition for Review is annexed as Appendix A. A copy of the Memorandum Decision of the Arizona Court of Appeals, Division One, affirming the termination of Mother's parental rights is annexed as Appendix B. A copy of the Under Advisement Ruling from the Yavapai County Superior Court, State of Arizona, is annexed as Appendix C.

JURISDICTION

The date on which the Arizona Supreme Court filed its order denying the Petition for Review was March 6, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. §1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

- a) Fourteenth Amendment to the United States Constitution
- b) 28 U.S.C. §1257
- c) A.R.S. §8-533

STATEMENT OF THE CASE

On March 10, 2017, the Arizona Department of Child Safety (hereinafter the "Department") filed a Motion for Termination of Parent-Child Relationship requesting to terminate the parent-child relationship between Daisy T. (hereinafter "Mother") and

the Children, I.W. and T.K. (hereinafter the “Children”). The Department requested that Mother’s parental rights to the Children be terminated on the following statutory grounds: (1) Mother neglected the Children pursuant to A.R.S. §8-533(B)(2); and (2) the Children had been in an out-of-home placement for fifteen months or longer, Mother was unable to remedy the circumstances that caused the Children to be in out-of-home placement, and there is a substantial likelihood Mother will not be capable of parenting in the near future, pursuant to A.R.S. §8-533(B)(8)(c). The Department further alleged that it was in the best interests of the Children to terminate their parent-child relationship with Mother. *See* A.R.S. §8-533(B).

The trial to terminate Mother’s parental rights was held on June 5, 2017. Dr. Stephen Gill (“Dr. Gill”), a psychologist, completed a psychological evaluation of Mother on August 8, 2016. Transcript (hereinafter “T.”) 6/5/17 at 22.¹ There were concerns regarding Mother’s choice of partners and relationships. *Id.* at 25. Dr. Gill discussed that Mother had a diluted urinalysis test (“UA”) from April which was followed up by a clean (negative) hair follicle test. *Id.* at 32. The reason L.A. was removed from Mother’s care was due to the diluted UA test and Mother’s continued contact with Jay Adams (father of L.A.).² *Id.* at 33.

¹ Citations to the record are to the record on direct appeal in the Arizona state courts.

² L.A. is Mother’s youngest child that was born during these proceedings involving the two older children, I.W. and T.K. The Department did not seek to terminate Mother’s parental rights to L.A., but only to I.W. and T.K. Mother currently has custody of L.A.

Dr. Gill discussed a January 9, 2017 bonding assessment that had been completed on the family. The bonding assessment concluded that the Children would benefit from a stable home environment and raised the question of whether Mother could provide that. *Id.* at 34.

Dr. Gill recommended that Mother stay out of a relationship for 12 months, but he did not allege that had to happen for Mother to be an effective parent. *Id.* at 36-37. Mother had moved out of a home that was next to a past boyfriend (who the Department had raised concerns about). *Id.* at 37. Dr. Gill was concerned that Mother had not returned to her medication after her latest pregnancy.

Dr. Gill indicated that Mother had a very strong bond with her Children. The bonding assessment made that clear as well. *Id.* at 38. For the most part, the parenting aide reports on Mother's visits with the Children were positive. Dr. Gill did have concerns that I.W. (who was over the age of 12-years-old) did not want to be adopted. *Id.* at 39.

Dr. Gill recommended that Mother participate in dialectical behavior therapy ("DBT"), but the Department did not have that as an available service. *Id.* at 40. Dr. Gill believed Mother could parent at some point with a lot of structure and support. *Id.* at 41. Dr. Gill was reluctant to make a "broad" statement of whether or not Mother would be able to parent. Dr. Gill verified that he knew Mother was at the same employment for two years and was living in an apartment in Mayer, AZ that had been approved by the Department. Dr. Gill was concerned about the distance between Mother's apartment and Mother's employment. *Id.* at 43.

Dr. Gill confirmed that Mother stated she agreed with the idea of not being in a relationship. Dr. Gill found no cognitive defects that would prevent Mother from parenting. *Id.* at 44. Dr. Gill stated Mother failed to recognize when her choices were distressing to the Children. *Id.* at 45. Dr. Gill believed that due to Mother's difficult upbringing she may not be able to recognize what was acceptable for her Children, but he believed those difficulties could be remedied by services. *Id.* at 47.

From August 2016 to May 2017, Mother maintained sobriety. Mother maintained stable housing, employment and transportation. *Id.* at 48. Dr. Gill was pleased that Mother went back on her medication in the last week before trial. Mother was able to get herself on a waiting list for the DBT therapy that Dr. Gill had recommended. *Id.* at 49. This progress showed Dr. Gill that Mother was motivated to make improvements.

Dr. Gill's reevaluation stated that when sober, Mother is intelligent and capable of growth and development despite a long-term problematic history of her parental role. *Id.* at 50-51. Dr. Gill believed that if Mother maintained her stable housing, employment, sober supports, and recovery groups, she could be a minimally adequate parent. Dr. Gill was corrected that Mother's work was only 40 miles from her house, not 70 miles (the work distance was one of his biggest concerns). *Id.* at 51. Dr. Gill did not have an idea of how long it would take Mother to become a minimally adequate parent. *Id.* at 56.

Dr. Thal, a psychologist, testified that on January 9, 2017 he prepared a bonding assessment for the family. *Id.* at 58-59. Dr. Thal discussed the good relationship

between the Children and their foster parents. *Id.* at 60-62. Dr. Thal stated that T.K.'s behavior regressed while interacting with Mother. *Id.* at 62. Dr. Thal stated that Mother acted appropriately with the girls. He said T.K. was leaning on her Mother and talked in a kind of a "baby" voice (this was what Dr. Thal was seeing as regressed behavior). Mother tried to get T.K. to relax and open up more. *Id.* at 63. Dr. Thal reviewed T.K.'s psychological report, and it stated that she has anxiety. I.W. sat apart from Mother and T.K. Dr. Thal stated that "might have been meaningful", but admitted there was not a lot of room on the couch. Dr. Thal found I.W.'s interactions with Mother to be "routine". There was not a lot of engagement, but Mother had her hands full in dealing with T.W. T.W. was doing some taunting and teasing of I.W., and Mother dealt with that situation. *Id.* at 64.

Dr. Thal discussed Brandon Holmes (Mother's ex-boyfriend). In prior reports, it was indicated that Mother had a domestic violence relationship with him. *Id.* at 65. Dr. Thal received information in the reports that the Children were afraid of Holmes. Dr. Thal believed Mother was minimizing the Children's fears. *Id.* at 66-67. Dr. Thal stated in his report that the girls were sensitized to issues of loyalty and not wanting to betray their Mother's trust and love. *Id.* at 68.

Dr. Thal indicated that these were reasons that I.W. could not be fairly assessed regarding her wishes on adoption. At times, I.W. would say it did not matter or she did not care regarding adoption or going back to Mother. *Id.* at 70. Dr. Thal identified the trauma that I.W. has experienced in her life. *Id.* at 71-72.

Dr. Thal could not get a sense of what T.K. wanted. *Id.* at 72. Dr. Thal stated in the individual interview and in records, T.K. has verbalized a desire to be returned to Mother.

Dr. Thal's bottom-line finding was that Mother will not be able to provide a safe and stable environment for the Children at any time in the near future. He believed that it was in the best interest of the Children to have Mother's parental rights terminated. *Id.* at 73-75.

From the parent aide reports, Dr. Thal agreed that Mother exceeds the required minimum standard of ability to parent her Children. *Id.* at 79. On cross-examination, Dr. Thal confirmed that T.K. has always wanted to go back with Mother. He verified that I.W. also wanted to go back to Mother, but he believed it was a "decidedly unenthusiastic statement". *Id.* at 80. Dr. Thal acknowledged that if I.W. did not consent to adoption that she could remain in foster care until she became of age. *Id.* at 86.

Dr. Thal acknowledged that he did see a bond between Mother and the Children. *Id.* at 87. The Children were relaxed and comfortable with Mother. Dr. Thal believed the Children would be distressed if they were not allowed to see their Mother in the future. *Id.* at 88. Dr. Thal was not asked to make a recommendation on whether Mother could parent, but he did find that Mother exceeded the minimally adequate standards of parenting. *Id.* at 89.

Rachel Alltop ("Alltop"), a program manager and counselor at Child Family Support Services, was a counselor for the Children. *Id.* at 96. In May 2016, Alltop's therapeutic relationship with I.W. came to a halt, and I.W. began saying things like,

“You’re going to use what I say against my mom in court and all adults are alike and I’m not supposed to talk about that.” *Id.* at 98, 100. In 2017, Alltop became I.W.’s counselor again, and the therapeutic relationship did not have any further problems. *Id.* at 99. Alltop believed that I.W. did not want Mother to get into trouble. *Id.* at 101-102.

I.W. has stated to Alltop that she did not wish to be adopted, and she wished to go back to Mother. I.W. spoke the statements recently and remained consistent on those wishes. *Id.* at 106-107. Alltop stated she believed I.W. was being “coached” on visits with Mother. *Id.* at 107. After a visit with Mother, Alltop stated that I.W. shut down, and the placement reported the same. *Id.* at 108. I.W. and T.K. are safe in their current placement and their hygiene is better. *Id.* at 109.

The Children never used the word “coached” regarding their Mother, but Alltop stated that the Children appeared to be told what to say by Mother. *Id.* at 110, 113. The Children never made statements that Mother threatened them about any boyfriends. *Id.* at 110.

T.K.’s attitude toward Mother has consistently been positive. With I.W., it has been an “ebb and flow” and some of it is “normative to age”. I.W. was mad because she felt she was promised her own room, and she felt Mother would not deliver. Alltop believed it would be traumatic if the Children did *not* have any contact with Mother. *Id.* at 112.

Jami Tiefenthaler (“Tiefenthaler”), office administrator at the Yavapai Family Advocacy Center, conducted a forensic interview of T.K. *Id.* at 116-117. T.K. refused to talk about “Jay” and she asked to end the interview several times. (Jay was identified as

L.A.'s father, Michael Jason Adams. *Id.* at 126.) T.K. said that she did not like the way Jay touched her. *Id.* at 118-120. T.K. also told Tiefenthaler that she was 18 years-old, has a child, has a boyfriend and is married (none of those things are true). *Id.* at 121. T.K. said that she wanted to live with Mother. T.K. made no disclosures about Jay except that he touched her on her stomach over her clothes and he would hug her. In contrast, I.W. stated that Jay did *not* make her uncomfortable. *Id.* at 122.

Mother testified in the State's case. Mother testified about her prior relationship with Mr. Adams (Jay). *Id.* at 124-139. Mother denied coaching the Children about what to say or not to say to the Department's case managers. *Id.* at 141. Mother found there to be inaccuracies in the case manager's notes about quotes from Mother. *Id.* at 142-143. Mother also discussed her 2014 relationship with Brandon Holmes and confirmed that there was domestic violence. *Id.* at 144-145.

Mother now lives in Mayer, which is farther away from some of the people that were a bad influence on her. Mother's father does not live near her. *Id.* at 151. Mother acknowledged that T.K has always wanted to go home with her.

Between September 9, 2016 and May 15, 2017, Mother had approximately 105 clean UA tests. Mother completed intensive outpatient therapy, and she liked the program so much that she continued to go to the classes. Mother does not have a boyfriend and was not involved with a man at the time of trial. *Id.* at 152. She was willing to put the needs of her Children above all else. Mother had been at her job for about four years. She is able to move to full-time as needed. *Id.* at 153.

Mother was avoiding L.A.'s father due to his convictions. *Id.* at 155-158. Mother denied any drug use at the time of L.A.'s birth. She believed the diluted tests were due to drinking a lot of water while she was pregnant. Mother followed up the diluted UA with a hair follicle test, which was negative. *Id.* at 158. Mother explained the successes with her sobriety program. *Id.* at 158-160.

Mother explained her difficulties with her case worker at the Department. The caseworker came to see her in jail and said that her girls were being well taken care of. Mother explained that she was in the foster care system herself from three years old until she aged out of the system. At times, Mother was not honest with the case worker, particularly regarding her pregnancy. *Id.* at 161. Her relationship with the case worker shifted to the positive when she realized that she needed to use her case worker as a resource. *Id.* at 162. Mother would provide information to the case worker in weekly emails.

Mother goes to AA (Alcoholics Anonymous) and NA (Narcotics Anonymous) meetings. She also goes to West Yavapai Guidance Clinic for counseling. *Id.* at 163. Mother has done parenting classes and domestic violence classes. Mother has completed vocational rehab services and participates in a class for healthy relationships and boundaries. *Id.* at 164.

Regarding her work commute, Mother commutes about 35 minutes each way. Mother has not made promises to the girls about returning to her care. *Id.* at 165. Mother loves her Children, and she worked hard to fix her mistakes. She loves being sober. *Id.* at 168. She also found a location to engage in DBT therapy. *Id.* at 170.

The trial continued into a second day. Beverly Veale ("Veale"), a Department of Child Safety specialist, testified that she was present at the initial investigation of Mother's home. Veale saw a bed for an adult and then two bunk beds. There was a shower without a door, and "some sexual instrument on the bed". There were dishes in the sink and the place was rather small.

Veale talked to the girls about being afraid of Brandon Holmes. T. 6/9/17 at 10. Mother did not appear to understand why the Department was concerned about her renting a home next to Brandon Holmes. Mother did not tell the Department that her father had been living with her at that time. It was the Department's understanding that her father was using methamphetamine. *Id.* at 11.

Mother did not initially tell Veale when she became pregnant. *Id.* at 12. Veale asked Mother if she was pregnant, and Mother then told her that she was pregnant and who the father was. *Id.* at 14. Veale believed Mother and other family members may have discussed the case with the girls. *Id.* at 15. Veale told of a story where I.W.'s cousin was speaking to her on the first day of trial and followed her into the bathroom, and I.W. was very upset by the incident with her cousin. *Id.* at 16. It was reported that I.W. became irritable and volatile when she arrived home that evening. Veale stated that she believed it was in the Children's best interests that Mother's rights be terminated. *Id.* at 18. Veale did not believe that Mother could provide a safe, stable home and adequate parental care. *Id.* at 19.

Veale confirmed Mother completed the psychological evaluation, bonding evaluations, a second psychological evaluation, completed many, many UAs, attended

her parenting classes, completed her IOP, and attended all of her visits with the Children (missing either none or very few). *Id.* at 26.-27. Dr. Gill's evaluation indicated Mother was bonded with the Children. Dr. Thal's bonding assessment also indicated Mother was bonded with the Children. *Id.* at 27-28. Mother never ended up actually moving into the trailer that she had rented next to Brandon. As stated, she moved to Mayer instead. *Id.* at 28.

T.K. has always stated she wants to go home, and I.W. indicated that she did not want to be adopted. *Id.* at 29. Veale stated it would be in I.W.'s best interests to be freed for adoption, but I.W. (who is 12-years-old) would be required to consent to her adoption. (Veale was not entirely clear on the barriers to adoption.) *Id.* at 30-32. Veale recalled a guardianship situation being raised as a possibility, but she did not agree with guardianship. *Id.* at 32-33.

In the allegations of the Motion for Termination of Parent-Child Relationship, it was alleged Mother had a dirty home. By the time of the trial, Mother's current home was appropriate and suitable for the children. Also, Mother was not in a relationship with Brandon Holmes (who was alleged to be a problem in the Motion). *Id.* at 34. The Motion alleged Mother was using illegal drugs. In July 2016, Mother did not complete UAs, and there were a couple of periods that Mother told Veale she relapsed on methamphetamine. However, from August 1, 2016 to the current date (other than a couple of diluted UAs), all of Mother's UA tests were timely and clean (negative). *Id.* at 35. Mother had also offered and completed a hair follicle, the results of which were also negative.

While Mother was four and a half months pregnant with L.A., Mother disclosed that Mr. Adams (Jay) was the father. Mother discussed the importance of distancing herself from Mr. Adams. *Id.* at 36. At the time of trial, Veale did not believe that Mother was involved in a relationship with Mr. Adams. *Id.* at 40. Mother sent weekly emails to Veale, and she would notify Veale of her weekly activity in the community. Veale believed that Mother had become more transparent with her. *Id.* at 37.

Veale was not aware of the recommendation for DBT therapy. *Id.* at 38. Mother informed Veale that she had gotten onto a list for the therapy. Veale believed that Mother needed to complete Stepping Stones, parenting classes, weekly counseling, AA sponsorship, domestic violence counseling, and continue with the services that she was already participating in. *Id.* at 39. Mother has been compliant with all of the requests of the Department. *Id.* at 41. Despite Mother having remedied the dirty home, remedied her substance abuse, and not being in any relationships, Veale still believed that severance of Mother's parental rights to T.K. and I.W. was appropriate. *Id.* at 42. However, Veale was supportive of Mother reunifying with L.A. *Id.* at 43. The Children's Guardian *ad Litem* rested her case at the end of this testimony. *Id.* at 46.

Mother called her substance abuse sponsor, Laura Lange ("Lange"), as a witness. *Id.* at 47. Lange is working with Mother on step four of treatment, which is taking personal inventory of anger, frustration, resentments, and working on changing any of those feelings. Mother has not been involved with any males since Lange has been working with her. *Id.* at 49. Lange's insights as to Mother were that Mother has gained

knowledge from working the steps so as not to repeat the same behaviors in the future.

Id. at 50.

Mother has shown increased stability in the past six months by showing accountability for her past, willingness to change past behaviors, willingness to own her part, willingness to want sobriety, and wanting to continue working the program. Lange believes Mother is maintaining her sobriety. Mother is committed to remaining relationship free for a period of time. *Id.* at 51. Mother surrounds herself with sober supports, and Mother and Lange attend the same recovery groups. *Id.* at 52.

April Hughes (“Hughes”), Mother’s parent aide, supervises Mother’s visits with the Children for 3 hours on Tuesdays and four hours on Saturdays. The baby, L.A., is present on the Tuesday visits. During the visits, Mother and the Children go to the library and watch movies. *Id.* at 56. They will sometimes cook together, do arts and crafts, manicures/pedicures, celebrate holidays, and play sports. Mother chooses the activities for the visits, and the activities are age-appropriate. Hughes has been at Mother’s homes eight to ten times. The residence is always clean and appropriate. *Id.* at 57. Hughes noted no concerns or safety risks regarding Mother’s residence. Mother has only brought guests to the visits with prior approval. Mother has brought her sister and nieces and nephews, and they were not a problem. Mother has not brought any male guests to any of the visits.

The Children are comfortable in Mother’s presence. Concerns that Hughes noted had mostly to do with the girls bickering. *Id.* at 58, 66. Mother will intervene when the Children bicker. Hughes has never witnessed Mother telling the Children that they

need to say certain things. Hughes has seen growth in Mother's parenting. Mother has taken on a parental role and established credibility with the Children. Mother is able to manage all three Children during the visits. *Id.* at 59. Mother has not discussed the case in front of the Children. Hughes has no concerns that Mother poses a safety risk to her Children. *Id.* at 60. Hughes has not had to redirect Mother and has had no concerns regarding Mother. *Id.* at 61. Hughes stays in earshot of Mother at all times, and she hears the discussions between Mother and the Children. Mother does not discuss the case or make promises regarding what will happen in the future. *Id.* at 63. Mother would seek direction if the Children started to ask specific questions about the future. *Id.* at 64.

Mary Vanderzee ("Vanderzee"), Mother's boss, met Mother because she was Mother's sister's legal guardian. Mother lived with Vanderzee when Mother was a teenager. *Id.* at 68. Mother became pregnant at 15 years-old while in Vanderzee's care. *Id.* at 69.

Mother repairs furniture for Vanderzee's business. Mother worked on and off for Vanderzee for 5 ½ years prior to September 2015, and then Vanderzee stopped hearing from Mother. *Id.* at 71. During the dependency, Mother continued to work for Vanderzee. She works 20 hours per week. Vanderzee has witnessed Mother's sobriety. Mother is dependable, and she is trying hard to learn new things for the business. Mother talks about her Children all the time. *Id.* at 72. Vanderzee has been supportive of Mother's schedule due to the dependency case and allows Mother to work when she

is available. Vanderzee has not witnessed Mother in a romantic relationship within the past six months. *Id.* at 73.

Vanderzee has seen Mother parenting the Children, and she is appropriate around the Children. The Children have not expressed any fear of Mother. If Mother is available, she can work 40 hours per week for Vanderzee. Vanderzee has seen no issue with the distance from Mother's home to work. Mother's home in Mayer is appropriate. *Id.* at 75. Vanderzee is aware that the Children want to go home to Mother. Vanderzee is willing to be a placement for the Children as well. *Id.* at 76.

Mother rested her case, and the parties agreed to submit written closing arguments. *Id.* at 79. The trial court took the matter under advisement, pending the written closing arguments. *Id.* at 80. Mother and the Children submitted a joint closing argument, and both took the position that Mother's parental rights should not be terminated.

The trial court issued its Under Advisement Ruling on the Motion for Termination of Parent-Child Relationship on September 11, 2017. The trial court terminated Mother's parental rights on both of the grounds alleged in the Motion (neglect and 15-months time-in-care), and also found that termination of parental rights was in the Children's best interests. *See Appendix C.*

Mother timely filed a notice of appeal. The Arizona Court of Appeals, Division One, affirmed the termination of Mother's parental rights on the statutory ground of 15-months time-in-care. *See Appendix B.* Regarding the issue of best interests, the Court of Appeals, Division One stated in its Memorandum Decision:

"Since being in foster care, the Children have progressed emotionally and physically. They have done well in school and are involved in community and family events with their foster parents. The foster parents have consistently made positive decisions about what is in the best interests of the Children, which cannot be said of Mother. Dr. Thal also opined that the Children's interests were best served by a safe, nurturing, and secure environment, which the foster parents could offer, but Mother could not. This is sufficient evidence for the court to find by the preponderance of the evidence that severance is in the best interests of the Children."

However, prior to the Arizona Court of Appeals decision, the trial court issued an Interim Ruling on the Guardian *ad litem*'s motion to set aside the termination of Mother's parental rights acknowledging that the Children had disrupted from the foster placement to which the Court of Appeals refers, and that Mother had reunified with her youngest child, L.A. The trial court acknowledged in its Interim Ruling that: 1) the termination order was entered on September 11, 2017 when the Children were residing in a prospective adoptive placement, but that placement disrupted in January 2018; and 2) Mother was able to reunify with her youngest child after her rights to I.W. and T.K. were terminated. Both of those events happened prior to the Arizona Court of Appeal's appellate decision and were raised in Mother's appellate briefing. Also, the record on appeal was supplemented with the additional minute entries from the trial court. At a minimum, the fact that the Department had reunited L.A. with Mother and Mother was able to parent her shortly after the termination trial for I.W. and T.K., demonstrated the testimony at trial about Mother's inability to parent in the near future was false.

The Court of Appeals also found that the evidence at trial established the following:

- The Children were originally found dependent based on an allegation that Mother had neglected them due to their deplorable living conditions and her drug abuse and incarceration. By the time of the severance trial, Mother established ten months of sobriety and had moved into appropriate housing.³ *See Appendix B at p. 7.*
- At the time of trial in June 2017, the evidence showed that Mother had been drug-free for around ten months, was employed, and lived in appropriate housing. Mother's DCS case worker and sobriety sponsor each testified that Mother told them she was not in a romantic relationship and had not been for months. In addition, the case manager testified Mother "recently" had been "more than compliant" with the Department's requests and that Mother had attended parenting classes, submitted to psychological and bonding evaluations, completed the group therapy program, and missed very few, if any, visits with the Children. *See Appendix B at p. 4-5.*
- Dr. Thal testified that Mother "exceeds minimally adequate parenting standards." *See Appendix B at 5.*
- Dr. Gill testified that it was possible for Mother to remedy her deficits through the services provided by the Department. *See Appendix B at 8.*
- As part of the "reasonable evidence" that Mother failed to remedy the relevant circumstances the Court stated, "as late as two months before the severance trial, she left her newborn in Jay's care despite the Department's warnings that he posed a risk to the children." *See Appendix B at 8.* (However, apparently Jay did not actually pose a risk to the Children as Mother was reunified with her youngest child, whom Jay is the father of, shortly after her parental rights to I.W. and T.K. were terminated. Which then begs the question whether Jay was actually any risk to the Children at all, or how he can only be a risk to two of the children but not the third).
- The DCS case manager testified it was "reasonable to presume" that Mother would not be able to provide a safe and secure environment for the Children in the near future. *See Appendix B at 9.* (Although at the same time she gave that testimony the Department was simultaneously moving forward with reunification of Mother with her youngest child, who was in fact reunified with Mother not long after her parental rights to I.W. and T.K. were terminated).

³ The Court of Appeals declined to address Mother's argument that the termination of her parental rights on the ground of neglect was erroneous.

- The Court of Appeals also stated, “There is evidence in the record, including the progress report notes indicating Mother’s improvement in the months immediately preceding trial, that she would be able to parent in the near future.” *See Appendix B at 9.*
- The Court of Appeals finding that there was “sufficient evidence...that severance is in the best interests of the Children” rested solely on how well the Children were doing in the foster home and the care that the foster parents were providing. *See Appendix B at 9.* (However, the Children disrupted from that foster home prior to the Court of Appeals decision and have since resided in a group home where it is expected they will continue to reside until they age out of the foster care system).

Mother subsequently filed a Petition for Review with the Arizona Supreme Court. Mother requested that the Arizona Supreme Court accept review and grant relief because the trial court’s termination of Mother’s parental rights was unsupported by the evidence, and in fact rested on false testimony, as demonstrated by the Court of Appeals findings and the events that happened after the trial. The opinions upon which the trial court rested its termination decision, specifically regarding whether Mother had remedied the circumstances and whether she would be capable of proper and effective parenting in the near future, were proven to be wrong by the events that occurred shortly after termination. However, the Arizona Supreme Court denied review. *See Appendix A.*

REASONS FOR GRANTING THE WRIT

This appeal arises from Mother’s claims that the State of Arizona failed to support its allegations to terminate Mother’s parental rights by at least clear and convincing evidence, as required by the Due Process Clause of the Fourteenth Amendment of the United States Constitution. Therefore, Mother requests that this

Court assess the constitutional adequacy of Arizona's procedures for terminating a parent-child relationship.

I. The State Of Arizona Failed To Terminate Mother's Parental Rights By At Least Clear & Convincing Evidence As Required By The Due Process Clause Of The Fourteenth Amendment.

This Court has recognized on numerous occasions that the relationship between parent and child is constitutionally protected. *See Quilloin v. Walcott*, 434 U.S. 246, 255 (U.S. 1978); *See also Lehr v. Robertson*, 463 U.S. 248, 258 (U.S. 1983) (relationship of love and duty in a recognized family unit is an interest in liberty entitled to constitutional protection). State intervention to terminate such a relationship must be accomplished by procedures meeting the requisites of the Due Process Clause of the Fourteenth Amendment. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982); *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981). "Before a State may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support its allegations by at least clear and convincing evidence." *Santosky*, 455 U.S. at 747-748. Until the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship. *Id.* at 760.

This is a case in which Mother has completed all of the services required by the Department, demonstrated her ability to parent her Children (and is, in fact, currently parenting one of her children), but the State of Arizona terminated her parental rights anyways. Therefore, Arizona's statutes and rules governing the termination of parental rights, as demonstrated by how they were interpreted and applied in Mother's case, did not adequately safeguard her constitutionally protected relationship with her Children.

A. The Procedures To Terminate Mother's Parental Rights On The Grounds Of Neglect Did Not Meet The Requisites Of The Due Process Clause Of The Fourteenth Amendment Because Such Termination Was Not Predicated Upon Clear & Convincing Evidence.

Arizona authorizes the termination of a parent-child relationship pursuant to A.R.S. §8-533(B)(2) upon clear and convincing evidence that the parent has neglected or willfully abused a child. Pursuant to A.R.S. §8-201(25)(a), "neglect" means:

"The inability or unwillingness of a parent, guardian or custodian of a child to provide that child with supervision, food, clothing, shelter or medical care if that inability or unwillingness causes unreasonable risk of harm to the child's health or welfare..."

The neglect allegations against Mother focused on the following: Mother's dirty home, relationships with inappropriate males, Mother's drug use, and poor decision making. Based upon those allegations, the trial court found that Mother neglected the Children or failed to protect the Children from neglect so as to cause an unreasonable risk of harm to their health and/or welfare.

At the time of the trial, Mother had eleven months of sobriety. Mother completed a multitude of substance abuse-related services, including IOP (which she continued to engage in voluntarily after successful completion of the program), random urinalysis testing, hair follicle testing in April 2017, Stepping Stones classes, and AZFF services. Mother testified to her sober life and commitment to sobriety. Mother attended NA/AA meetings regularly and worked with a sponsor. She had not missed any urinalysis tests since August 2016 and had over a hundred clean urinalysis tests. When she had diluted tests prior to giving birth to L.A., she requested and submitted a

hair follicle test which showed negative for all substances. T. 6/5/17 at 38-46, 51-52, 163-164. At the July 11, 2017 Report and Review Hearing, the trial court gave the Department the discretion to reduce Mother's UA testing. The evidence did not support the trial court's finding that Mother had not remedied her substance abuse problem by the time of the trial.

Mother also remedied the concerns regarding the condition of her home. At the time of trial, Mother was living in an appropriate and clean home. Veale testified that Mother's home had been approved by the Department as being an appropriate home in which the Children were having visits. In fact, the trial court had given the Department discretion to move to overnight visits in Mother's home. Mother's employer also testified that Mother has stable employment with the opportunity to work a full-time schedule at any point in the future should her schedule allow. The parent aide testified to the success of the visits with the Children. The experts testified that it would be a bad idea for Mother to never have contact with the Children again due to the Children's strong bond with Mother.

Mother also remedied the issues regarding prior relationships and made active efforts to avoid repeating the same patterns. Many of the witnesses discussed Mother's past relationships with Brandon Holmes and Jason Adams, coupled with Mother's initial lack of transparency with the Department. Mother acknowledged during the trial that in the past she had chosen the wrong men, and she had a difficult time trusting the Department and Veale due to her own history as a child in the foster care system. Mother made poor decisions, and she recognized and admitted her

shortcomings. By the time of the trial, Mother had actively worked to change herself, including participating in individual therapy, working with a sponsor, and communicating regularly with Veale.

Under the law, the Department must prove each fact by clear and convincing evidence. The Department alleged that Mother failed to remedy the possible danger to the Children due to a “dirty home”, substance abuse, and poor choices by Mother. Mother did not deny that there were problems prior to the dependency. After the dependency was filed, Mother recognized the seriousness of the situation, and Mother dove into services and provided what her Children needed. In fact, the trial court acknowledged this prior to the trial by lowering Mother’s UA testing and allowing overnight visits with L.A. in her home. The Department failed to meet its burden of proving that Mother neglected the Children as required by the law.

The evidence in this case fell far below the clear and convincing standard required by the United States Constitution to terminate Mother’s rights on the ground of neglect. By terminating Mother’s parental rights upon less than clear and convincing evidence, the trial court failed to afford Mother her constitutional due process protections. Therefore, Arizona’s procedures for terminating a parent-child relationship on the basis of neglect are constitutionally deficient. As such, Mother requests that this Court vacate the judgment of the Yavapai County Superior Court.

B. The Procedures To Terminate Mother’s Parental Rights On The Grounds Of 15-Months Time-In-Care Did Not Meet The Requisites Of The Due Process Clause Of The Fourteenth Amendment Because Such Termination Was Not Predicated Upon Clear & Convincing Evidence.

Arizona also authorizes the termination of a parent-child relationship pursuant to A.R.S. §8-533(B)(8)(c) upon clear and convincing evidence that a parent is unable to remedy the circumstances causing their children to be in court-ordered, out-of-home care for fifteen months or longer. It must also be established that there is a substantial likelihood the parent will not be capable of exercising proper and effective parental care and control of the Children in the near future. *Id.* It is not a parent's burden to prove he or she will be capable of parenting effectively in the near future, but the moving party's burden to prove there is a substantial likelihood he or she will not. *Jordan C. v. Ariz. Dep't of Econ. Sec.*, 223 Ariz. 86, 97 (App. 2009). In order to accomplish termination on this ground, the Department must first make a diligent effort to provide appropriate reunification services to the parent. A.R.S. § 8-533(B)(8). The trial court must then consider the availability of those services to the parent and the parent's participation in those services. A.R.S. § 8-533(D).

In the final order the trial court found that Mother was unable to remedy the circumstances that caused the Children to be in an out-of-home placement, including "refusal to meaningfully participate in reunification and other services offered by the Department". The trial court generically stated that Mother will not be capable of exercising proper and effective parental care and control in the near future. The trial court made no factual determinations to support those legal conclusions.

There was no dispute that Mother completed all of the services requested of her by the Department: substance abuse classes and treatment, individual counseling, a psychological evaluation, a bonding assessment, urinalysis testing, parenting aide

services, and attending all visitations and all court hearings. Mother submitted to over one hundred (100) timely UA tests, and all were negative. When one test came up diluted during Mother's pregnancy, she promptly submitted to a hair follicle (at Mother's own insistence) that was negative. Mother obtained stable housing, stable employment, and she had dependable transportation.

Dr. Gill's evaluation supported Mother's case. Dr. Gill stated that when sober, Mother is intelligent and capable of growth of development despite a long-term problematic history of her parental role. T. 6/5/17 at 50-51. She had reached all the requirements to be a minimally adequate parent according to Dr. Gill. In fact, Dr. Gill was fixated on the distance to Mother's work as being a major concern, but the evidence established that she only worked 35 minutes from home. Dr. Thal opined that Mother had exceeded the minimum standards of ability to parent her Children. *Id.* at 79, 89.

Veale verified that Mother had been compliant with all of the requests of the Department. *Id.* at 41. Despite Mother having remedied the dirty home, substance abuse, and not being in any relationships, Veale still believed that severance of parental rights to I.W. and T.K. was appropriate. *Id.* at 42. At the same time, Veale was supportive of Mother's reunification with L.A. *Id.* at 43. L.A. was Mother's third child whom the Department subsequently removed from Mother's care after her birth, placed in foster care, and alleged was a dependent child. The dependency trial for L.A. was combined with the termination trial as to I.W. and T.K. *Id.* at 4. The Department chose ***not*** to move forward with terminating Mother's parental rights to L.A. at the same time that they proceeded to terminate Mother's parental rights to I.W. and T.K. Instead, the

Department took the contradictory and incompatible positions that Mother would be unable to parent I.W. and T.K. "in the near future" while simultaneously moving forward with a plan of reunification for L.A. - meaning the Department believed Mother would be able to parent L.A. in the near future. In fact, the Department did return L.A. to Mother's care shortly after the trial terminating her parental rights to I.W. and T.K. Therefore, Veale testified at the trial that Mother could not provide a safe, stable home and adequate parental care (*Id.* at 19) when she in fact knew that was not true.

The issues raised in the Motion for Termination were resolved by Mother's successful completion of services by the time of the trial. Mother had remedied the circumstances that caused the Children to be in State custody and was able to parent. The trial court simply ignored the evidence regarding the progress Mother had made, which is evidenced by the trial court's lack of factual findings to support the legal conclusions in its Under Advisement Ruling. The trial court made the finding that Mother was unable to remedy the circumstances that cause the Children to be in an out-of-home placement, including "refusal to meaningfully participate in reunification and other services offered by the Department", even though the evidence and all of the testimony at trial were directly contrary to that finding. "In appraising the nature and quality of a complex series of encounters among the agency, the parents, and the child, the court possesses unusual discretion to underweigh probative facts that might favor the parent." *Santosky*, 455 U.S. at 762.

The evidence at trial did not support the trial court's findings on the grounds for termination. The Court of Appeals acknowledged in its Memorandum Decision that the trial court "did not make any specific factual findings supporting its decision to sever Mother's rights based on" the ground of time-in-care. *See Appendix B* at p. 6. Specifically, the trial court did not make any factual findings supporting its conclusion that Mother "has been unable to remedy the circumstances that cause the children to be in an out-of-home placement" or that there is a "substantial likelihood that Mother will not be capable of exercising property and effective parental care and control in the near future." *Id.*

Mother did not receive due process in this case. The evidence fell far below the clear and convincing standard required by the United States Constitution to terminate Mother's rights on the ground of 15-months time in care. Therefore, Arizona's procedures were constitutionally deficient, and this Court should vacate the judgment of the Yavapai County Superior Court.

II. Since The State Failed To Prove Mother's Unfitness By Clear & Convincing Evidence, The Termination Of Mother's Parental Rights Was Erroneously & Solely Predicated Upon The Children's Best Interests.

This Court has recognized that the fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents. *See Santosky v. Kramer*, 455 U.S. 745, 753 (1982). Parents have a liberty interest, protected by the Constitution, in having a reasonable opportunity to develop close relations with their children. *Id.* The Due Process Clause would be offended if a State were to attempt to force the breakup of a

natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest. *Quilloin v. Walcott*, 434 U.S. 246, 255 (U.S. 1978).

In Arizona, in addition to the statutory findings a court must make to support termination, the court must also find severance to be in the best interest of the child: that is, that severance provides some benefit over the continuation of the parent-child relationship. *In re Maricopa County Juvenile Action No. JS-8441*, 175 Ariz. 463, 857 P.2d 1317 (Ct. App. 1993). Although the best interests of the child alone are not sufficient to grant termination, they may be sufficient to deny termination. *In re Appeal in Maricopa County Juvenile Action*, 155 Ariz. 556, 559 (Ct. App. 1988).

This Arizona requirement – that termination cannot be predicated solely on a finding of best interests – appears to be in line with the Due Process requirements expressed in *Quilloin*. However, given the procedures in this case that resulted in a termination of Mother's parental rights without clear and convincing evidence of her parental unfitness, the trial court's termination was granted solely on a finding of best interests. Such a result runs afoul of the Fourteenth Amendment.

Those involved in this case apparently felt that I.W. and T.K. would be 'better off' with the foster parents than they would be with Mother. In fact, the Arizona Court of Appeals Memorandum Decision cited the following evidence regarding the Children's best interests:

"Since being in foster care, the Children have progressed emotionally and physically. They have done well in school and are involved in community and family events with their foster parents. The foster parents have consistently made

positive decisions about what is in the best interests of the Children, which cannot be said of Mother. Dr. Thal also opined that the Children's interests were best served by a safe, nurturing, and secure environment, which the foster parents could offer, but Mother could not."

See Appendix B.

The evidence and testimony at trial was that Mother and the Children are strongly bonded. Dr. Gill testified that Mother had a very strong bond with the children. The bonding assessment made that clear as well. T. 6/5/17 at 38. The parenting aide reports regarding Mother's visits with the Children were very positive. *Id.* at 39. Dr. Thal also acknowledged that he saw a bond between Mother and the Children. *Id.* at 87. The Children have repeatedly and unequivocally expressed their desire to return to Mother. Despite this evidence, it was determined that the parent-child relationship between the Children and Mother should be terminated so that the Children would be free for adoption.

The record is undisputed that I.W. is unwilling to consent to adoption. I.W. made her position very clear in the Guardian *ad litem*'s closing argument, which stated, "[I.W.] is unwilling to consent to adoption, which is necessary given her age for the case plan goal of adoption to be accomplished. Dr. Thal's testimony was clear that creating a long-term foster care circumstance for any child is not in that child's best interests.... Termination would result in greater hardship to [I.W.] than any benefit she would receive...". Given that I.W. is over the age of twelve, her consent to an adoption is required by law. Therefore, I.W. is unadoptable. Termination of Mother's parental rights will not achieve any of the finality, permanency or stability for the Children that

the trial court deemed it would. In fact, the record in the trial court reflects that the Children disrupted from their foster home in January 2018, just a few short months after Mother's parental rights were terminated.

Contrary to the assumptions of both the trial court and the Arizona Court of Appeals, foster care is not, in fact, a stable environment. Unfortunately, the reality of foster care is that foster children move much too frequently, and their placement in a particular foster family is never secure or stable. The average number of placements for a foster child in Arizona is 2.6, and the number of placements for any particular child ranges from 1 to 59. See Arizona Department of Child Safety, "*Child Welfare Reporting Requirements Semi-Annual Report for the Period of Apr. 1, 2017 through Sept. 30, 2017*"; 2016 Kids Count Data Center. In this case, the Children no longer live with the same foster parents that the Court of Appeals repeatedly referred to as evidence that the Children were doing so well in foster care.

Although an adoptive or even permanent placement is not available for the Children, Mother IS currently able to parent them. A best interests determination must rest on more than a mere hope that a child's placement in a foster care family will provide them with more security and stability than the legal parent, or that a child over 12 'might' change their mind about adoption. Statistics show that remaining in foster care will almost certainly fail to provide a child with stability or security. Especially when, as in this case, the Children will continue to live in temporary foster placements until they 'age-out' of the foster care system. Foster care has shown itself not to be a stable or sustainable long-term living situation.

Since the termination of Mother's parental rights was not supported by clear and convincing evidence of Mother's unfitness, the termination was based solely upon what the trial court felt would be in the best interests of the Children. Such a procedure violates the Due Process Clause of the Fourteenth Amendment. Therefore, this Court should vacate the judgment of the Yavapai County Superior Court.

CONCLUSION

If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections. *Santosky*, 455 U.S. at 753. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures. *Id.* at 753-754. The State of Arizona did not provide Mother with those Constitutional protections. Therefore, Mother requests this Court grant certiorari and vacate the judgment of the Yavapai County Superior Court terminating Mother's parental rights.

RESPECTFULLY SUBMITTED this 15th day of April 2019.

LAW OFFICE OF FLORENCE M. BRUEMMER, P.C.

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