IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

IN THE MATTER OF THE WELFARE OF:

J.W., A.W., and D.W., Jr.,

Minor children.

Consol. Nos. 50710-2-II
50714-5-II
50720-0-II
50724-2-II
50730-7-II
50734-0-II
51210-6-II
51214-9-II
51220-3-II
51224-6-II
51230-1-II
51234-3-II

RULING AFFIRMING ORDERS TERMINATING PARENTAL RIGHTS AND DENYING GUARDIANSHIP PETITIONS

D.W. is the father of J.W., A.W., and D.W., Jr.[1] He appeals the juvenile court's orders terminating his parental rights to these children and denying his petitions for guardianships for these children. He argues that the juvenile court judge erred by: (1)

[1] J.W. was born in August 2008. A.W. was born in December 2011. D.W., Jr. was born in April 2014.

APPENDIX A

not recusing himself; (2) not granting his motion for summary judgment; (3) denying the guardianship petitions; (4) denying his motion to extend the time to object to the Department of Social and Health Services's (Department)[2] ER 904 notice; and (5) dismissing his original guardianship petitions for lack of service. He also argues that the Department failed to prove: (1) it made reasonable efforts to provide him court ordered services while he was incarcerated; (2) there was little likelihood conditions could be remedied in the near future such that the children could be returned to his care; (3) continuation of the parent-child relationship clearly diminishes the children's prospects for early integration into a stable and permanent home; and (4) termination was in the children's best interests. Finally, he argues that: (1) he was deprived of due process when the Department did not warn him it would argue that services were futile; (2) he received ineffective assistance of counsel; and (3) Commissioner Mitchell erred by failing to recuse herself in the dependency proceedings.[3]

This court considered D.W.'s appeal on an accelerated basis under RAP 18.13A and affirms the juvenile court.

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[2] Child welfare functions have since been transferred to the Department of Children, Youth and Families.

[3] D.W. challenges Finding of Fact 2.14.6 related to his fitness to parent, but he does not make any argument that he was a fit parent at the time of the termination trial. As a result, this finding is a verity on appeal. *City of Burien v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 113 Wn. App. 375, 383, 53 P.3d 1028 (2002).

FACTS

Background

In July 2014, when D.W. and his wife, B.W.,[4] moved out of their home in Vancouver, Washington, the couple and their children stayed at several hotels. D.W. was drinking Fireball Whiskey "religiously" and taking OxyContin pills, but he did not believe he had a drug problem. Exhibit (Ex.) at 117 at 5, 19. He had "kicked the pill habit three times." Ex. 117 at 20. B.W. was also using OxyContin. They stayed in different hotels for approximately three months.

During this time, J.H.-W, a three-year-old son of a family friend, began living with D.W. and B.W. J.H.-W., B.W., and D.W. all signed an agreement that J.H.-W. would stay with B.W. and D.W. for one year. They all went to the beach near Lincoln City, Oregon, to allow B.W. to get sober. But she did not want to get sober and so in the middle of the night, the family drove back to Vancouver to buy pills. They then turned around and returned to the beach. But they quickly returned to Vancouver for D.W. to buy heroin for B.W. D.W. used marijuana while at the beach.

After approximately a week at the beach, D.W. and B.W. went to a friend's house to stay the night. J.W.-H. was asleep when they arrived. Fifteen minutes later, D.W. was on the front porch smoking as B.W. took the children from the car to the house. D.W. heard some sort of commotion from the car and claimed to have seen J.W.-H. with his hands near D.W. Jr.'s neck. D.W. hit J.H.-W. in the face three to five times, which caused

[4] B.W. relinquished her rights to the three children shortly before the termination trial.

him to fall backwards into his car seat. D.W. looked up and saw a neighbor looking out her window watching them. He decided he and B.W. should leave. B.W. and D.W. decided they "need[ed] drugs to get through the night." Ex. 117 at 30. So they headed to a "window to window [drug] exchange." Ex. 117 at 32.

In the car, J.W. told D.W. that "J.H.-W.'s doing it again." Ex. 117 at 30. D.W. told J.H. to stop him. So J.W. "whapped [J.H.-W.] with a seatbelt buckle." Ex. 117 at 30. After the drug exchange, D.W. crawled into the back of the car and "slapped [J.H.-W.] in the mouth prob[ably] five or seven times. . . out of anger." Ex. 117 at 32-33. When D.W. and B.W. arrived at a hotel, they noticed that J.H.-W.'s lips were severely swollen and bruised. They took him to the bathroom to clean him up and he began to yell and scream. B.W. wrapped a towel around his mouth to silence him. Both B.W. and D.W. were high on heroin. The other three children, J.W., A.W., and D.W. Jr. watched television in the same hotel room.

In the morning, D.W. noticed that J.H.-W.'s lips had ripped. D.W. decided he had "definitely overreacted." Ex. 117 at 37. And he decided that J.H.-W. should go back to his mother once he healed.

During that day, D.W. bought heroin from a pair of drug dealers. D.W. brought them to the hotel room, but the female dealer saw J.H.-W.'s condition and called police. The male dealer tipped off D.W. that the police were on the way, and D.W. and B.W. left the hotel without packing.

They moved on to Motel 6, where D.W. and B.W. smoked more heroin. D.W. was frustrated "in a drug induced messed up way" by J.H.-W. picking at his "wounds that were

inflicted by our neglect." Ex. 117 at 41. During this time, D.W. observed J.H.-W. experience what he believed was a seizure. J.H.-W. stiffened and fell hard to the floor as though he was completely knocked out. He hit his head on the floor. He screamed. When J.H.-W. was coherent, B.W. made him a "towel neck brace." Ex. 117 at 44. She thought that his neck was broken. Later, D.W. saw J.H.-W. start to "seizure shake" while lying in bed. Ex. 117 at 44. D.W. had no information that J.H.-W. suffered from seizures.

D.W. and B.W. aggressively spanked J.H.-W. on the butt and lower back because he was not their child, because of "drugs," and because D.W. had "a history of anger." Ex. 117 at 48. D.W. admitted that there was "[f]rustration" and "anger" behind his strikes. Ex. 117 at 47. Both D.W. and B.W. left bruises on J.H.-W.

In an attempt to "obsolve [sic]" the bruise, D.W. used a hot water cloth on it. Ex. 117 at 48. He then realized that he could maintain heat on the bruises more easily by using a wall-mount hairdryer from the hotel. He used the dryer to blow air on J.H.-W.'s butt and legs for "at least half a day." Ex. 117 at 50. While D.W. took breaks to "go hit the drugs," B.W. would use the dryer. Ex 117 at 49. But the hairdryer caused J.H.-W.'s legs to blister and it also burned the tip of his nose.

B.W. called a nurse line for advice. Instead of taking J.H.-W. to a doctor as recommended, D.W. and B.W. applied rubbing alcohol to the wound, causing J.H.-W. to scream. This turned into "a form of punishment" for him picking at his nose. Ex. 117 at 61. They also applied antibiotic cream and hydrogen peroxide. During the nights, D.W. taped J.H.-W.'s hands down to prevent him from picking at his wounds. D.W. did not take

him to a doctor because he feared jail and losing his children. Throughout these events, J.W., A.W., and D.W., Jr. were present in the hotel room.

Two to three weeks later, D.W. and B.W. left Motel 6 and went to Vader, Washington. They put makeup on J.H.-W.'s bruises and injuries to hide them from police or anyone else who might see J.H.-W. D.W. also arranged the luggage so that it would be hard for anyone looking in the car to see J.H.-W.

In Vader, D.W. went to a house that his mother partly owned. He hid J.H.-W. from his mother's partner by giving him to a family friend, Z., who was a teenager. He gave Z. some marijuana and dropped him and J.H.-W. off at a hotel. While Z. and J.H.-W. were at the hotel, D.W. went to buy more drugs. They stopped at a Walmart store where D.W. assaulted an off-duty police officer. He spent six or seven days in Cowlitz County Jail until B.W. bailed him out.

While D.W. was in jail, Z. had been taking care of the children, including J.H.-W. B.W. was not at home often. When D.W. returned to Vader, J.H.-W.'s bandage did not look like it had been changed regularly, and he looked like he had lost a lot of weight. D.W. also noticed that part of his nose was separated from his lip. Instead of hitting him, D.W. would flick J.H.-W. above his burns. They also continued to spray rubbing alcohol on J.H.-W.'s nose.

Three days after leaving jail, D.W. "got tired of listening to [B.W.]'s drama and the punishment and needed to self-medicate," so he began using heroin again. Ex. 117 at 62. B.W. was still smoking heroin.

On October 3, 2014, B.W. got angry with J.H.-W. for touching his own feces, and she smacked him in the back until bruising appeared. D.W. got "tired of watching," so he grabbed J.H.-W. "and got down in his face and kinda like head bucked him." Ex. 117 at 63. J.H.-W. hit his head on the floor. He kept trying to get up, but he would fall back down. D.W. did not want him to fall asleep that night because he thought J.H.-W. had a concussion.

The next day, J.H.-W. "wasn't doing much." He "paw[ed] the sky" and "grunted and moaned." Ex. 117 at 67.

On October 5, 2014, B.W. went to get heroin. She came back and decided that she and D.W. should "revive [D.H.-W.]" out of his "vegetative state by using an ice bath and a hot bath." Ex. 117 at 68. Z. helped transport the ice back and forth from the hot bath to the ice bath. D.W. took a break to smoke a cigarette. B.W. called him back because J.H.-W. was not breathing. B.W. called 911. D.W. started CPR, but was not able to save him. J.H.-W. died.[5] Throughout this event, J.W., A.W., and D.W., Jr. were present in the home.

Law enforcement arrived at the house and placed J.W., A.W., and D.W., Jr. into protective custody. Initially, the Department placed the children with a foster family, but in July 2015, the Department placed the children with B.W.'s cousins the R.-J.s, where they remain.

[5] D.W. died because of a Methicillin-resistant Staphylococcus aureus (MRSA) infection.

The Department filed dependency petitions for all three children in October 2014. Six weeks later, the juvenile court entered agreed orders of dependency signed by D.W. and his attorney.

Law enforcement arrested D.W. on November 7, 2014.[6] He pleaded guilty to one count of manslaughter in the first degree and one count of assault of a child in the third degree.[7] D.W. arrived at Washington State Penitentiary in Walla Walla, Washington, in December 2015.

Services

As part of the dependency order, the juvenile court ordered D.W. to complete a drug and alcohol assessment and follow all recommendations, submit random urinalysis (UA) tests, complete a psychological evaluation and any recommendations, engage in mental health counseling, complete a parenting class and anger management treatment.

Jim Schuttie, a social worker with the Department, met with D.W. shortly after his arrest to discuss services. D.W. received a drug and alcohol assessment in October 2014 immediately before his arrest, but further treatment was not available in Lewis County Jail. D.W. also received a second drug and alcohol assessment in January 2017 at the Washington State Penitentiary.

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[6] On October 9, 2014, D.W. tested positive for heroin.

[7] Initially, D.W.'s earned release date was January 18, 2046. This court overturned the sentence because his offender score for the third degree assault conviction was incorrectly calculated. *State v.* [*D.W.*], 197 Wn. App. 1083, No. 48143-0-II, 2017 WL 888608 (Feb. 28, 2017). However, D.W. has apparently re-affirmed his guilty plea and been resentenced.

Mark Hill, a counselor at Washington State Penitentiary, referred D.W. for anger management, substance abuse treatment, and moral recognition therapy. He also encouraged D.W. to participate in Alcoholics Anonymous (AA), Narcotics Anonymous (NA), and other programming. However, an anger management class was currently unavailable. Moral recognition therapy was similarly unavailable. Substance abuse treatment was "normally not offered until the last couple of years of incarceration."[8] 4 Report of Proceedings (RP) Jul. 13, 2017 at 732. However, D.W. received random UAs while incarcerated. He also received mental health counseling. D.W. completed a program called Roots of Success and Redemption, although the record is devoid of a description of this activity.

Several social workers, including Juli Jager, contacted Hill about services in prison. A "string of emails" came "fairly often." 4 RP Jul. 13, 2017 at 736. Jager also provided Hill with copies of letters describing the court-ordered services for D.W.

Hill initially told Jager that he was unable to accommodate a psychological evaluation in prison, but Jager later discovered that it was possible for an evaluation to occur while D.W. was in prison. D.W. notified Jager that he had found a provider that could enter prison for the evaluation. After confirming that the Department could pay for the psychological evaluation, Jager referred D.W. to Ronald Page, Ph.D. Dr. Page diagnosed D.W. with antisocial personality disorder, opioid use disorder, in remission during confinement, and cannabis use disorder, also in remission during confinement.

[8] At the time of trial, the Department of Corrections approved D.W.'s transfer to Stafford Creek Correctional Center.

He did not recommend treatment for D.W.'s antisocial personality disorder diagnosis because he did not believe that such diagnosis changes with treatment. Alternatively, he recommended chemical dependency treatment, which he believed could "markedly improve[]" D.W.'s parenting skills. 3 RP Jul. 12, 2017 at 610.

After the successful referral for a psychological evaluation, Jager called multiple different service providers to see if they could enter the prison. She specifically looked for a one-on-one parenting instructor, but did not find anyone. She contacted the director of a Department of Corrections parenting class, but it was not available at the Washington State Penitentiary. Jager also researched whether there was any online evidence-based parenting class she could offer D.W., but she was unable to find anything. Jager contacted D.W. and asked him if he was aware of any other provider who could enter the prison. D.W. said he was not.

Hill told Jager that no other service providers could enter the prison. Jager stated that Dr. Page's ability to enter the prison was "unusual." 2 RP Jul. 11, 2017 at 466. Sometimes, a provider could use the professional visitation room for an evaluation, but the room was not available for regular meetings or treatment. Inmates visiting with their attorneys had priority to use the visitation room. The room is not private. "[T]here are windows all around, there are other inmates," as well as visitors and guards. 3 RP Jul. 12, 2017 at 593.

Jager did not ask any local domestic violence or anger management providers if they were able to enter the prison. She did not contact any providers within the community to see if anyone was able to come into the prison for a drug and alcohol

evaluation. No other social worker assigned to the case made inquiries into whether local community service providers could provide classes to D.W.[9]

D.W. stayed in contact with the assigned social workers. While he was in prison, he sent the children drawings and birthday cards. He also sent them letters. Jager did not see anything inappropriate in these letters. However, due to the court order suspending contact between D.W. and the children, she and the children's guardian ad litem (GAL) decided not to forward the letters to the children.

D.W. actively sought out different services. He sought out drug and alcohol treatment. He sought out parenting classes. He wrote the superintendent of Washington State Penitentiary, as well as the Secretary of the Department of Corrections. He also repeatedly asked for a chemical dependency assessment.

D.W.—not the Department—found Dr. Page to perform his court-ordered psychological evaluation.

Affidavit of Prejudice

D.W. filed an Affidavit of Prejudice against Judge James W. Lawler on October 27, 2016.[10] He alleges that he mailed the affidavit to the superior court on October 19, 2016.

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[9] Social worker Schuttie testified at trial regarding the Department's procedures for incarcerated parents. He stated:

> Generally we ask what services are available inside DOC. That's the first question. And we let them know what our client's court-ordered services are. It's been clearly done and illustrated. But that's what we do, we let them know what the court-ordered services are for the client, is we ask them when can this client do the court-ordered services.

4 RP Jul. 13, 2017 at 872-73.

[10] In his reply, D.W. abandoned his claim of a December 2015 Affidavit of Prejudice.

At a status hearing on October 21, 2016, D.W., the parties discussed whether either parent currently had counsel. Both the Department and the attorney for the GAL agreed that continuing with the trial date as scheduled could potentially create an appealable issue. D.W., at that time acting pro se, then spoke up:

> THE COURT: Here's what I want to do—
> [D.W.]: Judge, Your Honor, --
> THE COURT: Just a second.
> [D.W.]: --this is Mr. [D.W.]. I'd --
> THE COURT: Just a second.
> [D.W.]: --like the opportunity--
> THE COURT: --Just a second--
> [D.W.]: --to at least [inaudible]--
> THE COURT: Mr. [D.W.].
> [D.W.]: --as far as [inaudible]--
> THE COURT: Mr. [D.W.]--
> [D.W.]: --before you go--
> THE COURT: All right.
> [D.W.]: --forward, if that's okay.
> THE COURT: Well, I want you to wait--
> [D.W.]: First of all,
> THE COURT: Mr. [D.W.], stop.
> [D.W.:] Yes, sir.
> THE COURT: I'll give you your opportunity. All right?
> Now, first I want to talk about the trial that's scheduled for next week. The problem that we've got with the trial for next week is we've got criminal cases, we've got three criminal cases that have already confirmed. That's why I was asking how long this case is going to take because I just don't have enough judicial time in the week to get this thing out, even if it just takes three days. We just can't fit it in. So, by necessity, I'm going to have to reschedule this trial.
>
> . . . .
>
> [D.W.]: I just [want to] make the Court aware for the record that on [October 19, 2016], per Criminal Civil [Rule] 3.1, I filed an affidavit of prejudice against yourself.
> THE COURT: In what case?
> [D.W.]: In the ones we're hearing currently today.
>
> . . . .
>
> THE COURT: . . . And I'll point out that I made the decision on the continuance prior to you mentioning anything about an affidavit of prejudice

> which has not been filed yet. So at this point I'm not inclined to honor any affidavit of prejudice that might come in after the fact.
>
> So let's get back to looking at a hearing.

RP Oct. 21, 2016, at 9-13.

Judge Lawler presided over the next hearing on October 31, 2016, over D.W.'s objection. And Judge Lawler presided over all subsequent termination hearings.

ER 904 Notices

On March 17 2016, the Department filed its first notice of intent to offer documents under ER 904. The Assistant Attorney General served the notice on D.W.'s attorney. On November 7, 2016, the Department filed a supplemental notice of intent to offer additional documents at the termination trial.[11] No declaration of service accompanies the motion, although it states that notice of the motion was given to all parties. The Department filed another pursuant to ER 904 in February 2017. Again, no declaration of service verified that the Department served D.W.'s attorney, but the notice of the motion was given to all parties.

On March 30, 2017, D.W. filed a motion objecting to the Department's ER 904 filings. In June 2017, D.W. brought a motion to allow him to object to the Department's ER 904 submissions. The juvenile court denied D.W.'s motion. The court explained that it "d[id not] want to get into a situation where we're making this trial that much longer.

[11] That same day, the trial court scheduled the termination trial for January 23, 2017. The Department had filed petitions to terminate D.W.'s parental rights in October 2015. At that time, the juvenile court set the termination trial for April 2016. However, the juvenile court continued trial four times because D.W. either fired his attorney or counsel withdrew and new counsel had to be appointed. Over the course of the dependency D.W. had five different attorneys.

We're moving criminal cases out of the way so this can go. I want this case to go and get this matter done in the allotted time." RP June 23, 2017 at 72.

Motion for Summary Judgment

Before trial, D.W moved for summary judgment, arguing that the Department failed to provide parenting classes, anger management evaluation, and drug and alcohol treatment. The juvenile court denied his motion.

Termination Trial

Roni Jensen, a Child Protective Services (CPS) investigative worker, interviewed J.W. and A.W. (separately) in October 2014. She "concluded that [J.W.] was traumatized by what had occurred." 1 RP Jul. 10, 2018 at 151. D.W. did not take any responsibility for what had happened to J.H.-W. while he was in D.W.'s care. Later, J.W. exhibited signs of post-traumatic stress disorder (PTSD). He also expressed hope that he would soon be adopted. Similarly, A.W. was diagnosed with adjustment disorder with anxiety. Jensen concluded that D.W. had abused or neglected J.W., A.W., and D.W. Jr. based on D.W.'s treatment of J.H.-W., J.W.'s report that D.W. had spanked him with a belt, leaving bruises, and J.W.'s report of witnessing the death of J.H.-W.

Jager testified that D.W. never expressed any remorse for what happened to J.H.-W. Schuttie also testified that D.W. showed "[z]ero" understanding that J.H.-W.'s death traumatized his children. 4 RP Jul. 13, 2017 at 846.

Dr. Page testified that D.W. avoided self-criticism so profoundly that he rendered two tests invalid. D.W. was "improbably virtuous in [his] self-representation." 3 RP Jul. 12, 2017 at 600. Based on the results of the test, Dr. Page believed that "[D.W.] was

manipulating and dissimulating with" him. 3 RP Jul. 12, 2017 at 599. Dr. Page testified that D.W. displays "sociopathic features . . . an abundance of them. And if one were to label a sociopath, he probably would qualify not just for features but for being a sociopath." 3 RP Jul. 12, 2017 at 608. But "[t]here's no sociopathic personality disorder in DSM-5 which is the current diagnostic manual." 3 RP Jul. 12, 2017 at 601.

He further stated that he would not recommend returning D.W.'s children to him until D.W. "had worked at a structured job for a year or two, that he was abstinent from alcohol [and] drugs for a year or two in the community where there was temptation and opportunity." 3 RP Jul. 12, 2017 at 629.

Similarly, Schuttie testified that requiring the children to wait several years for D.W. to resolve his parental deficiencies would have harmful psychological effects, such as anxiety, anger, irritability, and attachment issues, on the children. J.W.'s counselor, Cassandra Capone, also testified that an eight-year-old "would struggle with abstract and hypothetical concepts," like time. 3 RP Jul. 12, 2017 at 573. So, to J.W., time would pass very slowly. "[A] year or two years is a very large proportion" of the life of an eight-year-old child. 3 RP Jul. 12, 2017 at 573.

Following the termination trial, the juvenile court found that: (1) the Department had expressly and understandably offered or provided all necessary services, reasonably available, capable of correcting D.W.'s parenting deficiencies within the foreseeable future; (2) there was little likelihood that D.W. would remedy his parenting deficiencies so that the children could be returned to his care in the near future; (3) D.W. was currently unfit to parent the children; (4) the continuation of the parent-child relationship clearly

diminished the children's prospects for early integration into a stable and permanent home; and (5) termination was in J.W., A.W., and D.W., Jr.'s best interests. Accordingly, the juvenile court entered orders terminating D.W.'s parental rights to J.W., A.W., and D.W., Jr. D.W. appeals.

Guardianship

During the termination trial, Crystal[12] Englert-Brewer, D.W.'s aunt and the children's proposed guardian, testified regarding her fitness as a guardianship placement for the children. Englert-Brewer has spent time with A.W. and J.W. on three or four occasions over the course of their lives. Her last contact with the children was in 2014. Englert-Brewer indicated she only recently learned of the children's special needs. She is not a licensed foster parent in Washington or Iowa. Englert-Brewer resides in small town in Iowa. She works full time as a casino buffet manager, and a few hours a week as a massage therapist. She claimed between her and her husband, who also works fulltime, there was always someone present at the house.

Englert-Brewer does not have her own children, but has over 30 nieces and nephews. A number of her nieces and nephews live nearby, including seven next door and four more a few blocks away. She has an "open-door policy" and interacts with her nieces and nephews daily. 4 RP Jul. 13, 2017 at 782. She also lives near some of A.W.,

[12] This court notes that in the record Ms. Englert-Brewer's first name is spelled as Christil, but during testimony she spelled her first name as "Crystal." 4 RP Jul. 13, 2017 at 772. This court will refer to her with Crystal as she designated herself when being sworn in to testify.

J.W., and D.W., Jr.'s other relatives, including their grandfather and at least one aunt and one uncle.

Englert-Brewer said Chrystina Bitting conducted a home study on behalf of the State of Iowa in preparation for taking in A.W., J.W., and D.W., Jr. Englert-Brewer provided all of the necessary paperwork.

In the early 2000s, Englert-Brewer was charged with conspiracy to distribute. She was indicted in 2008. She did not have any other criminal history. Around that time, Englert-Brewer completed a nonresidential drug treatment program and participated in a few other drug education and lifestyle classes. But she denied struggling with substance abuse. She said she participated in the treatment program for informational purposes.

In early 2017, Englert-Brewer consented to a background check for the Department and sent a copy of her driver's license to Jager. She filed additional paperwork as needed with Social Worker Joanne Williams. Williams requested court records from the conspiracy charge. Englert-Brewer did not get the information to Williams in time. Williams subsequently discovered Englert-Brewer lived in Iowa and told her the Department did not have jurisdiction over her. Englert-Brewer was informed via mail that her criminal history required additional review, but a social worker had withdrawn her request for administrative review. The juvenile court rejected D.W.'s petitions that guardianships be established for the children.

ANALYSIS

Affidavit of Prejudice

Under former RCW 4.12.050(1) (2009), any party or attorney appearing in any case in superior court may file a motion, supported by an affidavit, to remove a judge when the party believes that he or she cannot receive a fair trial before the judge.[13] Former RCW 4.12.050(1). The judge must recuse himself or herself if the:

> motion and affidavit is filed and called to the attention of the judge before he or she shall have made any ruling whatsoever in the case, either on the motion of the party making the affidavit, or on the motion of any other party to the action, . . . involving discretion . . . the arrangement of the calendar, the setting of an action, motion or proceeding down for hearing or trial, the arraignment of the accused in a criminal action or the fixing of bail, shall not be construed as a ruling or order involving discretion.

Former RCW 4.12.050(1); *Harbor Enters., Inc. v. Gunnar Gudjonsson*, 116 Wn.2d 283, 291, 803 P.2d 798 (1991) (a judge against whom a timely affidavit has been filed does not have jurisdiction to hear the case). In *State v. Lile*, 188 Wn.2d 766, 398 P.3d 1052 (2017), the Washington Supreme Court held that whether to grant an agreed motion to continue a trial is a discretionary decision.

Former RCW 4.12.050(1) requires that an affidavit be filed *and* brought to the attention of the superior court *before* the court makes a discretionary decision, such as continue a trial. Here, D.W. did neither. The record reflects that Judge Lawler made his decision to continue the trial before D.W. referenced the affidavit. And the affidavit was

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[13] In 2017, the legislature amended this statute to state that "ruling on an agreed continuance," even though it may involve discretion, does not divest a party of the ability to file an affidavit of prejudice against a judge. RCW 4.12.050(2).

not filed until October 27, six days after the decision to continue the trial. Thus, D.W.'s Affidavit of Prejudice was untimely and the juvenile court had jurisdiction to conduct the termination proceedings.[14]

Summary Judgment

D.W. argues that the juvenile court erred by failing to grant his motion for summary judgment because there was no genuine issue of fact that the Department failed to offer or provide court-ordered services. Summary judgment is only appropriate if "'there is no genuine issue as to any material fact' and 'the moving party is entitled to a judgment as a matter of law.'" *Walston v. Boeing Co.*, 181 Wn.2d 391, 395, 334 P.3d 519 (2014) (quoting CR 56(c)). "The appellate court engages in the same inquiry as the trial court, with questions of law reviewed de novo and the facts and all reasonable inferences from the facts viewed in the light most favorable to the nonmoving party." *Christensen v. Grant Cty. Hosp. Dist. No. 1*, 152 Wn.2d 299, 305, 96 P.3d 957 (2004). "The moving party bears the burden of showing that there is no genuine issue of material fact. If this burden

[14] D.W. also argues in his Reply Brief that the juvenile court did not consider various factors that the *Lile* court enumerated, which might indicate an exercise of discretion. *See Lile*, 188 Wn.2d at 776 (listing such factors as diligence, materiality, due process, orderly procedure, and the possible impact of the result on trial). However, nothing in *Lile* indicates that these factors were exhaustive. Further, Judge Lawler's decision was more thoughtful than cursory. He considered judicial resources and availability, as well as witness and attorney availability, whether D.W. was going to ask for new counsel to be appointed, and the impact of continuing criminal proceedings on the termination trial. *See* RP Oct. 21, 2016 at 7-12.

In addition, *Lile* did not limit its hold purely to criminal cases. Instead, the court wrote that "for the purposes of RCW 4.12.050," which applies equally in civil and criminal proceedings, "a ruling on an agreed or unopposed continuance is discretionary." *Lile*, 188 Wn.2d at 776.

is satisfied, the nonmoving party must present evidence demonstrating material fact. Summary judgment is appropriate if the nonmoving party fails to do so." *Walston*, 181 Wn.2d at 395-96 (citations omitted). "A genuine issue is one upon which reasonable people may disagree; a material fact is one controlling the litigation's outcome." *Youker v. Douglas Cty.*, 178 Wn. App. 793, 796, 327 P.3d 1234, *review denied*, 180 Wn.2d 1011 (2014). This court reviews summary judgment decisions de novo. *Nichols v. Peterson NW, Inc.*, 197 Wn. App. 491, 498, 389 P.3d 617 (2016).

This court concludes that the juvenile court did not err by declining to grant D.W.'s summary judgment motion. Here, Jager submitted a declaration saying she repeatedly contacted the prison inquiring about services for D.W. The legal liaison officer from the Washington State Penitentiary submitted a declaration saying that she would "not open the [professional visit room] for any class."[15] Clerk's Papers (CP) at 1252. These declarations created a genuine issue of fact as to whether a service was reasonably available to D.W. or whether it could have remedied his parental deficiencies. Thus, summary judgment was not appropriate.

Necessary Services

The juvenile court may order termination of a parent's rights as to his or her child if the Department establishes the six elements in former RCW 13.34.180(1)(a) through (f) (2013) by clear, cogent, and convincing evidence. RCW 13.34.190(1)(a)(i). Clear, cogent

[15] D.W. also argues that some of these declarations contain hearsay. However, D.W. does not make clear which statements he objects to. And even if it were true that the declarations contained hearsay, they also contain sufficient non-hearsay that create a genuine issue of material fact.

and convincing evidence exists when the ultimate fact at issue is shown to be "highly probable." *In re the Welfare of Sego*, 82 Wn.2d 736, 739, 513 P.2d 831 (1973) (quoting *Supove v. Densmoor*, 225 Or. 365, 372, 358 P.2d 510 (1961)). The Department also must prove by a preponderance of the evidence that termination of parental rights is in the child's best interests. RCW 13.34.190(1)(b).

Because the juvenile court has the advantage of observing the witnesses, deference to the court is particularly important in termination proceedings. *In re the Welfare of Aschauer*, 93 Wn.2d 689, 695, 611 P.2d 1245 (1980); *In re Dependency of K.R.*, 128 Wn.2d 129, 144, 904 P.2d 1132 (1995). This court limits its analysis to whether substantial evidence supports the juvenile court's findings. *Sego*, 82 Wn.2d at 739. Substantial evidence is evidence sufficient to persuade a fair-minded rational person of the truth of the declared premise. *Bering v. SHARE*, 106 Wn.2d 212, 220, 721 P.2d 918 (1986), *cert. dismissed*, 479 U.S. 1050 (1987). This court does not review credibility determinations or weigh the evidence. *Sego*, 82 Wn.2d at 739-40.

Under former RCW 13.34.180(1)(d), the Department must prove "[t]hat 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." In determining whether the Department met its burden, the juvenile court may consider "any service received, from whatever source, bearing on the potential correction of parental deficiencies." *In re Dependency of D.A.*, 124 Wn. App. 644, 651-52, 102 P.3d 847 (2004), *review denied*, 154 Wn.2d 1030 (2005).

The Department, however, does not have to provide services when the parent is unable or unwilling to make use of them. *In re Dependency of Ramquist*, 52 Wn. App. 854, 861, 765 P.2d 30 (1988), *review denied*, 112 Wn.2d 1006 (1989). And even if the Department "inexcusably fails" to offer services to a willing parent, termination is still appropriate if the services "would not have remedied the parent's deficiencies in the foreseeable future." *In re Dependency of T.R.*, 108 Wn. App. 149, 164, 29 P.3d 1275 (2001); *In re the Welfare of Hall*, 99 Wn.2d 842, 850-51, 664 P.2d 1245 (1983).

D.W. argues that the Department failed to offer court-ordered parenting classes, chemical dependency evaluation or treatment, and anger management evaluation or treatment. He also argues that the Department's efforts to locate court-ordered services within the community were insufficient. The Department responds that it provided those services that were available to D.W. while he was incarcerated.

With respect to services, D.W. challenges Findings of Fact 2.14.4, 2.14.5, 2.14.8, and 2.14.9:

> 2.14.4. Services order[ed] under RCW 13.34.130 have been expressly and understandably offered or provided, and all necessary services reasonably available, capable of correcting parental deficiencies within the foreseeable future have been offered or provided to the father. No services were denied [D.W.] by [the Department] and no additional services could have remedied the parental deficiencies.
>
> 2.14.5. The Court accepts the testimony and report, Exhibit 120, filed by Dr. Ronald Page. The Court adopts the Doctor's mental health assessment of [D.W.]. [D.W.] suffers from a mental condition that is not likely to change and is not amenable to treatment. As a result of this mental condition, [D.W.] has no active conscience and is manipulative for his own ends. He is manipulative, even when it is not in the three children's best interest.
>
> . . . .

> 2.14.8. The Court finds that [D.W.]'s mental condition is not likely to change for several decades. Accordingly, offering [D.W.] additional services would be futile.
>
> 2.14.9. That there is little likelihood that conditions will be remedied so that the child can be returned to the parent in the near future.

CP at 1753.

This court concludes that substantial evidence supports the juvenile court's Findings of Fact. D.W. received two different drug and alcohol evaluations while incarcerated. He also received UAs, as well as mental health treatment. He participated in a psychological evaluation. The Department is only obligated to provide those services that are reasonable available. The record demonstrates that the court-ordered services that D.W. did not receive were unavailable at the Washington State Penitentiary. Jager contacted Hill, the counselor responsible for making referrals to service providers, who told her that drug and alcohol treatment and anger management treatment were unavailable to D.W. through the prison. He further stated that the prison did not have the ability to provide a room for a regularly scheduled class. Jager later confirmed this through her own independent investigation.

Jager also looked for a one-on-one parenting instructor who would go into the prison, but she did not find one. She similarly was not able to find an evidence-based online parenting course. She also contacted the director of a parenting class taught at other Department of Corrections institutions, but the class was not available at the Washington State Penitentiary. Thus, the record demonstrates that anger management and drug and alcohol treatment, as well as parenting classes, were unavailable to D.W. As the Department is only obligated to provide those services which are reasonable

available, the juvenile court's findings that the Department provided all reasonably available services are supported by substantial evidence.[16]

Little Likelihood

D.W. next argues there was insufficient evidence presented to establish there was little likelihood he would remedy his conditions so the children could reunite with him in the near future. To terminate a parent's rights, the juvenile court must find that there is little likelihood that conditions will be remedied so that the child can be returned to the parent in the near future. Former RCW 13.34.180(1)(e). In determining whether former RCW 13.34.180(1)(e) has been met, the focus is on whether parenting deficiencies have been corrected. *T.R.*, 108 Wn. App. at 165. The juvenile court may not terminate a parent's rights unless it finds that the parent is currently unfit to adequately care for the dependent child. *In re the Welfare of A.B.*, 168 Wn.2d 908, 911, 232 P.3d 1104 (2010). "When it is eventually possible, but not imminent, for a parent to be reunited with a child, the child's present need for stability and permanence is more important and can justify termination." *In re the Welfare of C.B.*, 134 Wn. App. 942, 958-59, 143 P.3d 846 (2006).

The juvenile court may consider the parent's history of parenting and compliance with services to determine whether conditions are likely to be remedied in the near future. *In re Dependency of J.C.*, 130 Wn.2d 418, 428, 924 P.2d 21 (1996). A determination of

[16] D.W. argues that the Department failed to contact providers in the community to inquire whether one could provide anger management or chemical dependency treatment in the prison. But under these circumstances this court concludes that where the prison has stated no such provider would be allowed in to provide a class, the Department is not then obligated to scour the community looking for providers willing to do what the prison prohibits.

what constitutes "near future" depends on the child's age and the circumstances of the placement. *In re Dependency of T.L.G.*, 126 Wn. App. 181, 204, 108 P.3d 156 (2005).

Relevant to this issue, the court entered challenged Findings of Fact 2.14.7 and 2.14.9[17]:

> 2.14.7. As a result of his sentence, [D.W.] is also not available to parent his children. Even if [D.W.] prevails on his Lewis County case, he will be incarcerated until January 2018 on his Cowlitz County conviction. Dr. Page stated that he would want to see at least one year, and possible two years, of drug free time in the community before [D.W.] regains custody of his children. Given the facts of this case, even 18 more months is too long a time frame to wait for [D.W.] to cure his parental deficiencies when the children have already waited for thirty-two months.
>
> . . . .
>
> 2.14.9. That there is little likelihood that conditions will be remedied so that the child can be returned to the parent in the near future.

CP at 1753-54.

D.W. argues that the Department failed to introduce any evidence as to what constitutes the near future for J.W., A.W., and D.W., Jr. But by the time of trial in July 2017, the children had been dependent for almost three years. J.W.'s counselor testified that two years would feel like an enormous amount of time for an eight-year-old child. Similarly, Schuttie testified that waiting two years for permanency would result in psychological harm for the children. Dr. Page opined that he would want to see two years of stability and sobriety within the community before he would recommend returning the children to D.W. Even if D.W. were released in 2018, the children would have to wait at least two years in addition to the three years they had already waited. This extends far

[17] Appellant references Findings of Fact 2.14.10 in their brief, but this court assumes they meant Findings of Fact 2.14.9.

beyond what this court has repeatedly held is the near future for young children. *In re Dependency of P.D.*, 58 Wn. App. 18, 27, 792 P.2d 159, (six months not in near future of fifteen-month-old), *review denied*, 115 Wn.2d 1019 (1990); *In re Dependency of A.W.*, 53 Wn. App. 22, 32, 765 P.2d 307 (1988) (one year not in near future of three-year-old), *review denied*, 112 Wn.2d 1017 (1989); *Hall*, 99 Wn.2d at 850-51 (finding eight months not in the foreseeable future for a four-year-old). Thus, substantial evidence supports the juvenile court's findings.

Integration into a Stable and Permanent Home

D.W. next argues that insufficient evidence was presented to establish that continuation of the parent-child relationship would clearly diminish the children's prospect for early integration into a stable and permanent home. Under former RCW 13.34.180(1)(f), the Department must prove that "continuation of the parent and child relationship clearly diminishes the child's prospects for early integration into a stable and permanent home." The Department can prove former RCW 13.34.180(1)(f) in one of two ways: (1) that prospects for a permanent home exist, but the parent-child relationship prevents the child from obtaining that placement; or (2) that the parent-child relationship has a damaging and destabilizing effect on the child that would negatively impact the child's integration into any permanent and stable home. *In re the Welfare of R.H.*, 176 Wn. App. 419, 428, 309 P.3d 620 (2013); *In re the Dependency of A.C.*, 123 Wn. App. 244, 250, 98 P.3d 89 (2004); *In re Dependency of K.D.S.*, 176 Wn.2d 644, 659, 294 P.3d 695 (2013). Under the first method, "[RCW 13.34.180(1)(f)] is mainly concerned with the continued effect of the *legal* relationship between parent and child, as an obstacle to

adoption; it is especially a concern where children have potential adoption resources." *A.C.*, 123 Wn. App. at 250 (emphasis theirs).

D.W. argues that the juvenile court failed to consider the availability of a guardianship when it determined that the Department had met its burden under former RCW 13.34.180(1)(f). Relevant to this issue, the court entered challenged Finding of Fact 2.14.10, which stated "[t]hat continuation of the parent child relationship clearly diminishes the child's prospects for early integration into a stable and permanent home." CP at 1754. Additionally, the court entered Finding of Fact 2.16 which stated "consideration of the factors [weighing in favor of a guardianship] set forth in RCW 13.36.040[2](b) does not change the Court's decision."[18] CP at 1754 and 1833.

This court concludes that substantial evidence supports the juvenile court's Finding of Fact and Conclusion of Law that the continuation of the parent-child relationship diminishes the children's prospects for early integration into a stable and permanent home. While "evidence of the availability of a guardianship is material to whether the State can meet its burden to prove RCW 13.34.180(1)(f)," it is not dispositive. *R.H.*, 176 Wn. App. at 428. It is simply one factor among many that the juvenile court must consider. And, here, the court did consider whether guardianship was a better option for the children than termination. D.W.'s continued legal relationship with the children prevents the children from being adopted. Thus, substantial evidence supports the court's finding.

[18] The termination order appears to inadvertently indicate that the court considered the guardianship factors under RCW 13.36.040(5)(b), which does not exist, instead of RCW 13.36.040(2)(b).

Best Interests of the Children

After proving all six elements of former RCW 13.34.180, the Department must then prove by a preponderance of the evidence that termination of parental rights is in the best interest of the child. RCW 13.34.190(1)(b); *In re the Welfare of A.J.R.*, 78 Wn. App. 222, 228, 896 P.2d 1298, *review denied*, 127 Wn.2d 1025 (1995). Although parents have a fundamental liberty interest in the care and custody of their children, the paramount consideration in a termination proceeding is the welfare of the children. *In re the Welfare of Young*, 24 Wn. App. 392, 395, 600 P.2d 1312 (1979), *review denied*, 93 Wn.2d 1005 (1980). Children have the right to a safe, stable, permanent home and a speedy resolution to dependency and termination proceedings. RCW 13.34.020. "When the rights of basic nurture, physical and mental health, and safety of the child and the legal rights of the parents are in conflict, the rights and safety of the child should prevail." RCW 13.34.020. Where a parent has been unable to rehabilitate over a lengthy dependency period, a court is "fully justified" in finding termination in the child's best interests rather than "leaving [the child] in the limbo of foster care for an indefinite period while [the parent] sought to rehabilitate himself." *T.R.*, 108 Wn. App. at 167 (quoting *A.W.*, 53 Wn. App. at 33).

With respect to best interests, the juvenile court entered challenged Finding of Fact 2.19:

> 2.19. The Court finds by a preponderance of the evidence that termination of the parent and child relationship between [D.W.] and [D.W., Jr.], [A.W.], and [J.W.] is in the children's best interest. [D.W.] is not in a position to parent [D.W., Jr.], [A.W.], and [J.W.] now nor will he be in that position in the near future.

CP at 1754.

D.W. argues that the juvenile court erred when it found that termination was in the children's best interests because testimony from J.W.'s counselor and the social worker indicated there was nothing inappropriate about the interaction between him and his children and he did everything within his power to comply with court orders.

This court concludes that substantial evidence supports the juvenile court's finding that termination of D.W.'s parental rights was in the children's best interests. D.W.'s lengthy prison sentence prevents him from providing a home to his children. D.W. used drugs and alcohol around his children. He exposed his children to the violence that he perpetrated against J.H.-W. He was unable to understand the harm that his abuse of J.H.-W. caused to his own children. Under the influence of drugs, he repeatedly hit a three-year-old child for whom he was responsible. Then, he chose not to provide J.H.-W. with the medical care he needed.

Incarceration Factors

In addition to the six elements of former RCW 13.34.180(1), when the Department attempts to terminate the rights of an incarcerated parent:

> the court shall consider whether a parent maintains a meaningful role in his or her child's life based on factors identified in RCW 13.34.145(5)(b)[19];

[19] Former RCW 13.34.145(5)(b) (2015) states:

> (b) The court's assessment of whether a parent who is incarcerated maintains a meaningful role in the child's life may include consideration of the following:
>
> (i) The parent's expressions or acts of manifesting concern for the child, such as letters, telephone calls, visits, and other forms of communication with the child;
>
> (ii) The parent's efforts to communicate and work with the department or supervising agency or other individuals for the purpose of

> whether the department or supervising agency made reasonable efforts as defined in this chapter; and whether particular barriers existed as described in RCW 13.34.145(5)(b) including, but not limited to, delays or barriers experienced in keeping the agency apprised of his or her location and in accessing visitation or other meaningful contact with the child.

Former RCW 13.34.180(1)(f).

In regards to RCW 13.34.180(1)(f), the juvenile court entered the following Findings of Fact:

> 2.15. The Court has considered the factors relating to incarcerated parents that must be considered pursuant to RCW 13.34.145(5)(b):
> 1. As to the first factor, the Court finds that [D.W.] has made expressions concerning or manifesting concern for his children even when his attempts violated court orders.[20]
> 2. As to the second factor, the Court finds that [D.W.] has made efforts to communicate and work with the Department or supervising agency. However, we are still faced with the limitations of what is available in the Department of Corrections and what could be effective for [D.W.].
> 3. As to the third factor, the Court finds that [D.W.] did respond favorably to reasonable efforts by the Department and the Department of Corrections.

> complying with the service plan and repairing, maintaining, or building the parent-child relationship;
> (iii) A positive response by the parent to the reasonable efforts of the department or the supervising agency;
> (iv) Information provided by individuals or agencies in a reasonable position to assist the court in making this assessment, including but not limited to the parent's attorney, correctional and mental health personnel, or other individuals providing services to the parent;
> (v) Limitations in the parent's access to family support programs, therapeutic services, and visiting opportunities, restrictions to telephone and mail services, inability to participate in foster care planning meetings, and difficulty accessing lawyers and participating meaningfully in court proceedings; and
> (vi) Whether the continued involvement of the parent in the child's life is in the child's best interest.

[20] D.W. provided Christmas gifts with notes to his children even though a court order prohibited any contact between him and the children.

> 4. As to the fourth factor, the Court finds that there are limitations for incarcerated persons accessing services, but the Department made reasonable efforts and offered services.
>
> 5. As to the final factor, the Court finds that continuation of [D.W.'s] involvement in the children's [lives] is not in their best interest.

CP at 1754.

D.W. argues that there is no evidence of the unavailability of the court ordered services. But as addressed above, substantial evidence supports the juvenile court's findings.

Fifth Amendment

D.W. argues that the juvenile court improperly drew a negative inference from his assertion of his Fifth Amendment right against self-incrimination.[21] However, the juvenile court may draw logical adverse inferences in a civil proceeding from a party who invokes his or her Fifth Amendment rights. *Diaz v. Wash. State Migrant Counc.*, 165 Wn. App. 59, 85, 265 P.3d 956 (2011).

Due Process

D.W. argues that the juvenile court deprived him of due process when it found that providing further services would be futile because the Department did not allege futility until its response to D.W.'s motion for summary judgment. In termination proceedings, due process requires that parents have notice, an opportunity to be heard and defend,

[21] The Fifth Amendment right against self-incrimination may be raised in any proceeding, "civil or criminal, formal or informal, where the answers might incriminate [the questioned person] in future criminal proceedings." *Lefkowitz v. Turley*, 414 U.S. 70, 77, 94 S. Ct. 316, 38 L. Ed. 2d 274 (1973). The Fifth Amendment protects a parent in dependency proceedings. *In re Dependency of J.R.U.-S.*, 126 Wn. App. 786, 793, 110 P.3d 773 (2005).

and the right to be represented by counsel. *In re the Welfare of S.E.*, 63 Wn. App. 244, 250, 820 P.2d 47 (1991), *review denied*, 118 Wn.2d 1017 (1992). To meet the due process requirement regarding notice, parents must:

> [R]eceive notice of the specific issues to be considered including a clear and concise statement that the hearing may result in deprivation of all parental rights. The parents must be clearly advised in adequate time to meet that serious issue to prevent surprise, helplessness and disadvantage.

In re the Welfare of Martin, 3 Wn. App. 405, 410, 476 P.2d 134 (1970).

D.W. relies on *In re the Dependency of A.M.M.*, 182 Wn. App. 776, 790, 332 P.3d 500 (2014), and argues that the Department never put him on notice of its intent to argue futility as a basis for terminating his parental rights. In *A.M.M.*, the mother argued that her due process rights were violated when the juvenile court terminated her parental rights based, in part, on her lack of knowledge regarding her children's developmental needs because she did not receive adequate notice that this was a parenting deficiency. *A.M.M.*, 182 Wn. App. at 790. The appellate court agreed that the mother received inadequate notice prior to trial that this lack of knowledge constituted a parenting deficiency upon which termination could be based, because neither the dependency petition nor the termination petition stated that this was a deficiency. *A.M.M.*, 182 Wn. App. at 791-92.

Here, the Department's argument that services were futile is not a parenting deficiency in the same way that a lack of understanding of a child's developmental needs is a parenting deficiency. It is a legal argument justifying the failure to provide services.

D.W. had notice of the parenting deficiencies the Department claimed he had. His due process rights were not violated.

Evidence Rule 904

D.W. argues that the juvenile court abused its discretion by denying his motion to extend the time that he had to object to the Department's ER 904 Notice. ER 904 provides that:

> **(b) Notice.** Any party intending to offer a document under this rule must serve on all parties a notice, no less than 30 days before trial, stating that the documents are being offered under Evidence Rule 904 and shall be deemed authentic and admissible without testimony or further identification, unless objection is served within 14 days of the date of notice, pursuant to ER 904(c). . . .
>
> **(c) Objection to Authenticity or Admissibility.** Within 14 days of notice, any other party may serve on all parties a written objection to any document offered under section (b), identifying each document to which objection is made by number and brief description.

ER 904(b) and (c). Without a timely objection, a court should presume that the documents submitted under ER 904 are admissible absent some compelling reason. *Miller v. Arctic Alaska Fisheries Corp.*, 133 Wn.2d 250, 260, 944 P.2d 1005 (1997).

D.W.'s objection to the Department's ER 904 Notice was untimely. D.W.'s objections were made 378 days after the first notice, 143 days after the second notice, and 50 days after the third notice. *Compare* CP at 106, 479, and 815 *with* CP at 960. He argues that the juvenile court erred by denying him more time to object to the ER 904 Notices because it was unclear whether they were properly served on him. But D.W. never made this argument to the trial court. During the hearing, D.W.'s counsel acknowledged "that [the ER 904 Notices] had previously been served in different parts . .

. to previous counsel." RP June 23, 2017 at 68. Thus, this court concludes the juvenile court did not abuse its discretion by denying D.W.'s motion.

Guardianship Petitions

D.W. argues the juvenile court erred by denying his guardianship petitions. This court will affirm a juvenile court's factual findings under RCW 13.36.040 so long as they are supported by substantial evidence. *In re the Welfare of A.W.*, 182 Wn.2d 689, 711-14, 344 P.3d 1186 (2015). Facts in a guardianship proceeding need only be proved by a preponderance of the evidence. RCW 13.36.040(2)(a).

Relevant to the juvenile court's denial of his guardianship petitions, D.W. challenges the following Findings of Fact:

> 2.9 The Court finds by a preponderance of the evidence that [D.W.] failed to prove that Guardianship is in the children's best interest in this case.
>
> 2.10 The Court finds [D.W.] failed to prove the sixth element of the guardianship petition because he has not proven that there is a written statement from the proposed guardian as required by RCW 13.36.040(2)(c) acknowledging the guardian's rights and responsibilities toward the child and affirming the guardian's understanding and acceptance that the guardianship is a commitment to provide care for the child until the child reaches age eighteen.
>
> 2.11 The Court finds that all professionals including the children's therapists, the GALs, and the social workers testified that uprooting the children from their current placement and moving them to a guardianship in Iowa would be damaging to both [J.W.] and [A.W.]. Further, the Court finds [D.W., Jr.] does not remember, or know, his parents or the potential guardian.
>
> 2.12 The Court finds that [D.W.] did not prove that [Crystal] Englert-Brewer is a suitable guardian for these three children. The evidence shows that she is working two jobs, and that she minimized her drug abuse history. Ms. Englert-Brewer did not pass a background check and is not a licensed foster parent.
>
> 2.13 The Court finds that a guardianship, which would continue to give [D.W.] control, or the ability to contact the children, is not in the

> children's best interest given [D.W.'s] mental condition and his inability to respect communication boundaries.

CP at 1831-32. RCW 13.36.040 governs the establishment of guardianships:

> (2) A guardianship shall be established if:
> (a) The court finds by a preponderance of the evidence that it is in the child's best interests to establish a guardianship, rather than to terminate the parent-child relationship and proceed with adoption, or to continue efforts to return custody of the child to the parent; and
> (b) All parties agree to entry of the guardianship order and the proposed guardian is qualified, appropriate, and capable of performing the duties of guardian under RCW 13.36.050; or
> (c)(i) The child has been found to be a dependent child under RCW 13.34.030;
> (ii) A dispositional order has been entered pursuant to RCW 13.34.130;
> (iii) At the time of the hearing on the guardianship petition, the child has or will have been removed from the custody of the parent for at least six consecutive months following a finding of dependency under RCW 13.34.030;
> (iv) The services ordered under RCW 13.34.130 and 13.34.136 have been offered or provided and all necessary services, reasonably available, capable of correcting the parental deficiencies within the foreseeable future have been offered or provided;
> (v) There is little likelihood that conditions will be remedied so that the child can be returned to the parent in the near future; and
> (vi) The proposed guardian has signed a statement acknowledging the guardian's rights and responsibilities toward the child and affirming the guardian's understanding and acceptance that the guardianship is a commitment to provide care for the child until the child reaches age eighteen.

RCW 13.36.040(2).

Here, the juvenile court determined guardianship was not in the children's best interests, under RCW 13.36.040(2)(a) and D.W. failed to provide a signed statement by the proposed guardian, Crystal Englert-Brewer, under RCW 13.36.040(2)(c)(vi). The determination of whether a guardianship is in the children's best interests is a case-specific inquiry. *A.C.*, 123 Wn. App. at 255. The court must also consider the strength of

the parent-child bond and potential adoptive home. *Matter of J.B.*, 197 Wn. App. 430, 439, 387 P.3d 1152 (2016).

D.W. argues the evidence does not support the juvenile court's finding that he failed to prove guardianship was in the children's best interests. He contends guardianship is in his children's best interests because of the strength of his bond with them. But while the children were attached to D.W. "to a degree," they found contact with him "frustrating" and upsetting. 5 RP Jul. 14, 2017 at 901. Additionally, the juvenile court's denial of contact between D.W. and his children was justifiable and supported by the opinions of the children's counselors. Jennifer DiStefano, A.W.'s counselor, recommended contact with D.W. remain discontinued. Cassandra Capone, J.W.'s counselor, also recommended against reopening contact with D.W. Maintaining contact with D.W. or strengthening the parental bond via guardianship is not in the children's best interests.

D.W. next argues the record does not support the juvenile court's finding that uprooting the children would be damaging. He believes a difficult, but short-term, adjustment period is justified if it furthers the children's long-term best interests. This court concludes a preponderance of the evidence supports the juvenile court's finding. Dr. Deborah Hall testified stability was particularly important for children recovering from trauma. Extensive testimony also established that the children's' relative placement, the R.-J.'s, provide stability and see to their medical and counseling needs. The children have bonded to the R.-J.s and refer to them as "mom and dad." 2 RP Jul. 11, 2017 at

514. The preponderance of the evidence supports the juvenile court's finding that uprooting the children in favor of guardianship is not in their best interests.

D.W. next argues the record does not support the findings regarding his proposed guardian, Englert-Brewer, because Englert-Brewer had a preexisting relationship with two of D.W.'s children and lived near many of the children's extended family members and could facilitate the children's involvement with their similarly-aged cousins. Second, D.W. argues the juvenile court's finding that a guardianship with Englert-Brewer would allow D.W. to assert control over the children is unfounded as she indicated she was willing and able to abide by any court order. Third, D.W. claims the record does not support the juvenile court's finding Englert-Brewer was an unsuitable because of her employment situation, drug history, failure to pass a background check, and lack of a foster care license.

This court concludes the record supports the juvenile court's finding that Englert-Brewer was not a suitable guardian. First, Englert-Brewer had limited experience as a primary caregiver for children.[22] A.W., J.W., and D.W., Jr., all have special needs and behaviors requiring extreme patience. J.W. is incredibly anxious, suffers from PTSD, and is behind in reading, writing, and math. A.W. regularly has "flip-outs," which entails her getting upset, blacking out, rolling her eyes to the back of her head, being unable to talk, going rigid, and running or fighting if approached. 2 RP Jul. 11, 2017 at 505. D.W., Jr.

[22] Englert-Brewer testified that she does not have children of her own, but has an open-door policy with her seven nieces and nephew, ranging in age from two to sixteen, who live next door. She has four more nieces and nephews with whom she has regular contact a few blocks away. She interacts with the children daily and often babysits.

has physical and speech delays. Englert-Brewer testified she only recently learned of the children's special needs. Second, Englert-Brewer minimized her substance abuse. Englert-Brewer was convicted of conspiracy to distribute a controlled substance. While she attended a non-residential drug treatment program, she denied ever having a substance abuse problem. Third, Englert-Brewer had an unsatisfactory background check constitute a preponderance of the evidence weighing against guardianship arrangement with her.

The juvenile court also found D.W. failed to prove Englert-Brewer signed the statement required by RCW 13.36.040. D.W. claims the juvenile court should have taken judicial notice of the document purportedly signed by Englert-Brewer. ER 201 provides judicial notice is appropriate only where the fact to be judicially noticed is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." ER 201(b)(2). Parties can request judicial notice or a court can take it on a discretionary basis. ER 201(c). This court acknowledges the signed declarations accompanied the guardianship petitions, but concludes the juvenile court was within its discretion in not taking judicial notice of them. D.W. did not offer the declarations as exhibits.[23] The declarations stated they were signed in Walla Walla, Washington, even though Englert-Brewer lived in Iowa at the time of signing. Additionally, one declaration lists Crystal Englert-Brewer as the proposed guardian, but is not signed by her.[24] These declarations are not sources of "indisputable accuracy and verifiable

[23] In the alternative, D.W. argues trial counsel's failure to offer the declarations as exhibits at trial constitutes ineffective assistance of counsel.

certainty." *CLEAN v. State,* 130 Wn.2d 782, 809, 928 P.2d 1054 (1996) (quoting *State ex rel. Humiston v. Meyers*, 61 Wn.2d 772, 779, 380 P.2d 735 (1963)). The juvenile court was within its discretion in not taking judicial notice of the declarations.

Lack of Adequate Notice

D.W. argues the juvenile court erroneously dismissed his original guardianship petitions for lack of notice. Under RCW 13.36.030(1), "all parties to the dependency and the proposed guardian must receive adequate notice of all proceedings [of a RCW 13.36 guardianship]." RCW 13.36.030(1). According to D.W., "adequate notice" is not defined by statute or interpreted by case law.

The juvenile court originally scheduled D.W.'s termination trial for January 23, 2017, but according to the record, as of January 17, 2017, none of the parties had received notice of the petitions. D.W. claims he verbally notified all parties of his guardianship petitions by January 23, 2017 and provided copies to each party by or before February 15, 2017.

This court concludes any error committed in dismissing D.W.'s original guardianship petitions was harmless because D.W. filed a second set of guardianship petitions. The juvenile court considered and denied one guardianship petition on the merits and D.W. voluntarily withdrew the other. D.W. cannot show any prejudice from the denial of his original guardianship petitions.

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[24] Danny Pete Englert, presumably Crystal Englert-Brewer's husband, signed the declaration.

Ineffective Assistance of Counsel

Finally, D.W. also argues that his counsel was ineffective for: (1) failing to timely object to the ER 904 exhibits; (2) not seeking the admission of Englert-Brewer's declaration in the guardianship proceeding; (3) failing to challenge the dependency and disposition orders; and (4) failing to personally serve B.W. and the guardian ad litem with the guardianship petition.

Washington law guarantees the right to counsel in termination proceedings. Former RCW 13.34.090(2) (2000); *In re Dependency of Grove*, 127 Wn.2d 221, 237, 897 P.2d 1252 (1995). This right to counsel includes the right to effective legal representation. *In re the Welfare of J.M.*, 130 Wn. App. 912, 922, 125 P.3d 245 (2005). Under the civil standard of review for claims of ineffective assistance of counsel, the record must indicate that an attorney provided a meaningful hearing to be effective.[25] *In re Dependency of Moseley*, 34 Wn. App. 179, 184, 660 P.2d 315, *review denied*, 99 Wn.2d 1018 (1983). Under the criminal standard, the burden is on the party alleging ineffective assistance to show: (1) counsel's representation was deficient, *i.e.*, fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) counsel's deficient representation prejudiced the party; *i.e.*, there is a reasonable probability that, except for counsel's deficient performance, the result of the proceeding would have been different.[26] *In re Dependency of S.M.H.*, 128 Wn. App. 45, 61, 115 P.3d 990, *review*

[25] Division Three employs a civil standard of review for ineffective assistance of counsel claims on review of proceedings under chapter 13.34 RCW.

[26] Division One employs a criminal standard of review for ineffective assistance of counsel claims on review of proceedings under chapter 13.34 RCW.

denied, 156 Wn.2d 1001 (2005); *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). This division of the court has not adopted either standard of review in dependency cases. For this analysis, this court assumes the *Strickland* standard applies.

On review, there is a strong presumption that counsel's representation was effective. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Further, "legitimate 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); *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). Generally, counsel's decisions regarding whether to object fall within the category of strategic or tactical decisions. *State v. Johnston*, 143 Wn. App. 1, 19, 177 P.3d 1127 (2007); *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662, *review denied*, 113 Wn.2d 1002 (1989).

First, D.W. argues that his counsel was ineffective for not objecting to the Department's ER 904 exhibits. But even if D.W. could show that counsel's failure to object was deficient performance, he fails to establish how he was prejudiced. He does not point to any specific document in the Department's exhibits that prejudiced him.

Second, D.W. argues that his counsel was deficient for not seeking the admission of Englert-Brewer's declaration in the guardianship proceeding.[27] Even assuming counsel's performance was deficient, D.W. does not show that the outcome was likely to

[27] As noted above, the record does contain a declaration apparently from Englert-Brewer. It's not entirely clear how the declaration ended up in the record if it was never admitted at the termination trial. The parties seem to agree that it was never admitted, however.

be different but for the failure. The juvenile court relied on multiple other factors when it denied the petition, including the testimony of the children's therapists, the GALs, and the social worker. The court also specifically noted that a guardianship is not in the children's best interests because it "would continue to give [D.W.] control [and] the ability to contact the children." 51210-6-II CP at 202.

Third, D.W. argues that his dependency counsel was deficient for failing to challenge the admission of the dependency orders and petition at the termination trial. But even absent a valid dependency order, this court may uphold a termination order if the findings of fact in the termination order create an inference that the child is dependent. *In re Dependency of K.N.J.*, 171 Wn.2d 568, 582-84, 257 P.3d 522 (2011). Here, the Findings of Fact support an inference that all three children were dependent. As such, D.W. fails to show prejudice from failing to object to the dependency orders.

Finally, D.W. argues that counsel was deficient for failing to serve B.W. and the GAL with the first guardianship petitions. This court concludes he was not prejudiced because D.W. subsequently filed a second guardianship petition, served all the parties, and the juvenile court considered the petition on the merits.

Recusal of Commissioner Mitchell

D.W. argues Commissioner Mitchell's attendance of his sentencing hearing qualifies as an ex parte investigation in violation of the Washington Code of Judicial Conduct. CJC 2.9(C) provides, "[a] judge shall not investigate facts in a matter pending or impending before that judge, and shall consider only the evidence presented and any facts that may properly be judicially noticed, unless expressly authorized by law." CJC

2.9(C). D.W. cites *Sherman v. State*, 128 Wn.2d 164, 905 P.2d 355 (1996), in which the Washington Supreme Court held recusal was required of a judge who initiated ex parte communications, to argue Commissioner Mitchell should similarly have been required to recuse here.[28]

During the course of the December 17, 2015 hearing, Commissioner Mitchell said the following in response to D.W.'s criminal defense attorney's statement that D.W.'s children were in good health:

> But what I am struck by is that [D.W.] and you and maybe other people have said, well, his biological children were not harmed. And I disagree with that statement. I went to the sentencing, and I was familiar on what the facts that were read into the case based upon the polygraphs and what [D.W.] pled to. And these children were in motel rooms when this child was being tortured, so there was vicarious trauma, and I don't know how you could not say that they didn't experience vicarious trauma.
>
> Maybe they weren't physically abused, but I have grave concerns on the emotional abuse that they experienced and the vicarious trauma watching a child die before their eyes. So that's why I have a therapist involved with the kids, to determine whether or not they should continue to have a relationship with their parents.
>
> So even though they're biologically related, I have a real concern how is this going to trigger these children. Are they going to suffer from PTSD in the future? Are they experiencing PTSD now? How is this going to affect them as teenagers and young adults?

RP Dec. 17, 2015 at 16-17.

This court concludes Commissioner Mitchell did not err in not recusing herself because D.W.'s motion for recusal was untimely and it lacked merit. First, D.W.'s

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[28] A physician terminated by his employer because he became chemically dependent on narcotics. *Sherman*, 128 Wn.2d at 170. The *Sherman* court held the lower court judge was required to recuse himself because he directed a legal extern to request information regarding the process used to monitor recovering physicians. *Sherman*, 128 Wn.2d at 203.

sentencing hearing occurred in September 2015. D.W. waited until October 2016, over a year later, to file his recusal motion. During that year, Commissioner Mitchell presided over multiple hearings. D.W.'s delay in filing was unreasonable. *State v. Carlson*, 66 Wn. App. 909, 917, 833 P.2d 463 (1992) (holding a three month delay in making an inquiry was unreasonable), *review denied*, 120 Wn.2d 1022. Second, a trial court is presumed to function without bias or prejudice and it is the movant's burden to present facts overcoming that presumption. *Wolfkill Feed & Fertilizer Corp. v. Martin*, 103 Wn. App. 836, 841, 14 P.3d 877 (2000); *In re Davis*, 152 Wn.2d 647, 692, 101 P.3d 1 (2004). While Commissioner Mitchell attended D.W.'s sentencing hearing, the record does not reflect she learned or relied upon any information therefrom. The exchange with D.W.'s criminal defense attorney reflects independent knowledge of the facts stated at the sentencing hearing. D.W. failed to overcome Commissioner Mitchell's presumption of impartiality.

Additional Arguments

D.W. argues that the juvenile court erred by admitting Dr. Page's evaluation to the extent it purported to evaluate D.W.'s chemical dependency or anger management issues because Dr. Page was not qualified on these topics. He did not object on these grounds in the juvenile court. RP 497. He may not raise it for the first time on appeal. RAP 2.5(a).

D.W. also argues that the Department violated the Public Record Act or RCW 13.50 by denying D.W. video footage of visitation, which he could have presented during trial to show his positive relationship with his children. But D.W. does not cite to anything in the record relating either the fact that he made any such request or any court order requiring the Department to provide such a video.

D.W. argues that the juvenile court's finding that D.W. "is a sociopath with no active conscience" is not supported by substantial evidence. CP at 1839. The juvenile court's finding was based on Dr. Page's conclusions and tests. Dr. Page found that D.W. scored "solidly within the average to high average range for sociopathology" on the Hare Psychopathy Checklist. 50210-2-II 3 RP Jul. 12, 2017 at 485. Further, Page testified that D.W.'s own actions "in the context of the offense and the aftermath suggest lack of remorse and lack of empathy or lack of responsibility." 3 RP Jul. 12, 2017 at 628. D.W.'s own account of beating J.H.-W. and subsequently leaving him to slowly weaken and die indicates he lacks an active conscience. Thus, substantial evidence supports the juvenile court's findings.

Finally, D.W. argues that the record does not support the juvenile court's finding that "through [D.W.'s] actions towards [J.H.-W.], [D.W.] has shown the Court what he does when he is the disciplinarian in charge of children." CP at 1841. However, the record reflects that D.W. repeatedly inflicted physical punishment on J.H.-W. by hitting him in the face, burning him with a hairdryer, flicking him, and spraying alcohol on his wounds. "What's past is prologue." WILLIAM SHAKESPEARE, THE TEMPEST, act 2, sc. 1. Substantial evidence supports the juvenile court's finding.

CONCLUSION

Substantial evidence supports the juvenile court's Findings of Fact. The court's Findings of Fact support its Conclusions of Law that the required elements for termination of parental rights under former RCW 13.34.180(1)(a) through (f) have been established

by clear, cogent, and convincing evidence and that termination of D.W.'s parental rights is in the best interests of the children. Accordingly, it is hereby

ORDERED that the juvenile court's orders terminating D.W.'s parental rights to J.W., A.W., and D.W., Jr., and denying his petitions for guardianships for them, are affirmed.

DATED this 11th day of April, 2019.

Eric B Schmidt

Eric B. Schmidt
Court Commissioner

cc: Hailey L. Landrus
Karl D. Smith
Hon. James Lawler

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re the Termination of Parental Rights to: J.W., A.W., and D.W.	No. 97401-2 Court of Appeals No. 50710-2-II (consol. w/ Nos. 50714-5-II, 50720-0-II, 50724-2-II, 50730-7-II, 50734-0-II, 51210-6-II, 51214-9-II, 51220-3-II, 51224-6-II, 51230-1-II and 51234-3-II) RULING DENYING MOTION TO DISQUALIFY, DENYING MOTION TO SUPPLEMENT RECORD, AND DENYING MOTION FOR DISCRETIONARY REVIEW

D.W. seeks discretionary review of a decision by Division Two of the Court of Appeals affirming superior court orders terminating his parental rights to his three biological children, J.W., A.W., and D.W., Jr. (the children). He also moves for me to disqualify myself from this matter for alleged bias arising from my ruling denying D.W.'s motion for discretionary review in a related matter involving this case. No. 97166-8. D.W. further moves to supplement the record with a copy of that ruling. The parties argued these motions at a teleconference hearing conducted on August 29, 2019. All three motions are denied for reasons explained below.

With regard to the motion to disqualify myself, D.W. previously sought discretionary review of a Court of Appeals decision ordering supplementation of the

APPENDIX C

record in his appeal of a Lewis County Superior Court order denying his motion to vacate orders finding the children to be dependent. While that appeal was pending, the superior court terminated D.W.'s parental rights to these children. The supplemental records relate to the termination decision under consideration here. After discussing the history of the case and the applicable legal authorities, I determined that D.W. failed to satisfy discretionary review criteria listed in RAP 13.5(b) and therefore denied review. In summarizing my decision, and citing a relevant child welfare decision, I noted generally that in light of the dynamic nature of child dependency proceedings and the history of the case it was "difficult to visualize the court requiring the entire termination and dependency proceedings to be unspooled and restarted years after the dependency petition was filed, particularly in light of the children's current residential status and D.W.'s lengthy incarceration."[1] Ruling at 8 (citing *In re Dependency of K.N.J.*, 171 Wn.2d 568, 584, 257 P.3d 522 (2011)). This court denied D.W.'s motion to modify my decision. While the motion to modify was pending, D.W. cited the above-quoted sentence as evidence that I am biased against him in relation to the dependency and termination matters and moved that I disqualify myself. The department opposes the motion but also suggests that referring the motion for discretionary review to a department of the court will cause the disqualification motion to become moot. D.W. seized upon this suggestion in reply and urges that I refer the motion for discretionary review to a department of the court.

The primary role of the Supreme Court Commissioner is to "promote the effective administration of justice." SAR 15(a). Relevant to that purpose, cases involving child dependency and termination of parental rights should be heard and decided expeditiously. RAP 18.13A(a). If I were to follow the department's suggested

[1] D.W. is serving a prison sentence imposed after he was convicted of manslaughter in the death of a young child in his care.

course, the motion for discretionary review will not be considered by a department of this court until November 5, 2019, due to the time it takes to properly screen the matter pursuant to SAR 15(c). Such a delay is contrary to the court's policy to promote the expeditious consideration of child welfare cases. *See* RAP 18.13A. The more efficient use of judicial resources at this juncture is for me to decide the disqualification motion now. The aggrieved party can still move to modify my ruling. RAP 17.7.

Moving on, D.W. reads the allegedly offending sentence out of context within the entire eight-page ruling. Rather than predicting or attempting to affect the outcome of the termination appeal, I was merely emphasizing the collateral nature of the meritless motion for discretionary review then under consideration. The subsequent denial of his motion to modify the ruling denying review in No. 97166-8 confirms that my assessment was correct. Furthermore, that I disagreed with D.W.'s arguments in relation to that motion for discretionary review does not mean that I am biased against him in relation to this motion for discretionary review or in the general sense. Each motion must be decided on its individual merits. That is what I did then and that is what I am doing now. In sum, I am not persuaded that a reasonable person viewing the ruling in its entirety and in context with the record would conclude that I harbor a personal bias against D.W. *See* CJC Canon 2.11(A)(1). The motion to disqualify myself is denied.

D.W. relatedly moves to supplement the record in this matter with a copy of my ruling in No. 97166-8, citing RAP 9.11. That rule is intended to allow the taking of additional evidence on the merits of a superior court decision currently on review. RAP 9.11(a). If the appellate court grants such a motion, the ordinary remedy is to direct the superior court to conduct an evidentiary hearing and enter findings. RAP 9.11(b). The rule does not apply in this situation. In any event, a copy of the ruling is appended to both the motion to disqualify and the motion to supplement. The court will take

judicial notice of the ruling denying review in No. 97166-8 insofar as it relates to the motion to disqualify and the motion to supplement.[2]

Turning to D.W.'s motion for discretionary review, the children were removed from D.W.'s care (and that of his wife, B.W.) after D.W. and B.W. killed another young child in their care.[3] The former Department of Social and Health Services[4] then filed dependency petitions as to all three children. D.W. entered into an agreed order of dependency as to the children in November 2014.

The department petitioned to terminate D.W.'s parental rights to these children in October 2015. D.W. subsequently moved for appointment of a guardian. The matter proceeded to a six-day evidentiary hearing in July 2017. After the hearing, on July 28, 2017, the superior court entered findings of fact and conclusions of law and orders terminating D.W.'s parental rights as to all three children. The court also denied the petition to establish a guardianship.

D.W. appealed. The Court of Appeals accelerated review pursuant to RAP 18.13A and affirmed the termination and guardianship orders in a 46-page ruling issued by Commissioner Eric Schmidt on April 11, 2019. A panel of judges denied D.W.'s motion to modify the commissioner's ruling. D.W. now seeks discretionary review of that decision. RAP 13.5A(a)(3); RAP 18.13A(k).

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[2] D.W. also moved for me to disqualify myself and for supplementation of the record in connection with his contemporaneous motion for discretionary review of a separate Court of Appeals decision concerning these dependency and termination matters. No. 97400-4. I denied the disqualification and supplementation motions for the same reasons as stated above and also denied discretionary review.

[3] The facts surrounding the child's death are disturbing and will not be recounted in detail here. D.W. and B.W. pleaded guilty to manslaughter. B.W. voluntarily relinquished her parental rights to J.W., A.W., and D.W., Jr., and is no longer involved in this matter. The Court of Appeals reversed D.W.'s conviction and remanded to the trial court to allow him an opportunity to withdraw his guilty plea. It appears D.W. elected not to withdraw his plea and therefore is still incarcerated on the manslaughter conviction.

[4] Effective July 1, 2018, all child welfare services formerly the responsibility of the Department of Social and Health Services were transferred to the newly created Department of Children, Youth and Families. RCW 43.216.906. Both agencies are referred to as "the department" for purposes of this ruling.

To obtain review in this court, D.W. needs to establish that the Court of Appeals decision conflicts with a decision of this court or with a published Court of Appeals decision, or that he is raising a significant constitutional question or an issue of substantial public interest. RAP 13.4(b). D.W. argues that review is justified under all four of these criteria. He fails to make this showing, as discussed below.

D.W. first argues that Judge James Lawler erroneously disregarded his affidavit of prejudice. D.W. made this argument in his separate and contemporaneous motion for discretionary review In No. 97400-4; *see* footnote 2, *supra*. I rejected the argument in that ruling and do so here as well. To briefly summarize the more extensive treatment of the issue in my ruling in No. 97400-4, D.W. failed to timely file his affidavit of prejudice before Judge Lawler entered a discretionary ruling concerning continuation of the termination fact-finding hearing. *See* former RCW 4.12.050(1) (2009); *State v. Lile*, 188 Wn.2d 766, 778-80, 398 P.3d 1052 (2017). This claim does not merit this court's review.

D.W. next argues that no evidence supports the superior court's finding that the department offered or provided all court ordered services under RCW 13.34.180(1)(d). The superior court's findings of fact in a child welfare proceeding are reviewed for substantial evidence from which a rational trier of fact could find the necessary facts by clear, cogent and convincing evidence. *In re Dependency of K.S.C.*, 137 Wn.2d 918, 925, 976 P.2d 113 (1999). A reviewing court does not make credibility determinations and does not weigh the evidence. *In re Welfare of C.B.*, 134 Wn. App. 942, 953, 143 P.3d 846 (2006). In this connection, an appellate court gives deference to the superior court judge's advantage in having the witnesses before him or her, which is particularly important in proceedings affecting the parent and child relationship. *In re Welfare of A.W.*, 182 Wn.2d 689, 711, 344 P.3d 1186 (2015). Thus, a reviewing court defers to the superior court and will not disturb findings of fact supported by substantial evidence

even if there is conflicting evidence. *Merriman v. Cokeley*, 168 Wn.2d 627, 631, 230 P.3d 162 (2010). Unchallenged findings of fact are verities on appeal. *In re Interest of Mahaney,* 146 Wn.2d 878, 895, 51 P.3d 776 (2002); *In re Welfare of L.N.B.-L.*, 157 Wn. App. 215, 243, 237 P.3d 944 (2010).

One of the elements the department must prove is "[t]hat 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). In determining whether the department met its burden under RCW 13.34.180(1)(d), the superior court may consider "any service received, from whatever source, bearing on the potential correction of parental deficiencies." *In re Dependency of D.A.*, 124 Wn. App. 644, 651-52, 102 P.3d 847 (2004). But the department need not provide services when the parent is unable or unwilling to make use of them. *In re Dependency of Ramquist*, 52 Wn. App. 854, 861, 765 P.2d 30 (1988). And even if the department "inexcusably fails" to offer all necessary services, termination is still appropriate if the services would not remedy the parent's deficiencies in the foreseeable future. *In re Parental Rights to K.M.M.*, 186 Wn.2d 466, 486, 379 P.3d 75 (2016) (citing *In re Dependency of T.R.*, 108 Wn. App. 149, 164, 29 P.3d 1275 (2001)).

D.W. argues that the department failed to offer or provide him with court-ordered parenting classes, a chemical dependency evaluation or treatment, and anger management evaluation or treatment. Substantial evidence in the record shows that the department made reasonable efforts to offer or provide these services. D.W. downplays the reality that he is incarcerated in a Department of Corrections facility and thus is under that agency's jurisdiction and control. His incarcerated status alone is a significant barrier to receiving services.

More to the point, D.W. received two different drug and alcohol evaluations during his incarceration. He underwent urinalysis (UA) testing and mental health treatment. D.W. participated in a psychological evaluation.[5] Drug and alcohol treatment and anger management training were not available in the correctional facility. The correctional facility could not even provide a room for a regularly scheduled class. Social worker Juli Jager tried to find a one-on-one parenting instructor who would go into the correctional facility but could not find one. She also could not locate an evidence-based online parenting course. She contacted the director of a parenting class taught at other Department of Corrections facilities, but the class was not available at D.W.'s facility. The evidence plainly shows that the department made reasonable efforts to obtain services for D.W. given the considerable constraints inherent in incarceration. *See In re Dependency of D.L.B.*, 186 Wn.2d 103, 123, 376 P.3d 1099 (2016) (department made reasonable efforts to provide services to incarcerated parent). D.W. fails to make a persuasive showing that this issue merits further review.

D.W. next contends that his successive array of trial counsel (five of them) were ineffective in various ways. A parent's right to counsel in a parental rights termination proceeding includes the right of effective representation. *In re the Welfare of J.M.*, 130 Wn. App. 912, 922, 125 P.3d 245 (2005). Commissioner Schmidt observed that the different divisions of the Court of Appeals have not settled upon a common ineffective assistance standard in child welfare cases. *See In re Dependency of Moseley*, 34 Wn. App. 179, 184, 660 P.2d 315 (1983) (applying civil standard: whether counsel provided client with meaningful hearing); *In re Dependency of S.M.H.*, 128 Wn. App. 45, 61, 115 P.3d 990 (2005) (applying two-part criminal standard explicated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). Noting that

[5] Dr. Ronald Page conducted the psychological evaluation of D.W. It was his view that D.W. displays an abundance of sociopathic features.

Division Two had not adopted either standard, Commissioner Schmidt assumed the *Strickland* standard applies. The argument in D.W.'s motion for discretionary review mirrors the *Strickland* analysis without citing that decision. Like Commissioner Schmidt, the department assumes the *Strickland* standard applies. At oral argument, D.W.'s counsel indicated that *Strickland* applies. Since *Mosely* predates *Strickland*, and a parent's right to counsel in a dependency or termination proceeding is similar to that of a criminal defendant, it makes better sense to apply the *Strickland* standard in this case, as Commissioner Schmidt and the parties seem to recognize.

Under the *Strickland* test, D.W. must demonstrate (1) that counsel's representation was deficient, in other words, that counsel's performance fell below an objective standard of reasonableness in light of all the circumstances; and (2) that counsel's deficient performance prejudiced him, in other words, that but for counsel's deficiencies, the results would have been different. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). If D.W. fails to satisfy either prong of this test, his ineffective assistance claim fails. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). Counsel's legitimate tactical or strategical decisions cannot be a basis for supporting a claim of ineffective assistance of counsel. *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). A claim of ineffective assistance is evaluated in light of the entire record below. *McFarland*, 127 Wn.2d at 335.

Here, D.W. specifically claims that counsel was ineffective in (1) failing to challenge the validity of the underlying dependency orders as evidence supporting termination under RCW 13.34.180(1)(a) and (b), and (2) failing to object to ER 904 exhibits. Neither assertion is persuasive.

D.W. fails to show that counsel was deficient in not challenging the validity of the dependency orders. D.W. continues to ignore that he stipulated to the children's dependency. The underlying facts are quite disturbing, so there was no real point in

contesting dependency. To the extent the resulting dependency orders may be deficient in some way (and I do not say they are), the findings of fact subsequently entered in support of the termination orders amply support an inference that the children were dependent. *In re Dependency of K.N.J.*, 171 Wn.2d 568, 582-84, 257 P.3d 522 (2011). D.W. cannot show either deficiency of counsel or resulting prejudice on this point.

As for the ER 904 exhibits, D.W. cannot show deficient performance without showing a tenable basis for objections. D.W. does not even identify specific exhibits he claims to be objectionable. Such generalities will not establish deficient performance. And in any event, counsel's decisions regarding objections are part and parcel of the type of tactical decisions not subject to claims of ineffective assistance. *State v. Johnston*, 143 Wn. App. 1, 19, 177 P.3d 1127 (2007). Even if D.W. could establish that counsel should have objected to the ER 904 exhibits, he fails to show that any of the objections would have been sustained or if some objections had been sustained it would have prevented the court from terminating his parental rights. D.W. thus fails to establish a reviewable claim of ineffective assistance.

D.W. next contends that a superior court commissioner should have recused herself after she attended his sentencing hearing. This claims pertains to the commissioner's December 2015 ruling denying D.W.'s visitation with the children. When D.W.'s counsel commented that the children were in good health, the commissioner disagreed, relating that she attended D.W.'s sentencing hearing and that she was familiar with the facts underlying D.W.'s confession. The commissioner expressed her concern that the children suffered trauma as a result of witnessing D.W. killing another child.

D.W. asserts that the commissioner's remarks indicate that she improperly conducted an ex parte investigation of his criminal case prior to ruling on the visitation issue. *See* CJC 2.9(C) (judge shall not investigate facts in a pending matter). D.W.

argues that the Court of Appeals decision conflicts with *Sherman v. State*, 128 Wn.2d 164, 905 P.2d 355 (1995); *In re Disciplinary Proceeding against Sanders*, 159 Wn.2d 517, 145 P.3d 1208 (2006); and *Wolfkill Feed & Fertilizer Corp. v. Martin*, 103 Wn. App. 836, 841, 14 P.3d 877 (2000), as to this issue.

There are no reviewable conflicts with these decisions. Read in context, the commissioner's remarks indicate she had background knowledge of D.W.'s crime before she attended the sentencing hearing. The commissioner did not contact a third party for information. *See Sherman*, 128 Wn.2d at 203-04. Nor did the commissioner elicit information pertaining to the case or engage in discussions with the parties present at sentencing. *See Sanders*, 159 Wn.2d at 519, 521. And there is no showing that the commissioner relied on information obtained from the sentencing hearing in denying visitation. Under these facts, D.W. cannot overcome the presumption that the commissioner performed her judicial functions "regularly and properly without bias or prejudice." *Wolfkill*, 103 Wn. App. at 841. And D.W.'s motion for the commissioner to recuse herself was untimely in any event, as he did not file the motion until more than a year after the hearing. *See State v. Carlson*, 66 Wn. App. 909, 917, 833 P.2d 463 (1992) (parties must exercise reasonable diligence in seeking disqualification). Furthermore, even if the commissioner should have recused herself, D.W. fails to show in light of the entire record that it would have affected Judge Lawler's ultimate termination decision.

D.W. urges reversal of the termination orders under the cumulative error doctrine. This doctrine applies if multiple nonreversible errors result in a fundamentally unfair proceeding. *State v. Emery*, 174 Wn.2d 741, 766, 278 P.3d 653 (2012). D.W. fails to persuasively show such an accumulation of errors.

Finally, D.W. urges this court to review a list of additional claims but provides no meaningful briefing on any of them. Passing treatment of an issue without adequate

briefing merits no consideration in this court. *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 416, 120 P.3d 56 (2005).

In sum, the Court of Appeals properly applied settled law to the facts of this case. D.W. fails to show that this court's review is warranted under RAP 13.4(b).

The motions to disqualify, to supplement the record, and for discretionary review are denied.

COMMISSIONER

September 4, 2019

THE SUPREME COURT OF WASHINGTON

In re the Termination of Parental Rights of:	)	No. 97401-2
	)	
J.W., A.W., and D.W.	)	**ORDER**
	)	
	)	Court of Appeals
	)	No. 50710-2-II
	)	(consolidated with Nos. 50714-5-II,
	)	50720-0-II, 50724-2-II, 50730-7-II,
	)	50734-0-II, 51210-6-II, 51214-9-II,
	)	51220-3-II, 51224-6-II, 51230-1-II
	)	and 51234-3-II)
	)	

Department II of the Court, composed of Chief Justice Fairhurst and Justices Madsen, Stephens, González and Yu, considered this matter at its November 5, 2019, Motion Calendar and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petitioner's motion to modify the Commissioner's ruling denying the motion for disqualification and the Petitioner's motion to modify the Commissioner's ruling denying the motion for discretionary review are both denied.

DATED at Olympia, Washington, this 6th day of November, 2019.

For the Court

Fairhurst, C.J.
CHIEF JUSTICE

APPENDIX D

Additional material from this filing is available in the Clerk's Office.