FINDINGS OF FACT IN DEPENDENCY & TERMINATION CASES

Top Ten Recommendations to Ensure Adequate Findings of Fact

Judge Beth M. Andrus (ret.) & Judge Helen Halpert (ret.)

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1. CR 52 requires the entry of written findings of fact and conclusions of law after a bench trial.

CR 52 provides:

(a) Requirements.

(1) *Generally.* In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law. Judgment shall be entered pursuant to rule 58 and may be entered at the same time as the entry of the findings of fact and the conclusions of law.

(2) *Specifically Required.* Without in any way limiting the requirements of subsection (1), findings and conclusions are required:

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(C) Other. In connection with any other decision where findings and conclusions are specifically required by statute, by another rule, or by a local rule of the superior court.

RCW ch. 13.34 mandates specific findings of fact in shelter care proceedings (RCW 13.34.065), dependency fact-finding hearings (RCW 13.34.110), and termination trials (RCW 13.34.180).

Written findings are also required under the Indian Child Welfare Act, RCW 13.38.040. In re J.M.W., 199 Wn.2d 837, 845, 514 P.3d 186, 191–92 (2022) (Trial courts presiding over hearings involving children protected by WICWA are required to evaluate whether active efforts have been taken "at every hearing when the Indian child is placed out of the home).

While RCW 13.34.035 mandates the use of forms prepared by the Administrative Office of the Courts, these forms still require judicial officers to enter their own findings of fact. See the dependency form order:

2.2 **Facts**:

☐ Facts establishing dependency have not been proved.

☐ The following facts establishing dependency have been ☐ agreed upon ☐ proved:

_____

_____

_____

_____

_____

_____.

The termination form contains no boxes to check but instead states "[The Washington Pattern Forms Committee believes that an order terminating a parent-child relationship should receive individualized attention due to the seriousness of the proceeding.]"

2. The written findings should track the applicable statutory language.

Written findings of fact should closely track the language of the applicable statute.

- **Identify all statutory findings the trial court "shall" make and ensure that the written findings address each of these statutory issues.**

The dependency and termination statutes set out mandatory findings that a court must make to support a ruling. Judicial officers should review the statute applicable to the fact-finding hearing at issue and make sure they have addressed each mandatory finding in writing.

Failure to do so may lead to a reversal on appeal. See for example, Matter of Dependency of Q.S., 22 Wn. App. 2d 586, 515 P.3d 978 (2022), a dependency appeal in which the Department contended the child had no parent capable of caring for them under RCW 13.34.030(6)(c). In reversing a finding of dependency, the court noted that the written findings did not track the statutory language:

> The written findings of fact entered by the superior court fail to include language that [father's] parenting of either child poses a danger of substantial damage to the child's psychological or physical development. The superior court's oral ruling includes such language, and the written findings of fact incorporate the oral ruling. Still, we wonder why such critical language was omitted from the written findings.

22 Wn. App. 2d at 609 (emphasis added). It is therefore best practice for the judicial officer's written findings to track the statutory language.

- **Don't assume that incorporating the oral ruling by reference will suffice on appeal.**

While an appellate court may refer to the trial court's oral ruling to fill in gaps in the written findings, the requirement of formal written findings is not satisfied by incorporating by reference a trial court's oral findings of fact. Douglas J. Ende, 14A Wash. Prac., Civil Procedure § 33:6. (3d ed.) (citing Peoples Nat'l Bank v. Birney's Enterprises, Inc., 54 Wn. App. 668, 670, 775 P.2d 466 (1989)).

Counsel will often ask that the oral ruling be incorporated by reference, to ensure that the written findings are not deemed inadequate, but trial courts should not assume that this practice will work in all cases.

- **Ask counsel at a presentation hearing if the court has overlooked any issues.**

There may be issues that parties overlook when finalizing written findings of fact and conclusions of law. Asking counsel if there are additional disputed issues needing to be resolved may be a way to avoid

3. Findings of fact should identify the specific evidence on which the court relied to support its ultimate findings.

An appellate court reviews an order of dependency or termination to determine whether "substantial evidence" supports the court's findings of fact and whether those findings support the conclusions of law. In re Welfare of X.T., 174 Wn. App. 733, 737, 300 P.3d 824 (2013).

"Substantial evidence" exists when, viewing the evidence in the light most favorable to the prevailing party, a rational trier of fact could find the fact more likely than not to be true. In re Dependency of A.C., 1 Wn.3d 186, 193, 525 P.3d 177 (2023).

It will assist the appellate court if the trial court outlines the evidence which it believes supports each ultimate finding of fact.

The findings should not be conclusory in nature. They should be as specific as possible, identifying the evidence that the trial court found to support its findings. *See* State v. Shimer, 112 Wn. App. 1059 (2002) (unpublished) (written findings of fact and conclusions of law did not adequately identify the evidence relied upon to support each element of each criminal charge; deficiencies required remand for entry of proper findings and conclusions under CrR 6.1(d)).

Again, see In re Dependency of Q.S.:

> The superior court, in its oral ruling, did not identify the evidence on which it determined that [the father] constituted a danger of substantial damage to either child's psychological or physical development. Thus, the finding is conclusory in nature.

22 Wn. App. 2d at 609-10. The court of appeals reversed the finding of dependency because it refused to speculate as to what evidence the trial court relied on at the shelter care hearing.

4. Findings of fact should not summarize testimony but should specify whose testimony the court found credible.

- **Findings of fact should be more than a mere summary of each witness's testimony.**

What is the difference between the following two findings?

> **Example 1:** Mother testified she did not use drugs during her pregnancy. The maternal grandmother testified she observed mother using methamphetamine while pregnant.
>
> **Example 2:** While the mother claimed she had not used drugs during her pregnancy, the maternal grandmother testified credibly that she observed the mother using methamphetamine while pregnant. The court finds the maternal grandmother's testimony to be more credible.

The first example just recounts who said what at trial. It does not tell the appellate court whose testimony the trial court accepted as more credible. The second example provides this missing information.

- **Explain why the trial court found one witness more credible than another on disputed facts.**

A court of appeals will not reweigh evidence or reassess witness credibility. When there is a dispute between two witnesses' version of events, the findings of fact should include specific findings as to whose testimony the trial court found to be the more credible. And the findings should explain <u>why</u> one witness was found more credible than the other.

The following example builds on the first two examples above to include this type of explanation:

> **Example 3:** While the mother claimed she had not used drugs during her pregnancy, the maternal grandmother testified credibly that she observed the mother using methamphetamine while pregnant. The court finds the maternal grandmother's testimony to be more credible <u>because</u> the maternal grandmother was in a position to observe her daughter's drug use during the relevant time period, she had no motive to fabricate a story about this drug usage, she tried to convince the mother to enter residential treatment at the same time, and her observations are corroborated by the hospital drug test results after the mother gave birth.

No appellate court will reverse this type of finding as long as there is evidence in the record to support the trial court's reasoning.

5. Findings of fact must be based on evidence admitted at trial, not on evidence admitted in prior hearings or evidence admitted for a non-substantive, limited purpose.

- **Evidence presented at prior dependency hearings**

During a fact-finding hearing, judicial officers may take notice of undisputed facts and may apply common sense based on their experience, but they cannot consider evidence outside the record. The court cannot take judicial notice of testimony from a prior dependency proceeding. Matter of Dependency of RLL, 2023 WL 8817876 (Div. 3, 12/21/2023) (at shelter care hearing relating to mother's second child, trial court erred in relying on expert medical testimony from dependency hearing relating to first child).

If the Department does not re-introduce testimony from the prior proceeding and this testimony was not subject to questioning and cross-examination by the parties, then the testimony is evidence outside the record and cannot be considered. *Id.*, 2023 WL 8817876, at *5.

- **Expert testimony and expert reports**

A trial court also cannot rely on an expert's description of facts over which the expert lacks personal knowledge. Experts may testify about hearsay statements made by an out-of-court witnesses to explain how they reached their opinions. But a judicial officer cannot rely on that hearsay as substantive evidence.

In Dependency of X.T., an expert social worker based her testimony supporting a child's dependency solely on written reports. 174 Wn. App. 733, 735-37, 300 P.3d 824 (2013). Those reports were mostly hearsay. The trial court found the child dependent based entirely on this testimony. *Id.* The Court of Appeals reversed. *Id.* at 739. Because the evidence rules apply to dependency fact-finding hearings, the court held that the trial court erred by relying on the unsworn out-of-court testimony in those reports as substantive evidence. *Id.*

A party may offer factual evidence to explain the basis of an expert's opinion. However, if a party offers factual evidence only through an expert witness for the limited purpose of explaining that expert's opinions, the factual evidence itself cannot be relied on to prove a necessary element of the Department's case.

- **Evidence the court did *not* rely on**

Transcripts are not always clear as to whether the trial court admitted or excluded evidence, or whether the court found a particular report persuasive. The written findings should identify any evidence the court excluded at trial or any evidence it deemed

untrustworthy or lacking in corroboration.

6. Findings of fact should include a recitation of the applicable burden of proof.

Burdens of proof are extremely important to appellate courts and will guide their review of evidence on appeal. As discussed below, there may be differing burdens of proof for various required findings in different stages of the dependency process.

Different evidentiary standards apply when the court finds that the child is an Indian child under the Washington Indian Child Welfare Act, RCW ch. 13.38, and the federal Indian Child Welfare Act (ICWA), 25 U.S.C § 1902 *et seq*. *See generally*, In re J.M.W., 199 Wn.2d 837, 514 P.3d 186 (2022); Matter of Dependency of G.J.A., 197 Wn.2d 868, 489 P.3d 631 (2021); Matter of Dependency of Z.J.G., 196 Wn.2d 152, 471 P.3d 853 (2020).

As to non-WICWA cases:

Dependencies: To find a child dependent, the Department must present enough evidence to support a trial court's findings by a "preponderance of evidence." *In re Welfare of Key*, 119 Wn.2d 600, 612, 836 P.2d 200 (1992). This burden of proof requires evidence sufficient to show that a fact is more probably true than not true.

But once the court finds a child dependent, the court can only order an out-of-home placement if it makes a specific finding, by clear, cogent and convincing evidence that such a placement is required to protect the child.

As stated in the very recent Division One case of In re Dependency of Z.A., et al, https://www.courts.wa.gov/opinions/pdf/841220.pdf (December 26, 2023):

> [U]nder RCW 13.34.130(6)(a), the Department still has the burden to prove *by clear, cogent, and convincing evidence* that a parent's deficiency jeopardizes the child's rights to conditions of basic nurture, health, or safety in circumstances where an in-home placement would pose a manifest danger to the children (emphasis added).
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> ***
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> Here, the trial court did not find by "clear, cogent and convincing evidence" that the father's deficiencies were such that an in-home placement posed a manifest danger that jeopardized the children's rights of basic nurture, physical and mental health, and safety. Instead, the court found that it would be "detrimental to the children to move them into a hotel with their father at this time" because he has "not shown any type of consistency in their lives" and "does not possess the skills to care for them as the sole parent and he has not articulated a realistic plan to do so." The court found that it is "imperative to consider the best interest of the children and not have them going back and forth between housing."

> We conclude that the trial court abused its discretion because it applied the incorrect legal standard and failed to determine whether the Department had met its burden to show by clear, cogent, and convincing evidence of a circumstance where an in-home placement would "pose a manifest danger" to the children.

Terminations: There is a two-step burden of proof in non-WICWA termination cases. First, the Department must show that it has satisfied its statutory obligations pursuant to RCW 13.34.180(1), and then it must establish that termination of parental rights would be in the child's best interests. Matter of K.M.M., 186 Wn.2d 466, 478, 379 P.3d 75 (2016).

The RCW 13.34.180(1) factors[1] must be found by "clear, cogent, and convincing evidence." K.M.M., 186 Wn.2d at 477. This burden of proof requires proof sufficient to show that a fact is "highly probable." In re Welfare of M.R.H., 145 Wn. App. 10, 24, 188 P.3d 510 (2008).

Unless ICWA applies, the finding that termination is in the best interest of the child is made using a preponderance of the evidence standard. In re Dependency of A.M.F., 23 Wn. App 2d 135, 147 (2022), ***affirmed***, 1 Wn.3d 407 (2023) (burden of proof issue not discussed in Supreme Court opinion). See also RCW 13.34.190.

The findings should explicitly note the applicable burden of proof and then lay out the specific evidence that satisfies that burden of proof. The court can and should use the "more probably true than not true" or "highly probable" language (as applicable) in its written findings of fact.

Although beyond the scope of this presentation, judicial officers need to keep in mind the high standards for removal of a child at shelter care contained in the Keeping Families Together Act, Engrossed Second Substitute H.B. 1227, 67th Leg., Reg. Sess. (Wash. 2021), discussed in Matter of Dependency of L.C.S., 200 Wn.2d 91, 102, 514 P.3d 644, 650 (2022).[2]

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[1] The Department may seek to terminate parental rights pursuant to RCW 13.34.180(1) only when: (a) That the child has been found to be a dependent child; (b) That the court has entered a dispositional order pursuant to RCW 13.34.130; (c) That the child has been removed or will, at the time of the hearing, have been removed from the custody of the parent for a period of at least six months pursuant to a finding of dependency; (d) That the services ordered under RCW 13.34.136 have been expressly and understandably offered or provided and all necessary services, reasonably available, capable of correcting the parental deficiencies within the foreseeable future have been expressly and understandably offered or provided; (e) That there is little likelihood that conditions will be remedied so that the child can be returned to the parent in the near future, and (f) That continuation of the parent and child relationship clearly diminishes the child's prospects for early integration into a stable and permanent home.

[2] *See also* https://www.wacita.org/hb-1227-keeping-families-together-act/ (as of July 1, 2023, after the shelter care hearing, trial court must return a child to their parent unless the court finds reasonable cause to believe that (1) reasonable efforts to prevent removal have been made; and either (2) the child has no parent to provide supervision or care for the child, or (3) removal is necessary to prevent imminent physical harm to the child.

7. Identify any rebuttable presumptions on which the trial court relied.

RCW 13.34.180(e) provides:

> A parent's failure to substantially improve parental deficiencies within 12 months following entry of the dispositional order shall give rise to a rebuttable presumption that there is little likelihood that conditions will be remedied so that the child can be returned to the parent in the near future. The presumption shall not arise unless the petitioner makes a showing that all necessary services reasonably capable of correcting the parental deficiencies within the foreseeable future have been clearly offered or provided.

In most termination cases, more than 12 months have expired between the date of the disposition order and the termination trial. Thus, the Department often invokes this presumption at trial. But it is not always clear in the written findings whether the trial court actually relied on this rebuttable presumption or, if it did, whether it would have impacted the outcome of the case.

The trial court should set out in the written findings of fact if and why this presumption applied. Also consider adding an additional finding to the effect that even if the presumption did not apply, the trial court's decision would be the same—that way the appellate court does not have to guess.

8. If the court relied on exhibits to support certain findings, the trial court should include a citation to the exhibits by number in the written findings.

It is extremely helpful to the court of appeals for the written findings of fact to identify which exhibit the trial court relied on to establish which particular facts.

9. The doctrine of res judicata does not prevent a parent from relitigating certain findings of fact in a dependency order and the trial court should not rely on this doctrine in termination findings of fact.

Records and proceedings of any court are admissible in evidence if they are certified by an officer in charge of the court records and if the seal of that court is annexed. RCW 5.44.010. State v. Benefiel, 131 Wn. App. 651, 654, 128 P.3d 1251 (2006).

This, however, does not make every single factual finding made in a dependency fact-finding hearing binding on the trial court in a subsequent termination trial. It merely allows the trial court to find that a court found a child dependent and issued a disposition order, findings required under RCW 13.34.180.

"RCW 13.34.180 does not require the State to reprove the facts supporting the dependency by clear, cogent, and convincing evidence. Allegations (1) and (2) only require the State to prove by clear, cogent, and convincing evidence that the children have been found to be dependent under RCW 13.34.030 and that dispositional orders

have been issued." In re Dependency of K.R., 128 Wn.2d 129, 142, 904 P.2d 1132 (1995).

But a trial court cannot treat other findings in a dependency order as res judicata:

> The Joneses argue, however, that the judge based his conclusions regarding [a parent's abuse] on his res judicata ruling that Patsy Jones had abused K.R. We agree that the trial court's findings must not be based on some notion of res judicata. We are concerned with the use of the res judicata doctrine in termination proceedings as it may cast doubt on whether the judge made the required statutory findings based on clear, cogent and convincing evidence. Fortunately, it is clear from the judge's oral ruling in this case that he did not mean that his findings of fact regarding allegation 5 were based on res judicata.

In re Dependency of K.R., 128 Wn.2d 129, 144–45, 904 P.2d 1132 (1995).

The written findings of fact in a termination trial should make it clear that the trial court independently found the parent unfit to parent, based on the higher burden of proof.

10. A termination order should contain a written finding that the parent is currently unfit to parent the child.

Parents have a constitutional due process right not to have their parental rights terminated without a finding of fact of current unfitness to parent. In re Parentage of B.P., 186 Wn.2d 292, 313, 376 P.3d 350 (2016). "In order to prove unfitness, the State must show that the parent's deficiencies make him or her incapable of providing 'basic nurture, health, or safety.' " Id. (quoting In re Welfare of A.B., 181 Wn. App. 45, 61, 323 P.3d 1062 (2004)).

When an appellate court is faced with a record that omits an explicit finding of current parental unfitness, the appellate court can imply or infer the omitted finding only if all the facts and circumstances in the record (including but not limited to any boiler plate findings that parrot RCW 13.34.180) clearly demonstrate that the omitted finding was actually intended, and thus made, by the juvenile court. In re Welfare of A.B., 168 Wn.2d 908, 921, 232 P.3d 1104 (2010). The trial court should therefore make an express finding of unfitness to ensure clarity in the ruling.