No. 101582-8

IN THE SUPREME COURT FOR
THE STATE OF WASHINGTON

IN RE THE DEPENDENCY OF G.M.W,
A MINOR CHILD

BRIEF OF AMICI CURIAE FAMILY VIOLENCE APPELLATE PROJECT; KING COUNTY DEPARTMENT OF PUBLIC DEFENSE; WASHINGTON DEFENDER ASSOCIATION; PIER PETERSEN; INFINITUM LEGAL COUNSEL, P.S.; DESMOND LAW GROUP, P.S.; THURSTON COUNTY PUBLIC DEFENSE; WASHINGTON STATE OFFICE OF PUBLIC DEFENSE; STEBBINS ULLRICH, LLP; ABC LAW GROUP LLP; ALFORD & ASSOCIATES, PLLC; AND TESSNEER LAW, PLLC IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

I. IDENTITY AND INTEREST OF *AMICI CURIAE*

Family Violence Appellate Project; King County Department of Public Defense; Washington Defender Association; Pier Petersen; Infinitum Legal Counsel, P.S.; Desmond Law Group, P.S.; Thurston County Public Defense; Washington State Office of Public Defense; Stebbins Ullrich, LLP; ABC Law Group LLP; Alford & Associates, PLLC; and Tessneer Law, PLLC, are *amici curiae* in this matter. The identities and interests of each are described in full in the accompanying motion for leave to file brief of *amici curiae* in support of review and are incorporated herein by reference.

II. ISSUE OF INTEREST TO AMICI

Should this Court grant review to correct a Court of Appeals decision that will profoundly, fundamentally erode the due process rights of parents in dependency and termination cases?

III. STATEMENT OF THE CASE

Amici adopt the facts as stated in the briefing of the Petitioner.

IV. ARGUMENT

Division I critically weakened the due process rights of parents facing dependency and termination of parental rights cases – adopting a rule that will be particularly harmful to domestic violence victims and homeless or unstably housed parents. In a published opinion, the court below upheld an order of default against an indigent father, concluding that the father had been properly served when the department left a copy of the dependency petition with *another party* to the litigation, a person with incentives not to give him the petition, at a place he only sometimes stayed. This rule will authorize service in future cases where, for example, the petition is left with one party in a domestic violence relationship to give to another or left at a location where an unstably housed parent is unlikely to return.

By its plain language, the dependency statute does not permit the kind of substitute personal service that the Court of Appeals upheld here. Rather, as laid out in dissent by Judge Coburn, the dependency statute sets forth rules for service that protect the due

process rights of parents, prioritizing personal service and, failing that, authorizing service by mail. Yet to reach its conclusion, and to uphold the order of default, the Court of Appeals ignored the plain language of the dependency statute and instead incorrectly applied a hodge-podge mix of statutory provisions, creating a process different from the dependency statute. Review is necessary to affirm the plain language of the dependency statute and correct the rule adopted below which would deny due process to parents.

Although *amici* agree with the dissent that the Department of Children, Youth, and Families (DCYF) *also* failed to make active efforts and failed to document active efforts in detail as required by the Indian Child Welfare Act's (ICWA) regulations, this Court need not reach that issue because the failure to personally serve the father deprived the dependency court of jurisdiction to enter a dependency order.

Amici write separately to urge this Court to grant review because in our experience representing parents we see the negative impact the Court of Appeals decision will have on core due process

guarantees for vulnerable people. Parents in dependency cases are likely to be people living in extreme poverty, unstably housed, and may be in conflict with one another, their families and extended families. A rule that permits one party to the case (or one family member involved in the litigation) to "serve" another will deny parents notice of these important cases.

The decision below is inconsistent with the statute and profoundly erodes core due process protections and must, therefore, be reversed.

A. Notice Is the Essential Starting Point for Due Process

Notice is the core of due process—without notice all other procedural rights are meaningless. "An essential principle of due process is the right to notice and a meaningful opportunity to be heard." *Morrison v. State Dep't of Lab. & Indus.*, 168 Wn. App. 269, 273, 277 P.3d 675, 677 (2012) (*citing Cleveland Bd. Of Educ. v. Loudermill*, 470 U.S. 532, 542, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985)). Accordingly, "[p]rocedural due process requires that an individual receive notice of the deprivation and an opportunity to

be heard to guard against erroneous deprivation of a protected interest." *Fields v. Dep't of Early Learning*, 193 Wn.2d 36, 44, 434 P.3d 999, 1003 (2019) (internal quotations omitted).

To ensure that litigants receive proper notice, this Court has required compliance with *both* the plain language of statutes governing service *and* constitutional requirements. *Weiss v. Glemp*, 127 Wn.2d 726, 734, 903 P.2d 455, 458–59 (1995) (recognizing difference between constitutionally adequate service and service required by the statute and holding that: "[B]eyond due process [requirements], statutory service requirements must be complied with in order for the court to finally adjudicate the dispute between the parties." (internal quotations omitted)).

Here, there is no inconsistency between constitutional and statutory requirements; compliance with the dependency statute would have ensured meaningful notice to the father. However, the Court of Appeals failed to uphold the plain language of the dependency statute and also violated due process.

B. The Plain Language of the Dependency Statute Prohibits Service by Another Party

The plain language of the dependency statute, on its face, sets forth rules for service of dependency petitions. RCW 13.34.070, .080.

> If a party to be served with a summons can be found within the state, the summons shall be served upon the party personally as soon as possible following the filing of the petition…If the party is within the state and cannot be personally served, but the party's address is known or can with reasonable diligence be ascertained, the summons may be served upon the party by mailing a copy by certified mail as soon as possible following the filing of the petition…

RCW 13.34.070(8).[1]

The statute further states:

> Service of summons may be made under the direction of the court by any person eighteen years of age or

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[1] Although the statute also allows publication to proceed simultaneously, the person seeking to effectuate service by publication must be able to allege that, "After *due diligence*, the person attempting service of the summons or notice provided for in RCW 13.34.070 has been unable to make service, and a copy of the notice has been deposited in the post office, postage prepaid, directed to such person at his or her last known place of residence." RCW 13.34.080(1)(b) (emphasis added).

> older *who is not a party to the proceedings* or by any law enforcement officer, probation counselor, or department employee.

RCW 13.34.070(9) (emphasis added).

For the reasons set forth in the dissent by Judge Coburn, the plain language of the dependency statute is clear and complete and does not require construction. (Slip Op Dissent at 8.) The plain language of the statute does not permit *either* leaving a petition with another suitable person *or* allowing one party to serve another; the statutory language should end the analysis. "If the plain language is subject to only one interpretation, our inquiry ends because plain language does not require construction." *Matter of Dependency of Z.J.G.*, 196 Wn.2d 152, 163, 471 P.3d 853, 859 (2020) (citations omitted).

Yet, the Court of Appeals below engaged in a mixing and matching of statutory provisions, selectively borrowing from language outside the dependency statute thereby permitting one (potentially adverse) parent to serve another. Allowing one parent

in the case to be responsible for providing notice to another parent violates both the statute and due process.

The context of these cases further underscores the wisdom of the dependency statute and the need to reverse the Court of Appeals decision here. Consistent with the concerns raised by the dissent, *amici* recognize that parents facing a dependency petition are sometimes struggling with mental illness and/or substance use disorders that may interfere with their ability to provide a copy of the summons to the other parent, even if they intend to. Yet, the dissent also recognizes the more important concern, that parents may not be aligned with one another.

Parents are often not aligned in a dependency case even when they are married and living together, let alone when they are not married or living separately. Parents may have disagreements which predate any contact with DCYF; this is true regardless of parents' efforts to put forward a "united front" when confronted by a state agency expressing doubts as to their capacity to care for their child or children. Parents may have a history of custody disputes or

one parent may enjoy unilateral control and custody over a child. In many situations, one parent will have an incentive not to provide notice to the other parent.

Further, a dependency case may allege domestic violence between the parents – and, in cases of domestic violence the parents are likely to be residing together. The Court of Appeals ruling permits an absurd result in which a petitioner could properly serve a domestic violence victim with a dependency petition by leaving a copy of the summons with a domestic violence perpetrator who lives in the same abode. Likewise, the rule allows for the absurd result that a domestic violence victim, who lived in the same abode as an alleged domestic violence perpetrator, would be expected to deliver the petition. *Amici* urge the Court to accept review in order to explore these unintended consequences and reverse the Court of Appeals decision.

Finally, serving the petition marks a new phase in the case, a change that may not otherwise be obvious to those who have been in contact with child protective services (CPS) many times in the

past.[2] This notice is particularly important for a non-custodial parent (like the father here) who may not otherwise even know that the child has been removed. Because of the unique nature of dependency cases, the statutory requirements for service are different from other civil cases and especially critical components of due process.

This Court has acknowledged that, in the dependency context, "the majority of cases involve persons who are poor, uneducated, and/or minorities, leaving an opening for class and racial bias." *Matter of Welfare of D.E.*, 196 Wn.2d 92, 104, 469 P.3d 1163, 1169 (2020). Therefore, parents in dependency cases are more likely than litigants in other civil cases to be experiencing profound instability in their lives. Indeed, parents under

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[2] *See* RCW 74.13.031; *see, e.g.,* 2023 Annual Progress and Services Report, Department of Children Youth & Families, 15 (CPS Family Assessment Response offered in roughly 44 percent investigation conducted in nearly 52 percent of the screened in reports), www.dcyf.wa.gov/sites/default/files/pdf/reports/apsr-2022.pdf (viewed on 1/4/2023).

investigation and being threatened with the removal of their children are in the midst of a profound trauma that can interfere with their ability to understand complex procedures. *See* Vivek Sankaran, Christopher Church, and Monique Mitchell, *A Cure Worse Than the Disease: The Impact of Removal on Children and Their Families*, Marq. L. Rev. 102, 1169-70 (2019).

Review is required to ensure that requirements for service of process in dependency cases comport with the statute, which prohibits one party from serving another, and due process which requires meaningful notice to parents facing a unique deprivation of a fundamental liberty interest.

C. The Court of Appeals Construction of Usual Abode Reads the Word "Usual" Completely Out of the Statute

The dependency statute, by its plain language, does not authorize "substitute personal service" at a person's usual place of abode by delivering it to another resident there. However, even if the Court of Appeals correctly applied RCW 4.28.080(16) instead of the more specific and more recent language in the dependency

statute, the court incorrectly held that the father was served at his "usual abode."

The Court of Appeals acknowledged "the record indicates three separate addresses as *possible* residences for the father." (Slip Op. at 22). Yet, the Court determined that the *mother's* family's home was the most *possible* of the three. This rule will exacerbate conflict within families in future cases, particularly when extended family members are working with the department, coming forward as relative caregivers for the child. In those cases, relatives may be required by DCYF to prohibit parents from staying with them. The intervention of DCYF may cause parents to relocate away from the homes of relatives or extended family members. Leaving the petition at the home of a family member where they previously stayed is not, therefore, reasonably calculated to provide actual notice in the context of a dependency case.

Further, a "possible" abode is not the same as a "usual" abode. For parents in dependency cases who may be unstably housed, the requirement of a "usual abode" is a particularly

important protection that ensures they will receive notice. By finding that one of several places could be the usual abode of an unstably housed person, like the father here, the lower court read the word "usual" out of the statute.

The better rule is the one contained in the dependency statute which does not permit service by leaving it at the person's usual abode with another person residing there. RCW 13.34.070. Rather, the dependency statute requires attempts at hand-to-hand service before mailing to more than one address, by certified mail, in an effort to locate the person.[3] The rule in the dependency statute

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[3] Amici agree with Judge Coburn, dissenting, that the dependency statute is clear on its face and prioritizes personal (hand-to-hand) service. (Slip Op Dissent at 5-6, construing RCW 13.34.070(8).) The statute plainly requires the petitioner exercise "due diligence" to attempt personal service. *Id.*; RCW 13.34.080(1)(b). Only after due diligence to personally serve the parent, can the state attempt service by certified mail and by publication. Here, the Department only attempted to personally serve the father one time, despite multiple contacts with him. (Slip Op Dissent at 7.) Because the petitioner, DCYF, did not exercise due diligence to personally serve the father, they failed to comply with the plain language of the statute and service on the father was not proper.

avoids the potential family conflict associated with leaving the petition with someone else living in the home of a parent.

Therefore, even if the Court of Appeals correctly construed the statutes to allow for substitute personal service, the petition in this case was not left at the father's usual abode and, therefore, the Court of Appeals incorrectly upheld the finding of default against him.

V. CONCLUSION

The decision below will prevent parents in dependency and termination cases from getting notice of legal proceedings about their children and will disadvantage domestic violence victims and unstably housed people. For the foregoing reasons, *amici* urge this Court to grant review in order to uphold the plain language of the dependency statute and due process.

RESPECTFULLY SUBMITTED this 27th day of February 2023.

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VI. CERTIFICATE OF COMPLIANCE WITH RAP 18.17

I certify that the word count for this brief, as determined by the word count function of Microsoft Word, and pursuant to Rule of Appellate Procedure 18.17, excluding title page, tables, certificates, appendices, signature blocks and pictorial images is 2,429.

RESPECTFULLY SUBMITTED this 27th day of February 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on February 27, 2023, I filed the foregoing brief via the Washington Court Appellate Portal, which will serve one copy of the foregoing document by email on all attorneys of record.

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