NO. 96830-6

SUPREME COURT OF THE STATE OF WASHINGTON

JESSICA L. WRIGLEY, et al

Respondents,

v.

STATE OF WASHINGTON, DSHS, et al

Petitioners.

RESPONSE TO PETITION FOR REVIEW

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A. STATEMENT OF THE CASE

Respondents herein rely on the facts set forth in *Wrigley v. State*, 5 Wn. App.2d 912–923, 428 P.3d 1279 (2018), as amended (2019).[1] The statement of facts set forth by DSHS/DCYF is generally accurate, though Respondents would make several clarifications (which are probably not all that relevant for the state's issues).

The state claimed, Petitioners' Brief (PBrief) at 19, that Mrs. Wrigley "equivocated in the trial court" as to A.A. going to live with Mr. Viles and that in Mrs. Wrigley's absence her attorney said she "ha[d] no strong position either way" on placement with Mr. Viles. PBrief at 5–6. Mrs. Wrigley missed the court hearing due to car trouble, CP 262, and Mr. Watson's notes indicate she was in tears when she spoke to Mr. Watson about A.A. being with Viles. *Id.* Mrs. Wrigley said she called the social worker "hysterical" that A.A. was with Viles. On a summary judgment motion, the court should consider Mrs. Wrigley's statement to be accurate and her attorney's to have been mistaken, especially since (in his client's absence) he said he had limited authority to speak. CP 306.

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[1] The amendment, irrelevant for present purposes, may not have been completely effectuated. The order amending opinion dated February 20, 2019, amended 5 Wn. App.2d at 921 by replacing "an excusable neglect" with "inexcusable neglect". Westlaw, however, reads as of this writing "an inexcusable neglect," the "an" having been incorrectly retained. The undersigned is uncertain if the error lies with Westlaw or the court, but he did bring the matter to the attention of West law on the date below stated.

The State suggests that Viles' criminal history did not reveal many convictions, as opposes to arrests, and that his last conviction for violent assaultive behavior had occurred 11 years earlier as a juvenile. PBrief at 4. While the State is accurate, it confuses the high burden of proof necessary for a criminal conviction with the low standard of proof—"reasonable cause to believe"—necessary to remove a child from its parents at a shelter care hearing. RCW 13.34.065(5). The fact that Mr. Viles threatened someone who was probably a relative with breaking his neck, just a moth before A.A. was placed with him, *Wrigley v. State*, 5 Wn. App.2d at 914, certainly suggests on a summary judgment motion that social worker Watson's failure to competently investigate led to A.A.'s death. And it also shows that Defendant Watson disregarded A.A.'s "right to conditions of basic nurture, health, or safety". RCW 13.34.020.

B. SUMMARY OF RESPONSE

RCW 26.44.010 sets forth the "Declaration of Purpose" of chapter 26.44 RCW, stating in part that children have "the right to conditions of minimal nurture, health, and safety".[2] Similarly, in the dependency process, the legislative declaration of the rights of a child are that a child has the "right

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[2] In what might be considered a strategic abbreviation, and probably recognizing the implications of the language, the State in its brief omitted the words "conditions of minimal nurture". PBrief at 13.

to conditions of basic nurture, [physical and mental] health, [and] safety." RCW 13.34.020. The Court below held:

> To conclude, the phrase "reports concerning the possible occurrence of abuse or neglect" in former RCW 26.44.050 contemplates both reports of incidents that have already occurred and reports suggesting a reasonable possibility of future abuse or neglect if the placement decision is made.

Wrigley v. State, 5 Wn. App.2d at 931. In so doing, the court recognized that when A.A. was placed with Mr. Viles, his nurture—not to mention his physical and mental health and his safety—in the Viles home was within the scope of the concerns of chapter 26.44 RCW and thus of RCW 26.44.050.

C. RESPONSE TO STATE

1. **Precedent.** The decision of the Court of Appeals below does not conflict with the court's precedent. The State quotes *H.B.H. v. State*, 192 Wn.2d 154, 165, 429 P.3d 484 (2018) "The dependency process is initiated when [the Department] receives a report that a child *has been* abused, neglected, or abandoned. RCW 26.44.050." (Emphasis added by State.) The foregoing quote is inapplicable to the present case because the dependency case was already in process. Moreover, while the *H.B.H.* quote is generally correct, it is not entirely accurate. The "dependency process" is found in chapter 13.34 RCW, not in chapter 26.44 RCW. Moreover the RCW 26.44.050 investigation might be initiated by a report to the police.

The State correctly cites *M.W. v. DSHS*, 149 Wn.2d 589, 591, 70 P.3d 954 (2003) that RCW 26.44.050 gives rise to a claim for negligent investigation "only when [the Department] conducts a biased or faulty investigation that leads to a harmful placement decision." PBrief at 10. Defendant Watson clearly conducted a biased or faulty investigation of Mr. Viles that led to a harmful placement decision.

What the State overlooks is that the concern for A.A.'s welfare that Mr. Watson should have had required consideration of the nurturing, physical and mental health and safety of A.A. in the Viles home. The very fact that Mr. Viles dragged A.A.'s mother up the stairs by her hair suggests that the Viles home might be deficient in nurturing, mental health and safety. And the fact that Mr. Viles had just threatened a male relative to break his neck does not suggest A.A. was being placed inn a nurturing home where his right to mental health or his safety would be met.

2. **Verified Findings.** RCW 26.44.010 states in full as to the declaration of purpose of the chapter:

> The Washington state legislature finds and declares: The bond between a child and his or her parent, custodian, or guardian is of paramount importance, and any intervention into the life of a child is also an intervention into the life of the parent, custodian, or guardian; however, instances of nonaccidental injury, neglect, death, sexual abuse and cruelty to children by their parents, custodians or guardians have occurred, and in the instance where a child is deprived of his or her right to

> conditions of minimal nurture, health, and safety, the state is justified in emergency intervention based upon verified information; and therefore the Washington state legislature hereby provides for the reporting of such cases to the appropriate public authorities. It is the intent of the legislature that, as a result of such reports, protective services shall be made available in an effort to prevent further abuses, and to safeguard the general welfare of such children. When the child's physical or mental health is jeopardized, or the safety of the child conflicts with the legal rights of a parent, custodian, or guardian, the health and safety interests of the child should prevail. When determining whether a child and a parent, custodian, or guardian should be separated during or immediately following an investigation of alleged child abuse or neglect, the safety of the child shall be the department's paramount concern. Reports of child abuse and neglect shall be maintained and disseminated with strictest regard for the privacy of the subjects of such reports and so as to safeguard against arbitrary, malicious or erroneous information or actions. This chapter shall not be construed to authorize interference with child-raising practices, including reasonable parental discipline, which are not proved to be injurious to the child's health, welfare and safety.

As noted previously, the state's strategic abbreviation of its selection from RCW 26.44.050 obscures the breadth of the legislature's purpose in RCW 26.44. Moreover, RCW 26.44.015, states the "limitations", none of which apply to the state's reading of RCW 26.44.050. Importantly, the basis of the need for "verified information" occurs when there is a "emergency intervention" into the child's life and that protective services should be provided "to prevent further abuses" and "to safeguard the general welfare" of the child.

Mr. Viles had already agreed to shelter care in this case. Since emergency intervention had already occurred, which Mr. Viles had not opposed, there is no requirement in RCW 26.44.010 that preventing "further abuses" applies only to the parent that initially abuse the child. Moreover, the comment that the child "general welfare" be safeguarded is not limited to he parent from whom the child was initially removed.

The state claims the Court of Appeals expanded the scope of chapter 26.44 RCW. On the contrary, the state fails to recognize the scope of chapter 26.44 RCW in its attempt to avoid liability for the tragic consequences that flowed from the inaction of its employee defendant Watson.

3. **"Risk Only" Allegations.** The state mistakenly attempts to separate chapter 26.44 RCW from RCW 74.13.031. In doing so the state attempts to create a "crack" into which A.A. fell and into which all such children in the same circumstances would also fall. As the DSHS attempts to construe this statue, child welfare services in a "risk only" situation exist when there is a "imminent risk of serious harm."

In RCW 26.44.050, imminent risk of serious harm is the basis for removing a child from their parents. By claiming that RCW74.13.031 should apply, the department only introduces a confusion into the matter when there is an imminent risk of serious harm. In following RCW74.13.031, the

department would create the "crack" into which A.A. fell and from which he never returned. Rather, the protection of children envisioned in RCW 26.44.010 is only and best met by the decision of the Court of Appeals.

D. CONCLUSION

Respondents request the Court deny the Petition.

Respectfully submitted this 13th day of March, 2019.

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