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No. 33611-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In Re:

The Dependency of D.M. and S.R.

Grays Harbor County Superior Court

Cause Nos. 03-7-00194-0 and 03-7-00195-8

The Honorable Judge Gordon Godfrey

Appellant's Amended Opening Brief

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ASSIGNMENTS OF ERROR

1. The trial court erred by vacating the custodians' nonparental custody decree.
2. The Department and the trial court violated appellants' rights as custodians under RCW 13.34.
3. The trial court erred by terminating the custodians' rights without allowing them to fully participate in a termination proceeding.
4. The Department and the trial court violated appellants' rights as de facto parents by terminating their relationships with their children without affording them a termination trial under RCW 13.34.180 and RCW 13.34.190.
5. The Department failed to follow the proper procedure for modifying a nonparental custody order under Title 26 RCW.
6. The trial court erred by "vacating" the nonparental custody decree without adhering to the requirements and standards of RCW 26.09 and RCW 26.10.
7. The trial court's *ad hoc* procedure for "vacating" the de facto parents' custody decree violated their constitutional rights to substantive due process.
8. The trial court's decision vacating the nonparental custody decree was contrary to the evidence
9. The court's decision vacating the nonparental custody decree was contrary to the children's best interests.
10. The trial court erred by basing its order vacating the nonparental custody decree on facts that were not adduced at the hearing.
11. The trial court erred by adopting Findings of Fact and Conclusions of Law that were not supported by substantial evidence.
12. The trial court erred by entering Finding of Fact No. 1, which reads as follows:

That [S.R.], dob: 06/22/1998, and [D.M.], dob: 05/15/1996, are residents of Grays Harbor County and in the legal custody of the Department of Social and Health Services.
CP 69.

13. The trial court erred by entering Finding of Fact No. 2, which reads as follows:

On April 26, 1999, a Petition for Custody was filed for [D.M.] and [S.R.] by J.M., the maternal aunt and her partner, C.B..
CP 70.

14. The trial court erred by entering Finding of Fact No. 3, which reads as follows:

On July 12, 1999, a Parenting Plan and Decree of custody was entered, awarding custody of [S.R.] and [D.M.] to C.B. and J.M..
CP 70.

15. The trial court erred by entering Finding of Fact No. 4, which reads as follows:

On March 24, 2003, Petitions Alleging Dependency were filed on [S.R.] and [D.M.]. A shelter care order was entered.
CP 70.

16. The trial court erred by entering Finding of Fact No. 5, which reads as follows:

The children were placed into care due to allegations of physical abuse and neglect at the hands of C.B. and J.M.. An Order of Dependency was entered on April 29, 2003 in Cause No's. 03-7-194-0 and 03-7-195-8.
CP 70.

17. The trial court erred by entering Finding of Fact No. 6, which reads as follows:

Services were offered to correct the deficiencies of J.M. and C.B..
CP 70.

18. The trial court erred by entering Finding of Fact No. 7, which reads as follows:

[S.M.] [sic] and [D.R.] [sic] are not members of an Indian tribe.
CP 70.

19. The trial court erred by entering Finding of Fact No. 8, which reads as follows:

[S.R.] and [D.M.] have been removed from the custody of J.M. and C.B. continuously since the entry of the shelter care order in March of 2003.
CP 70.

20. The trial court erred by entering Finding of Fact No. 14, which reads as follows:

There remain, however, significant concerns about C.B. and J.M.'s ability to parent these children. There is concern about a lack of empathy on the part of the nonparental custodians with regard to the children. There is also a concern about the lack of understanding as to why the children originally came into care.
CP 71.

21. The trial court erred by entering Finding of Fact No. 15, which reads as follows:

It would take a considerable length of additional time for the parental deficiencies of J.M. and C.B. to correct their parental deficiencies [sic] in order for [S.R.] or [D.M.] to return to their care.
CP 71.

22. The trial court erred by entering Finding of Fact No. 16, which reads as follows:

[D.M.] and [S.R.] continue to have fears of C.B. and J.M. and physical abuse.
CP 71-72.

23. The trial court erred by entering Finding of Fact No. 17, which reads as follows:

Continuation of the nonparental custody of J.M. and C.B. diminishes these children's prospects for early integration into a stable and permanent home.
CP 72.

24. The trial court erred by entering Finding of Fact No. 18, which reads as follows:

It would be a minimum of six months to a year in order for these children to be returned to the C.B.- J.M. home. which is a considerable length of time in these children's lives.
CP 72.

25. The trial court erred by entering Finding of Fact No. 19, which reads as follows:

The environment of the C.B.-J.M. home would be detrimental to [D.M.] and [S.R.]'s physical, mental and emotional health, should they be returned to their care. There has been a substantial change in the circumstances of C.B.-J.M.'s since the placement of these children in the C.B.-J.M. home.
CP 72.

26. The trial court erred by entering Finding of Fact No. 20, which reads as follows:

It is clearly in the best interests of [D.M.] that the nonparental custody decree be vacated.
CP 72.

27. The trial court erred by entering Finding of Fact No. 21, which reads as follows:

It is currently in the best interests of [S.R.] that the nonparental custody decree be vacated.
CP 72.

28. The trial court erred by entering Conclusion of Law No. 2, which reads as follows:

The foregoing findings of fact have been established by clear cogent and convincing evidence.
CP 73.

29. The trial court erred by entering Conclusion of Law No. 3, which reads as follows:

Setting aside the nonparental custody decree and parenting plan is in the best interest of [D.M.].
CP 73.

30. The trial court erred by entering Conclusion of Law No. 4, which reads as follows:

Setting aside the nonparental custody decree and parenting plan is in the best interest of [S.R.].
CP 73.

31. The trial court erred by entering the following order:

IT IS THEREFORE ORDERED that the Non-parental Custody Decree and parenting plan entered in the above entitled court is vacated and C.B. and J.M. shall have no further standing in this matter.
CP 73.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

J.M. and C.B. obtained permanent legal custody of J.M.'s niece and nephew in 1999. The children lived with them until March 2003, and visited with them every week from November 2003 until June 2005.

In October of 2004, the Department filed a short motion and declaration to vacate the nonparental custody decree. The purpose of the motion was to enable the Department to move forward with its permanent plan of adoption for the children.

The custodians were not served with a Summons, Petition to Terminate, or Notice of Rights, and a termination trial was not held. Following an evidentiary hearing on the Department's motion, the trial court vacated the nonparental custody decree, and ordered that "C.B. and J.M. shall have no further standing in this matter."

1. Did the Department and the trial court violate appellants' rights as custodians under RCW 13.34, by refusing to allow them to participate in termination proceedings involving their children? Assignments of Error Nos. 1-3.

Appellants' relationships with the children developed with the apparent consent of the absent biological parents. J.M. and C.B. assumed the obligations of parenthood without any expectation of compensation, and developed a bonded, dependent, and parental relationship; the children called them mom and dad, and the Department repeatedly referred to appellants as the children's parents.

2. Were J.M. and C.B. the children's de facto parents? Assignment of Error No. 4.
3. As de facto parents, were appellants entitled to the same rights as biological or adoptive parents? Assignment of Error No. 4.
4. Did the Department and the trial court violate appellants' rights as de facto parents by terminating their relationships with their children without affording them a termination trial under RCW 13.34.180 and RCW 13.34.190? Assignment of Error No. 4.

The Department's motion to vacate the nonparental custody order did not comply with the requirements for a Petition for Modification under Title 26 RCW. The trial court did not hold an adequate cause hearing, and did not base its decision on the standards for modification under RCW 26.09.

Neither the Department, the CASA, the GAL, the custodians' attorney, or the court ever articulated the standards and burden of proof required for "vacating" a nonparental custody order. The written Findings of Fact and Conclusions of Law covered a variety of standards, but did not articulate what was actually required to "vacate" the decree.

5. Did the Department fail to follow the correct procedures for modifying a nonparental custody decree under RCW 26.09 and RCW 26.10? Assignments of Error Nos. 5-6.
6. Did the trial court erroneously "vacate" the nonparental custody decree without adhering to the requirements and standards of RCW 26.09 and RCW 26.10? Assignments of Error Nos. 5-6.
7. Did the trial court's *ad hoc* procedure for "vacating" the de facto parents' custody decree violate appellants' constitutional rights to substantive due process? Assignment of Error No. 7.

The evidentiary hearing on the Department's motion to vacate the nonparental custody decree was bifurcated. After hearing conflicting testimony on December 7, 2004, the trial court continued the hearing for six months.

The hearing resumed on June 21, 2005. At that time, the parties agreed that the custodians had made progress toward reunification by participating in services and improving their parenting. The children had been visiting with the custodians, and were described as being bonded to them.

The witnesses (including evaluating psychologist Dr. David Hawkins and the Department's social worker) agreed that the children could be permanently returned home within six to twelve months. The GAL deferred to the CASA, who also recommended return home. Despite this, the court vacated the nonparental custody order.

8. Was the court's decision vacating the nonparental custody decree contrary to the evidence? Assignment of Error No. 8.
9. Was the court's decision vacating the nonparental custody decree contrary to the children's best interests? Assignment of Error No. 9.

Following the court's decision, the Department presented Findings of Fact and Conclusions of Law. The findings were unrelated to the court's oral decision, and were largely drawn from information not introduced into evidence during the hearing.

10. Are participants in a hearing held under RCW 13.34 entitled to a decision based solely on the evidence adduced at the hearing? Assignments of Error Nos. 10-31.
11. Are the trial court's findings of fact and conclusions of law unsupported by substantial evidence? Assignments of Error Nos. 10-31.
12. Must the trial court's findings of fact and conclusions of law be vacated because they are unsupported by substantial evidence? Assignments of Error Nos. 10-31.

STATEMENT OF FACTS AND PRIOR PROCEEDINGS¹

In 1999, J.M. and C.B. obtained permanent legal custody of J.M.'s niece and nephew, [S.R.] and [D.M.], who were then 16 months and 3 years old, respectively. *See* Nonparental Custody Decree, CP 65². The permanent custody order was entered under RCW 26.10, and was supported by the Department of Social and Health Services, which had grave concerns about the children's natural mother.³ Exhibit 7 (DSHS Letter, June 10, 1999), Supp. CP.

Both children continued to live with J.M. and C.B. until the Department removed them from their home in March of 2003, after allegations of abuse and neglect by J.M. and C.B.. Order Taking Child Into Custody, Supp. CP. A Dependency Petition was filed, and a shelter

¹ The statement of facts and prior proceedings is derived from testimony, court documents, and exhibits. Most of the information summarized here was not admitted into evidence at the hearing on the Department's motion to vacate the nonparental custody decree. J.M. and C.B. do not admit or acknowledge the information contained in the statement of facts and prior proceedings for any purpose. This applies especially to the question of whether or not the evidence admitted at the evidentiary hearing was sufficient to sustain the trial court's Findings of Fact and Conclusions of Law.

² Two sets of clerk's papers were filed in this case, one for each child's case. Where both sets of clerk's papers are identically numbered, they will be cited as CP. Where they differ, they will be identified using the children's initials.

³ The biological mother's name is J.M..

care hearing was held on March 25, 2003.⁴ CP 1-6; RP 1-41. At the hearing, social worker Patience Jones outlined the allegations of abuse and neglect. RP 2-17. C.B. testified as well, admitting some of the allegations, denying others, and asking the court to return the children. RP 17-29. The court entered a Shelter Care Order, and restricted visitation with the custodians until the children had been professionally evaluated. Supp. CP.; RP 39-40.

J.M. and C.B. signed a dependency order on April 29, 2003.⁵ CP 7-27. The order adopted recommendations for disposition set forth in an Individual Service and Safety Plan (ISSP) proposed by the Department. CP 11, 14. The ISSP identified the primary plan for the children as reunification with J.M. and C.B.. CP 14-15. Despite this, the ISSP indicated that the couple would “be offered services to address parental deficits and reduce risk until [the] third party custody is vacated by the court.” CP 15.

⁴ The order itself and the transcript of the hearing indicate that the correct date was March 25, 2003; however, the signature page of the order indicates it was signed on March 24, 2003.

⁵ Additional orders were subsequently entered as to J.M. and the biological father. CP 28, 49. The Department sought and received a ruling that aggravated circumstances existed with respect to J.M.. RP 58.

The ISSP also noted that if the recommended services were successfully completed, J.M. and C.B. “should be able to demonstrate that they are able to effectively parent the children...[and] will be provided with the skills necessary to effectively parent their children...” CP 22. The plan did not provide for visits until the children’s evaluations were completed. CP 22.

An ISSP filed on September 19, 2003 indicated that [D.M.] wished to visit with J.M. and C.B. (whom he referred to as mom and dad) and that he missed them, although he did not wish to live with them. [D.M.’s] ISSP (9-19-03) pp. 6, 18, Supp. CP.⁶ The ISSP also indicated that although neither J.M. nor C.B. were compliant with the service plan, they were both “very appropriate” when dealing with the Department, and both had made efforts to maintain weekly contact. [D.M.]’s ISSP (9-19-03) pp. 20-21, Supp. CP. The ISSP concluded by noting that visitation “is not recommended until significant progress is made on their services and recommendations.” [D.M.’s] ISSP (9-19-03), p. 22, Supp. CP. There is no indication in the record that a copy of the ISSP was provided to the custodians. [D.M.’s] ISSP (9-19-03), p. 23, Supp. CP.

⁶ Although the ISSPs filed for both children were generally the same, they contained some differences, including differences in pagination. In this brief, citations to the ISSP will specifically reference only the ISSPs filed in [D.M.]’s case, except where differences in content require citation to both ISSPs.

On September 23, 2003, a Dependency Review Hearing Order/Permanency Planning Order was entered. The court made a finding that [D.M.] “would like to visit with his aunt and uncle who he refers to as mom and dad. he [sic] says he misses them but he does not want to live with them.” [S.R.] did not wish to visit. Finding No. 2.7. Review Order (9-23-2003), Supp. CP. The ISSP of September 19, 2003 was adopted in its entirety. Review Order, (9-23-2003) p. 4, Supp. CP.

J.M. and C.B. attended and successfully completed a parenting class in October of 2003. A report from Lynette M. Lile, MA, CMHS, LMHC, dated October 27, 2003 indicated that J.M. attended all sessions after starting the class, participated respectfully, and identified deficiencies in her own parenting skills and the impact these deficiencies had on the children. Ms. Lile noted that J.M. “seems to have come to the conclusion that she needs to change her parenting style and knows it will take work to do so... [She] did her homework and always appreciated the time taken in class to discuss and explain new concepts.” The report also recommended additional services (including individual or in-home parenting sessions) to help J.M. in her parenting. Report of Lynette Lile, Attachment to [D.M.]’s ISSP (filed 5-14-2004), Supp.CP.

On November 4, 2003 an agreed order of visitation was entered.⁷ RP 61; Clerk's Minutes, Supp. CP. Visitation commenced November 7, 2003, and a later report indicated that "the visits were supervised and went well." [D.M.'s] ISSP (5-14-2004), p. 6, Supp. CP. Visits continued every Friday, for one-and-a-half hours per week, and the social worker reported that

[t]he quality of the visits have [sic] been good. J.M. and C.B. made sure they brought the children a good snack and something they enjoyed. They have also brought them gifts. J.M. and C.B. were careful to not let the children know if they were upset in a visit or to question the children about if they want to return home to them [sic]. J.M. and C.B. always asked the kids what they are doing in school, what they have been doing, movies they have seen, and upcoming events. Both parents⁸ interacted with both [D.M.] and [S.R.] throughout the whole visit. They played board games, colored, talked, played with toys, brought music, and helped [D.M.] with his homework. Both J.M. and C.B. made the most they can out of their visits. They have celebrated Christmas, Easter, and birthdays with both children during their visits. They have worked with the foster mother and have coordinated [sic] a couple visits at McDonald's.

...
The visits help foster bonding and attachment with parents and children. The visits allowed the parents to practice their parenting skills they have learned with the children. The visits allowed the parents to interact with the children. Even though the visits have been of very good quality, reunification is not the permanent plan for [D.M.] and [S.R.] with their maternal aunt and uncle whom

⁷ The order is not docketed in SCOMIS and does not appear in the court file.

⁸ Documents prepared by the Department and providers in this case often refer to J.M. and C.B. as the children's parents; these references have not been changed.

they call mom and dad. Per the recommendation of the service providers, they state do not send these children home [sic]. Also the children do not want to return to the home of their parents. They do want to visit with them but do not want to live with them. Both children still have a lot of fear from the incidents that brought them into care.
[D.M.]’s ISSP (5-14-2004), p. 7, Supp. CP.

[D.M.] indicated that he liked visiting with his parents (the custodians). [D.M.]’s ISSP (5-14-2004), p. 19, Supp. CP. [S.R.] also enjoyed visiting her parents (the custodians), and described the visits as fun. She experienced “great anticipation” around her birthday, when her parents (the custodians) planned a party for her. [S.R.]’s ISSP (5-14-2004), p. 18.

As of May, 2004, J.M. and C.B. were in compliance with their service plan and had completed all requested services. [D.M.]’s ISSP (5-14-2004) p. 20-23. According to the Department, “When Ms. J.M. and C.B. engage in services and successfully complete services identified in this service plan, they should be able to demonstrate that they are able to effectively parent the children... If [they] comply with all services identified in this plan they should be provided with the skills necessary to effectively parent their children...” [D.M.]’s ISSP (5-14-2004), p. 17, Supp. CP.

Despite the positive visits and the parents’ compliance with the service plan and completion of all requested services, the department

requested a decrease in visitation and changed the permanent plan from reunification to adoption. [D.M.]’s ISSP (5-14-2004), p. 9-10, 17, Supp. CP. This change in plan was prompted by the psychological assessments performed by Dr. Hawkins and the anger management evaluations by Ms. Rognlin of STOP. [D.M.]’s ISSP (5-14-2004), p. 10, Supp. CP. These evaluations included negative conclusions about both custodians; Dr. Hawkins’ reports in particular expressed little or no hope for change, especially with regard to J.M.. Exhibits 1, 2, 4, 5, Supp. CP.

The ISSP also noted that termination of the biological mother’s parental rights was “in progress.” [D.M.]’s ISSP (5-14-2004), p. 9, Supp. CP. There is no indication in the record that the ISSP was provided to either custodian. [D.M.]’s ISSP (5-14-2004), p. 25, Supp. CP; [S.R.]’s ISSP (5-14-2004), p. 24, Supp. CP.

The Department moved to intervene in the 26.10 nonparental custody action, and asked the court to join the dependency with that case. An order allowing intervention and joining the cases was entered on May 10, 2004. RP 68; CP 56-57.

Subsequently, the attorney for J.M. and C.B. asked the court to appoint a CASA to investigate the case, as the GAL had not performed any investigation. RP 75-78.

The next review hearing was held on October 19, 2004. RP 81. By that time, the Department had filed a motion to vacate the 26.10 nonparental custody order. CP 61-68. According to the declaration accompanying the Department's motion, "The permanent plan in the dependency action is to have the children adopted. This can not be accomplished until the nonparental custody decree is set aside." CP 62.

The court signed a Dependency Review Hearing Order/Permanency Planning Order. The order included a finding that visitation had occurred weekly since November 2003, and had gone well; however, the court adopted the May 14, 2004 ISSP (recommending a permanent plan of adoption) in its entirety. Review Order (10-19-2004) p. 3, 4, Supp CP. The court appointed a CASA volunteer and scheduled an evidentiary hearing on the Department's Motion to Vacate for December 7, 2004.⁹ Order appointing CASA; Order (re: CASA); Supp. CP.

At the December 7 hearing, the Department called Dr. Hawkins to testify. He told the court that both custodians had significant parenting problems and would not be able to change. RP 86-98. On cross-examination, he admitted that his evaluations were performed a year prior

⁹ A second order clarifying the appointment was entered on November 2, 2004. Supp. CP.

to the hearing, but insisted that the custodians would not be able to make changes and described the case as hopeless. RP 98, 99, 102. Dr.

Hawkins' reports were admitted as evidence. Exhibits 4 and 5, Supp. CP.

The Department also called Lynette Lile, who testified about the custodian's participation and progress in parenting classes. She indicated that both custodians had done well in the classes, that they were open to learning, had made progress, and seemed to understand and agree with the lessons learned in the class, and that both could benefit from in-home coaching. RP 105-119.

The Department also called various witnesses to testify about events prior to the filing of the dependency, including a school bus driver (RP 122-124), social worker Patience Jones (RP 132-148), and CPS Supervisor Jody Lamoreaux (RP 148-151).

The foster mother testified about the children's current situation (RP 126-132), and social worker Linda Smith testified that she wanted the nonparental custody order vacated based on the reports from the providers. (RP 153-155). Finally, the Department submitted reports from Ms. Rognlin of STOP. Exhibits 1 and 2, Supp. CP.

J.M. and C.B. called Kathy Drape, a Head Start supervisor, who testified that she was familiar with [S.R.] and had never received any reports of concern regarding her well-being. RP 120-121. The custodians

also called four friends and neighbors who were familiar with their household and the children, and who had positive things to say about the custodians, their relationships with the children, their living situation, and their interest in working with the Department. RP 155-163.

The CASA testified that she'd reviewed the files, conducted a home visit, contacted the custodian's neighbors, and contacted the children's school. She indicated that both children wanted to return home, that the custodians were appropriate parents, and that their home was safe. She recommended that the children be returned home, and expressed concern that the children were not doing as well at school while in foster care. RP 164-178.

The children's GAL testified that she did not meet with the children, their teachers, or the custodians, and that she did not do a homestudy. Instead, she reviewed the discovery in the case and spoke with Dr. Hawkins and the social worker. She opined (over objection) that the nonparental custody order should be vacated. RP 180-190.

Finally, C.B. testified. After outlining the history of the case, he told the court that he and J.M. were willing to change, that they now knew that corporal punishment was wrong, that they were willing to repeat the parenting classes (preferably with the children), and that they were willing to take advantage of any additional help offered. RP 191-198.

At the conclusion of the hearing, the court refused to vacate the nonparental custody order. RP 208-209. Rather than denying the Department's motion, the court continued the hearing six months, ordered the Department to continue providing services, and asked for an update from the GAL and the CASA volunteer at that time. RP 213-216.

A new ISSP was filed in April of 2005. The Department noted that the custodians had recently completed a Parent Protection Group with Dr. Hawkins and a six-week parenting class (in addition to their original classes in 2003); both were also awaiting re-assessment by Dr. Hawkins. [D.M.]'s ISSP (4-19-2005) p. 13, 15, 22-23, Supp. CP. The ISSP indicated that both children enjoyed their visits with the custodians, and missed them when they didn't occur. [D.M.]'s ISSP (4-19-2005) p. 20; [S.R.]'s ISSP (4-19-2005) p. 20. Visits were also described in positive terms by the social worker:

The quality of the visits has been very good J.M. and C.B. (parents) made sure they provide the children with a good snack or dinner. Many times the visits are held at a restaurant or pizza place. The children enjoy these visits and the time they spend with their parents. The parents have also practiced their parenting skills and implement manners for [D.M.] and [S.R.]. There have not been any incidents of inappropriate conducts [sic] during these visits. The parents have also brought them gifts and celebrated the holidays and birthdays with [D.M.] and [S.R.]. J.M. and C.B. always asked the kids what they are doing in school, what they have been doing, movies they have seen, and upcoming events. Both parents interacted with both [D.M.] and [S.R.] throughout the whole visit. They brought crafts to work on, colored, talked,

played with toys, and helped [D.M.] with some of his homework. Both J.M. and C.B. made the most they can out of their visits. They have worked with the foster mother and have coordinated some of the visits at McDonald's and other places.

...

The visits help foster bonding and attachment with the parents and children. The visits allowed the parents to practice their parenting skills they have learned with the children. The visits allowed the parents to interact with the children. Even though the visits have been of very good quality, at this time, reunification is not the permanent plan for [D.M.] and [S.R.] with their maternal aunt and uncle whom they call mom and dad. J.M. and C.B. need to be reassessed for their parenting skills and have a follow up psychological evaluation. The social worker is in the process of providing these services.

...

J.M. is very interactive in the visits with both [D.M.] and [S.R.]. She always brings the children something for them all to do such as coloring, drawing, and arts and crafts. She has shown improvement on correcting the children during visitations and is more nurturing and attentive to their needs.

...

C.B. is also very attentive and interactive in the visits with [D.M.] and [S.R.]. The visits go very well. C.B. will attend the visits even if J.M. is unable to attend them due to illness. C.B. is always appropriate with the children. Sometimes he will have to redirect J.M. at the visits but does so in a kind, patient, and caring mater [sic].

[D.M.]'s ISSP (4-19-2005) p. 8, 22, 23.

A Dependency Review Hearing Order/Permanency Planning Order was entered on April 26, 2005. Review Order (4-26-05), Supp. CP. Once again, the court found that both children enjoyed their visits and missed them when they did not occur. Finding No. 2.7, Review Order (4-26-05), Supp. CP.

The Department prepared an updated "progress report" on June 7, 2005. The report outlined the custodian's participation in the Parent Protection Group, their second parenting class, and re-assessments by Dr. Hawkins, as well as the positive results of the social worker's home visit with J.M. and C.B.. Progress Report, p. 1-3, Supp. CP. [D.M.] expressed a desire to return home; [S.R.] did not want to return home, but apparently wanted supervised visits at the home. Progress Report, pp. 3-4, Supp. CP.

Attached to the Progress Report were the re-assessments performed by Dr. Hawkins. Dr. Hawkins met with the custodians, the social worker, and the foster mother. He reported that the custodians

have made significant gains and seem prepared to move forward with gradual involvement with their niece and nephew. I believe this involvement should begin with intermittently supervised visitation, and then, increased unsupervised visitation, leading to possible permanent home placement with C.B. and J.M.. Re-Assessment, p. 3, Attached to Progress Report, Supp. CP.

Dr. Hawkins indicated that his "only concerning note" was that J.M. continued to rationalize slapping the children and sending them to their room excessively, and "slips very easily into playing the victim." Re-Assessment, p. 2, Attached to Progress Report, Supp. CP.

On June 21, 2005, the court concluded the hearing on the Department's motion to vacate the nonparental custody order. Dr. Hawkins testified that the custodians had progressed in their parenting.

He noted a close bond between the custodians and the children, and recommended a return home within the next 6-12 months. RP 223-229.

The children's GAL deferred to the CASA, who expressed her agreement with Dr. Hawkins. RP 229-230. Social Worker Linda Smith testified that the custodians had made progress and had completed the Parent Protection Group as well as another parenting class. RP 230-231. She noted that "the Department has to err [on the side of] caution. And I did come up with some concerns, and I can state three of them." RP 231. Her three concerns were that Sapphire was afraid of the custodians, that the custodians scored low on empathy, and that the children had been in foster care for two years. RP 231-232. She reiterated that the Department "has to err [on the side of] caution," and recommended that the court vacate the nonparental custody order. RP 232. On cross-examination, she admitted that the current foster home would not adopt the children, and that there was no pre-adopt home planned should the children become legally free. RP 230-234.

After hearing the testimony and the arguments of counsel, the court ordered the nonparental custody order vacated. The court's oral ruling was as follows:

The original third party matter in this was filed in April of 1999. Judge Foscue in March of '99 signed the first temporary order. I signed the order of default in June of 1999. If my math is

correct, at the time [S.R.] was about 15 months of age. [D.M.] was three. He is eight, she is six.

I understand what Dr. Hawkins says, and you used a very good word a few moments ago, regret. I regret ever signing the first order in this case. That's one I have to live with. I am not going to re-live this thing. When I read what's going on with these kids and what's happened to these kids, you know, I don't need to entertain anyone in this courtroom; the lawyers know what I am talking about. The wetting, the abuse, the neglect, the slapping, the belts, the whole nine yards. I am not gambling again. I am vacating the third party order. The children are going to remain where they are and I am going to go from there. Thank you.
RP 235-236.

Following this decision, the children had only one more visit with the custodians: a "closure visit" that occurred on August 8, 2005.

[D.M.]'s ISSP (11-16-2005) p. 7, Supp. CP. The visit was described as follows:

There has not been any scheduled visitations [sic] since the nonparental custody with the maternal aunt and uncle has been overturned on 06/21/05 except for the closure visit. The children, [D.M.] and [S.R.], had a closure visit with their aunt and uncle on 08/08/05 at Pizza Hut. There have not been any visitation or any contact since that date.

Quality:

The closure visit on 08/08/05 went well. The children were excited about seeing their aunt and uncle. The aunt and uncle gave the children a few gifts and they had cake. Ms. J.M. made each of the children a drawing/writing tablet with a family picture on it so they will remember the family. The children did not seem upset that this was the last visit with their aunt and uncle who had been their guardian (mom and dad) for four years. The social worker talked to the children after the visit and processed their feelings of not being able to see their aunt and uncle any longer. The children said they were a little sad, but were happy they could stay with their foster family.

[D.M.]'s ISSP (11-16-2005), p. 7, Supp. CP.

Ultimately, extensive Findings of Fact and Conclusions of Law were entered (without a hearing). CP 69-74. The findings and conclusions were far more detailed than the court's oral ruling, and did not incorporate any portion of that ruling except for the result. The custodians appealed the court's decision. CP 59, 74.

ARGUMENT

I. THE DEPARTMENT AND THE TRIAL COURT VIOLATED THE CUSTODIANS' RIGHT TO "FULLY PARTICIPATE" IN TERMINATION PROCEEDINGS INVOLVING THEIR CHILDREN.

A. RCW 13.34 requires that custodians be treated as full participants in termination proceedings.

The term "custodian," as used in RCW 13.34 means a person "who has the legal right to custody of the child," and includes people who have been granted custody (even temporarily) under RCW 26.10. RCW 13.04.11; *Blume v. State Dep't of Soc. & Health Servs. (In re J.W.H.)*, 147 Wn.2d 687 at 696, 57 P.3d 266 (2002). When a dependency is commenced under RCW 13.34, a custodian must be treated in the same manner as a biological parent; this parity continues throughout the course of the dependency, and requires that custodians be provided services and visitation as though they were the biological parents of the children. *See, e.g.*, RCW 13.34.060, RCW 13.34.062, RCW 13.34.070, RCW 13.34.090.

If a case proceeds to termination, RCW 13.34.180(1) and (4) require that the custodians be served with a summons, a copy of the termination petition, and a notice of rights. The mandatory notice of rights provides as follows:

NOTICE

A petition for termination of parental rights has been filed against you. You have important legal rights and you must take steps to protect your interests. This petition could result in permanent loss of your parental rights.

1. You have the right to a fact-finding hearing before a judge.
2. You have the right to have a lawyer represent you at the hearing. A lawyer can look at the files in your case, talk to the department of social and health services and other agencies, tell you about the law, help you understand your rights, and help you at hearings. If you cannot afford a lawyer, the court will appoint one to represent you. To get a court-appointed lawyer you must contact: (explain local procedure).
3. At the hearing, you have the right to speak on your own behalf, to introduce evidence, to examine witnesses, and to receive a decision based solely on the evidence presented to the judge.

You should be present at this hearing.

You may call (insert agency) for more information about your child. The agency's name and telephone number are (insert name and telephone number).

RCW 13.34.180(4).

Under RCW 13.34.190, a termination order may only be entered after a hearing “pursuant to RCW 13.34.110,” which provides (in relevant part) that “the parent, guardian, or legal custodian of the child shall have all of the rights provided in RCW 13.34.090(1).” That statute is entitled “Rights under chapter proceedings,” and reads (in relevant part):

Any party has a right to be represented by an attorney in all proceedings under this chapter, to introduce evidence, to be heard in his or her own behalf, to examine witnesses, to receive a decision based solely on the evidence adduced at the hearing, and to an unbiased fact-finder.
RCW 13.34.090(1).

Under these provisions of RCW 13.34, a custodian must be treated as a full participant in any termination proceeding.¹⁰ Nothing in RCW 13.34 or Title 26 RCW allows a court to “vacate” a third party custody order, and thereby circumvent the custodians’ status as parties to the termination.

A custodian’s right to participate in termination proceedings is analogous to the rights afforded a custodian in the dependency factfinding itself, as described by the Supreme Court in *Blume, supra*. In that case, the trial court entered an “agreed” dependency order over the objection of the custodians, after ruling that they had no standing to challenge the order. The Supreme Court reversed, and remanded the case with orders that the custodians be treated as “full participants” in the dependency proceedings. *Blume, at 702*. As the court noted, “[i]t is only with all

¹⁰ As argued elsewhere in this brief, a custodian should be treated not merely as a participant, but rather as a parent. This is implied by the required notice of rights served upon custodians (along with the summons and petition) pursuant to RCW 13.34.180(4).

parties participating in the proceeding that the best interests of [the children] can be protected and justice done.” *Blume, at 702.*

B. J.M. and C.B. were not treated as full participants in termination proceedings involving their children.

In this case, the Department, instead of allowing the custodians to participate in termination proceedings, filed a short motion to vacate the nonparental custody decree. CP 61-62. The purpose of the motion was to allow the Department to proceed with its permanent plan of having the children adopted. CP 62. The trial court terminated C.B.’s and J.M.’s rights by vacating the 26.10 custody decree and ordering that “C.B. and J.M. shall have no further standing in this matter.” CP 73. This order was entered without affording appellants the basic protections afforded custodians under RCW 13.34. CP 73.

The procedure followed by the Department and the court violated appellant’s rights as custodians. First, as noted above, the governing statutes (RCW 13.34 and Title 26 RCW) do not allow the Department or the trial court to circumvent the custodians’ right to full participation at termination by “vacating” the nonparental custody decree in advance of a termination proceeding. RCW 13.34; RCW 26.09, RCW 26.10. Second, there is no indication that C.B. and J.M. were ever served with a termination petition, a summons, or the mandatory notice of rights set

forth in RCW 13.34.180(4). Third, they were not invited to participate in any termination trial. Third, they were not permitted to introduce evidence at a termination trial, nor were they permitted to be heard at such a trial, to examine witnesses at such a trial, or to receive a decision based solely on the evidence from an unbiased fact-finder at such a trial. Instead, the trial court, after “vacating” the 26.10 custody order proceeded toward terminating the biological parents’ rights without allowing C.B. and J.M. to participate. This was unlawful.

Like the custodians in *Blume*, C.B. and J.M. should have been treated as full participants in the termination proceeding. The trial court’s decision vacating the 26.10 must be reversed and the case remanded to the trial court. If the department still intends to proceed toward termination, C.B. and J.M. must be served with the required summons, petition, and notice of rights, and must be treated as full participants at any termination trial. *Blume, supra*.

II. AS DE FACTO PARENTS, J.M. AND C.B. WERE ENTITLED TO THE SAME RIGHTS AS BIOLOGICAL AND ADOPTIVE PARENTS; THE TRIAL COURT VIOLATED THEIR RIGHTS BY TERMINATING THEIR RELATIONSHIPS WITH THEIR CHILDREN WITHOUT AFFORDING THEM A TERMINATION TRIAL UNDER RCW 13.34.180 AND RCW 13.34.190.

A. Under Washington law, de facto parents are entitled to the same rights and protections afforded biological or adoptive parents.

Washington recognizes the existence of de facto parents and “accord[s] them the rights and responsibilities which attach to parents in this state.” *In re Parentage of L.B.*, 155 Wn.2d 679 at 693, 122 P.3d 161 (2005). A de facto parent is one whose parent-like relationship with a child was established under the following conditions:

(1) the natural or legal parent consented to and fostered the parent-like relationship, (2) the [de facto parent] and the child lived together in the same household, (3) the [de facto parent] assumed obligations of parenthood without expectation of financial compensation, and (4) the [de facto parent] has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship, parental in nature. *In re Parentage of L.B.*, at 708-709.

De facto parents stand “in legal parity with an otherwise legal parent, whether biological, adoptive, or otherwise.” *Parentage of L.B.*, at 708-709. De facto parents, like biological and adoptive parents, have a fundamental liberty interest in the care, custody, and control of their

children.¹¹ *Parentage of L.B.*, at 710, citing *Troxel v. Granville*, 530 U.S. 57 at 65, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000).

B. J.M. and C.B. are the de facto parents of [S.R.] and [D.M.], yet their rights were terminated without benefit of a termination trial under RCW 13.34.180 and RCW 13.34.190.

J.M. and C.B. are de facto parents under the five factor test announced in *Parentage of L.B.*, *supra*: the children's natural parents consented to and fostered the parent-like relationship, the children lived with C.B. and J.M., who expected no financial compensation, and by the time the court moved toward termination the parent-like connection had endured a total of six years (with four years in-home), resulting in a bonded, dependent, parental relationship. *Parentage of L.B.*, at 708-709. As de facto parents, the custodians are in legal parity with the children's biological parents, and should have been treated as biological parents under RCW 13.34.180 and RCW 13.34.190.

In order to terminate the custodians' rights to their children, the Department should have been required to do more than simply file a

¹¹ Even before the Supreme Court decided *Parentage of L.B.*, numerous Washington decisions had implicitly enforced the rights of de facto parents. *See, e.g., In re Custody of Shields*, 120 Wn.App. 108, 84 P.3d 905 (2004); *In re Custody of A.C.*, 124 Wn.App. 846, 103 P.3d 226 (2004); *In re Marriage of Thier*, 67 Wn. App. 940, 841 P.2d 794 (1992); *In re Custody of Stell*, 56 Wn. App. 356, 783 P.2d 615 (1989); *In re Welfare of Hansen*, 24 Wn. App. 27, 599 P.2d 1304 (1979), cited with approval in *Blume*, *supra* at 701.

motion to “vacate” their relationship. Instead, J.M. and C.B. should have been served with a Summons, a Petition for Termination, and a Notice of Rights as required by RCW 13.34.180. This was not done.

At trial, the Department was required to prove (by clear cogent and convincing evidence) (a) that the children were found to be dependent, (b) that a dispositional order had been entered, (c) that the children had been removed pursuant to a finding of dependency for at least six months, (d) that all services ordered and all services reasonably necessary to correct parental deficiencies had been expressly and understandably offered or provided, (e) that there was little likelihood that conditions would be remedied so that the child could be returned to the parent in the near future, and (f) that continuation of the relationship clearly diminished the child's prospects for early integration into a stable and permanent home. RCW 13.34.180(1)(a)-(f). Furthermore, the Department was required to prove that an order completely terminating all relationships and contact between the children and J.M. and C.B. were in the best interests of the children.¹² Even taking the trial court’s findings at face value,¹³ the

¹² It is difficult to understand how concluding a six-year- long relationship with a single “closure visit” could possibly be in the best interests of the children, after four years of living together followed by two years of weekly visits of good quality.

¹³ The Findings of Fact and Conclusions of Law are disputed elsewhere in this brief.

Department did not satisfy its burden. The Department did not prove (and the court did not find) that all services ordered and all services reasonably necessary to correct parental deficiencies were expressly and understandably offered or provided to J.M. and C.B.,¹⁴ as required under RCW 13.34.180(1)(d) and RCW 13.34.190.

Because J.M. and C.B. are de facto parents, and because the Department did not afford them the protections afforded parents under RCW 13.34, the order “vacating” their nonparental custody decree must be reversed and the case remanded to the trial court. *Parentage of L.B., supra*. If the Department still believes that termination is appropriate, it may serve J.M. and C.B. with a Summons, a Petition, and the required Notice of Rights, and it may proceed towards termination as with any other parent.

III. THE TRIAL COURT ERRONEOUSLY “VACATED” THE NONPARENTAL CUSTODY DECREE WITHOUT FOLLOWING THE PROCEDURES FOR MODIFICATION MANDATED BY TITLE 26 RCW.

RCW 13.34.155 allows the trial court to exercise concurrent jurisdiction over third party custody actions. This permits the court to determine issues relating to the dependency petition in conjunction with a

¹⁴ Indeed, the parenting evaluator Lynette Lile noted that individual or in-home parenting coaching would be beneficial; this service was never offered. RP 111; Report of Lynette Lile, Attachment to David’s ISSP (filed 5-14-2004).

nonparental custody action brought under RCW 26.10. RCW 13.34.155

provides as follows:

(1) The court hearing the dependency petition may hear and determine issues related to chapter 26.10 RCW in a dependency proceeding as necessary to facilitate a permanency plan for the child or children as part of the dependency disposition order or a dependency review order or as otherwise necessary to implement a permanency plan of care for a child. The parents, guardians, or legal custodian of the child must agree, subject to court approval, to establish a permanent custody order. This agreed order may have the concurrence of the other parties to the dependency including the supervising agency, the guardian ad litem of the child, and the child if age twelve or older, and must also be in the best interests of the child. If the petitioner for a custody order under chapter 26.10 RCW is not a party to the dependency proceeding, he or she must agree on the record or by the filing of a declaration to the entry of a custody order. Once an order is entered under chapter 26.10 RCW, and the dependency petition dismissed, the department shall not continue to supervise the placement.

(2) Any court order determining issues under chapter 26.10 RCW is subject to modification upon the same showing and standards as a court order determining Title 26 RCW issues.

(3) Any order entered in the dependency court establishing or modifying a permanent legal custody order under chapter 26.10 RCW shall also be filed in the chapter 26.10 RCW action by the prevailing party. Once filed, any order establishing or modifying permanent legal custody shall survive dismissal of the dependency proceeding.

RCW 13.34.155

Neither this statute nor any other provision of RCW 13.34 allows a trial court to “vacate” a properly obtained nonparental custody order under RCW 26.10. Instead, the parties are directed to proceed “upon the same

showing and standards as a court order determining Title 26 RCW issues.” RCW 13.34.155(2). Nor are there any provisions in Title 26 RCW permitting a court to “vacate” a properly obtained custody order entered under RCW 26.10.

Instead, actions to modify a 26.10 nonparental custody order are governed by RCW 26.10.190, entitled (in part) “Petitions for modification and proceedings concerning relocation of child...” The statute provides that “[t]he court shall hear and review petitions for modifications of a parenting plan, custody order, visitation order, or other order governing the residence of a child, and conduct any proceedings concerning a relocation of the residence where the child resides a majority of the time, pursuant to chapter 26.09 RCW.” The modification provisions of RCW 26.09 are set forth in RCW 26.09.260, which reads (in relevant part) as follows:

26.09.260 Modification of parenting plan or custody decree.

(1)...[T]he court shall not modify a prior custody decree or a parenting plan unless it finds, upon the basis of facts that have arisen since the prior decree or plan or that were unknown to the court at the time of the prior decree or plan, that a substantial change has occurred in the circumstances of the child or the nonmoving party and that the modification is in the best interest of the child and is necessary to serve the best interests of the child.

(2) In applying these standards, the court shall retain the residential schedule established by the decree or parenting plan unless:

(a) The parents agree to the modification [or]

...

(c) The child's present environment is detrimental to the child's physical, mental, or emotional health and the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child...
RCW 26.09.260.

The procedure for initiating a modification action is set forth in RCW 26.09.270. That statute, entitled "Child custody -- Temporary custody order, temporary parenting plan, or modification of custody decree-- Affidavits required," reads (in relevant part) as follows:

A party seeking... modification of a custody decree or parenting plan shall submit together with his motion, an affidavit setting forth facts supporting the requested order or modification and shall give notice, together with a copy of his affidavit, to other parties to the proceedings, who may file opposing affidavits. The court shall deny the motion unless it finds that adequate cause for hearing the motion is established by the affidavits, in which case it shall set a date for hearing on an order to show cause why the requested order or modification should not be granted.
RCW 26.09.270.

To initiate a modification proceeding, a party must file a Petition for Modification that conforms with the requirements of 26.09.006 ("a party shall not file any pleading with the clerk of the court in an action commenced under this chapter unless on forms approved by the administrator for the courts.") The Petition must be served on the nonmoving party along with supporting declarations, a Summons, and a

Notice of Hearing for Adequate Cause.¹⁵ If the court determines there is adequate cause to hear the petition, an evidentiary hearing on the petition will be scheduled. RCW 26.09.270.

There is no provision anywhere in Title 26 RCW exempting the department from these requirements when it intervenes as a party in a 26.10 action or when the trial court exercises concurrent jurisdiction over a dependency and a nonparental custody action.

In this case, the department did not follow the correct procedure to modify the third party custody order. Instead, the prosecuting attorney filed a short motion with a one-page declaration indicating that “vacating” the order was in the best interest of the children. CP 61. The court did not hold an adequate cause hearing. No one involved in the proceeding articulated the standards required for modification or the evidentiary burden undertaken by the department. Indeed, the court’s only ruling on the record consisted of the following:

I regret ever signing the first order in this case. That’s one I have to live with. I am not going to re-live this thing. When I read what’s going on with these kids and what’s happened to these kids, you know, I don’t need to entertain anyone in this courtroom; the lawyers know what I am talking about. The wetting, the abuse, the

¹⁵ The required forms for a modification action are WPF DRPSCU 07.0100 - 07.0400, and are available through the Administrative Office of the Courts at <http://www.courts.wa.gov/forms/>.

neglect, the slapping, the belts, the whole nine yards. I am not gambling again. I am vacating the third party order. The children are going to remain where they are and I am going to go from there.
RP 235-236.

Some of the standards for modification were incorporated into the court's Findings of Fact and Conclusions of Law; however, even if taken at face value, the findings and conclusions are insufficient to support a modification.¹⁶ First, there is no indication what facts were before the court when it granted the nonparental custody decree in 1999, thus it is impossible to determine whether or not the threshold finding of a substantial change in circumstances based on "facts that have arisen since the prior decree or plan or that were unknown to the court at the time of the prior decree or plan..." RCW 26.09.260(1). Second, although the court found that "vacating" the order was in the best interest of the children (as required under RCW 26.09.260(1)), it did not separately determine that it was *necessary* to the best interest of the children (RCW 26.09.260(1)), nor did it specifically find that "the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child..." as required under RCW 26.09.260(2).

¹⁶ The court's Findings and Conclusions are disputed elsewhere in this brief.

Given the Department's failure to follow the correct procedures and the trial court's failure to find facts adequate to justify a modification, the order "vacating" the nonparental custody order must be set aside and the case remanded to the trial court. If this court determines that the custodians are not entitled to a termination trial under RCW 13.34, then the Department may proceed with a modification action under RCW 26.09; however, it should not be permitted to cut corners.

IV. THE *AD HOC* PROCEDURE USED TO "VACATE" THE NONPARENTAL CUSTODY ORDER VIOLATED APPELLANTS' CONSTITUTIONAL RIGHTS TO SUBSTANTIVE DUE PROCESS.

The Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. Amend. XIV. This clause has a substantive component that provides "heightened protection against government interference with certain fundamental rights and liberty interests." *Washington v. Gluksberg*, 521 U.S. 702, 719, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997). The rights of parents in the care, custody and control of their children is a fundamental liberty interest long recognized by the United States Supreme Court. *See, e.g., Meyer v. Nebraska*, 262 U.S. 390, 399, 43 S.Ct. 625, 67 L. Ed. 1042 (1923) (recognizing liberty protected by Due Process Clause includes right of parents to raise children); *Pierce v. Society of Sisters*, 268

U.S. 510, 534-35, 45 S.Ct. 571, 69 L.Ed. 1070 (1925) (recognizing liberty interest of parents includes right to direct upbringing of children).

Interference with a fundamental right is constitutional “only if the state can show that it has a compelling interest and such interference is narrowly drawn to meet the compelling state interest involved.” *In re Dependency of I.J.S.*, 128 Wn.App. 108 at 116, 114 P.3d 1215 (2005).

As de facto parents, J.M. and C.B. have the same interest in raising their children as any biological or adoptive parent. *Parentage of L.B.*, *supra*. The U.S. Supreme Court has stated that a parent’s fundamental liberty interest in her or his relationship with her or his child

does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures. *Santosky v. Kramer*, 455 U.S. 745 at 753-754, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982).

The process due a parent facing termination turns on a balancing of the factors specified in *Mathews v. Eldridge*, 424 U.S. 319 at 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976): the private interests affected by the proceeding, the risk of error created by the State’s chosen procedure, and the government’s interest in maintaining the challenged procedure.

Santosky v. Kramer, at 754. In *Santosky v. Kramer*, the Supreme Court described the private interest in a termination proceeding as “commanding” and “far more precious than any property right,” and found that it weighed heavily in favor of the highest protections. *Santosky v. Kramer*, at 758-759.

Whatever minimal process is due, it is unquestionably greater than the unclear and ad-hoc standard used by the trial court here in “vacating” the nonparental custody decree. Indeed, the only standard clearly expressed by the trial judge in his oral ruling was regret: “I regret ever signing the first order in this case. That’s one I have to live with. I am not going to re-live this thing.” RP 235-236.

None of the parties clearly articulated the appropriate standard either in pleadings or in arguments to the court, and the court’s Findings of Fact and Conclusions of Law, although lengthy, covered a great deal of territory without ever specifying what minimal factors needed to be established in order to “vacate” the order. CP 69-73. Without clear standards and an evidentiary burden articulated in advance, the parties were unable to determine what evidence to present and what arguments to make. *See, e.g., Santosky v. Kramer, supra:*

Since the litigants and the factfinder must know at the outset of a given proceeding how the risk of error will be allocated, the standard of proof necessarily must be calibrated in advance.

Retrospective case-by-case review cannot preserve fundamental fairness when a class of proceedings is governed by a constitutionally defective evidentiary standard.
Santosky v. Kramer, at 757.

The *ad hoc* procedures adopted by the Department and the court here violated the custodians right to substantive due process. Because of this, the order vacating the nonparental custody decree must be reversed, and the case remanded to the trial court.

V. THE TRIAL COURT'S ORDER VACATING APPELLANTS' NONPARENTAL CUSTODY DECREE IS CONTRARY TO THE EVIDENCE AND UNDERCUTS THE CHILDREN'S BEST INTERESTS.

At the time the court's ruling was made on June 21, 2005, the court had before it evidence that the custodians had participated in every service offered, had made substantial progress toward reunification with their children (contrary to the expectations of Dr. Hawkins), and had never regressed. RP 221-233. Dr. Hawkins, the CASA, and the children's GAL all agreed that the children could be returned home within six to twelve months. RP 229-230. Even the social worker acknowledged progress, and agreed that the children could be returned home permanently within six to twelve months.¹⁷ RP 232. In light of this, the trial court's decision to vacate the order was erroneous.

¹⁷ Despite this, the social worker continued to recommend that the order be vacated: "[W]hen we have these concerns the Department has to err on [the side of] caution." RP 232

This is so whether the correct standard is the standard set forth in RCW 13.34.180 and RCW 13.34.190, or the modification standard set forth in Title 26 RCW, or a minimal due process standard as required under the Fourteenth Amendment to the U.S. Constitution and *Santosky v. Kramer*. Indeed, had the trial judge followed the recommendations of Dr. Hawkins (instead of vacating the order based on a feeling of regret, RP 235-236), the November ISSP may have reported the final stages of a successful transition plan, instead of the failure of an attempted preadopt placement and the children's return to foster care. [D.M.]'s ISSP (11-16-2005).

Because the trial court's decision was erroneous, the order vacating the nonparental custody decree must be reversed and the case remanded to the trial court. Since the evidence suggested that reunification was in the children's best interest, the remand order should be accompanied by instructions to recommence the reunification process.

VI. THE TRIAL COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW ARE UNSUPPORTED IN THE RECORD AND MUST BE VACATED.

A trial court's findings are reviewed for substantial evidence. *In re Custody of Shields*, 120 Wn.App. 108 at 120, 84 P.3d 905 (2004).

Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding. *State v. Carlson*, 130 Wn. App.

589 at 592, 123 P.3d 891 (2005). It is more than “a mere scintilla” of evidence, and must convince an unprejudiced thinking mind of the truth of the fact to which the evidence is directed. *Northwest Pipeline Corp. v. Adams County*, ___ Wn.App. ___, ___ P.3d ___, 2006 Wash. App. LEXIS 650 (2006), citing *Davis v. Microsoft Corp.*, 149 Wn.2d 521 at 531, 70 P.3d 126 (2003). A finding that is not supported by substantial evidence must be vacated. See, e.g., *Albertson's v. Employment Security*, 102 Wn.App. 29 at 43, 15 P.3d 153 (2000).

In this case, the record upon which the court’s findings may rest consists of the testimony introduced at the hearings on December 7, 2004 and June 21, 2005, and the exhibits admitted at the December 7 hearing. This is so because the parties have the right “to receive a decision based solely on the evidence adduced at the hearing...” RCW 13.34.090(1). On this record, many of the court’s findings and conclusions are either unsupported or are simply erroneous.

Finding No. 1 reads as follows: “That [S.R.], dob: 06/22/1998, and [D.M.], dob: 05/15/1996, are residents of Grays Harbor County and in the legal custody of the Department of Social and Health Services.” CP 69. This finding is not supported by substantial evidence because there was no testimony or other evidence establishing the age, residency, or custody

status of [S.R.] and [D.M.]. Accordingly, the finding must be vacated.

Albertson's v. Employment Security, supra.

Finding No 2. reads as follows: "On April 26, 1999, a Petition for Custody was filed for [D.M.] and [S.R.] by J.M., the maternal aunt and her partner, C.B." CP 70. This finding is not supported by substantial evidence because there was no testimony or other evidence establishing the date a custody petition was filed, or the relationship between J.M. and the children. Accordingly, the finding must be vacated. *Albertson's v. Employment Security, supra.*

Finding of Fact No. 3 reads as follows: "On July 12, 1999, a Parenting Plan and Decree of custody was entered, awarding custody of [S.R.] and [D.M.] to C.B. and J.M." No evidence was introduced establishing the date the decree was entered. Accordingly, the finding must be vacated. *Albertson's v. Employment Security, supra.*

Finding of Fact No. 4 reads as follows: "On March 24, 2003, Petitions Alleging Dependency were filed on [S.R.] and [D.M.]. A shelter care order was entered." No evidence was introduced establishing this finding: the Department did not submit as evidence copies of the Petitions or copies of the shelter care order, and there was no testimony on the subject. Accordingly, the finding must be vacated. *Albertson's v. Employment Security, supra.*

Finding of Fact No. 5 reads as follows: "The children were placed into care due to allegations of physical abuse and neglect at the hands of C.B. and J.M.. An Order of Dependency was entered on April 29, 2003 in Cause No's. 03-7-194-0 and 03-7-195-8." CP 70. The first part of the finding is supported by the testimony of social worker Patience Jones. RP 132-139. There was no evidence introduced relating to a dependency order; therefore, the second part of the finding is unsupported and must be vacated. *Albertson's v. Employment Security, supra.*

Finding of Fact No. 6 reads as follows: "Services were offered to correct the deficiencies of J.M. and C.B.." CP 70. There was some testimony about services offered to the custodians; however, there was no testimony establishing that the services were geared toward correcting deficiencies. Accordingly, the finding must be vacated. *Albertson's v. Employment Security, supra.*

Finding of Fact No. 7 reads as follows: "[S.M.] and [D.R.] are not members of an Indian tribe." CP 70. No evidence was introduced establishing the children's Indian status. Accordingly, the finding must be vacated. *Albertson's v. Employment Security, supra.*

Finding of Fact No. 8 reads as follows: "[S.R.] and [D.M.] have been removed from the custody of J.M. and C.B. continuously since the entry of the shelter care order in March of 2003." CP 70. There was no

testimony or other evidence establishing this finding. Accordingly, the finding must be vacated. *Albertson's v. Employment Security, supra.*

Finding of Fact No. 14 reads as follows: "There remain, however, significant concerns about C.B. and J.M.'s ability to parent these children. There is concern about a lack of empathy on the part of the nonparental custodians with regard to the children. There is also a concern about the lack of understanding as to why the children originally came into care." CP 71. Although these "concerns" existed at the start of the hearing, they had been resolved by the conclusion of the hearing on June 21, 2005. Accordingly, the finding that the concerns "remain" is unsupported by substantial evidence and must be vacated. *Albertson's v. Employment Security, supra.*

Finding of Fact No. 15 reads as follows: "It would take a considerable length of additional time for the parental deficiencies of J.M. and C.B. to correct their parental deficiencies [sic] in order for [S.R.] or [D.M.] to return to their care." CP 71. When the hearing concluded on June 21, 2005, all witnesses (including the social worker) agreed that a permanent return home could be accomplished within six to twelve months. Because of this, the finding is not supported by substantial evidence and must be vacated. *Albertson's v. Employment Security, supra.*

Finding of Fact No. 16 reads as follows: “[D.M.] and [S.R.] continue to have fears of C.B. and J.M. and physical abuse.” CP 71-72. This is incorrect; the only testimony on the children’s *current* fear reflected that [S.R.] continued to have some fear, but that [D.M.] (for the most part) did not. RP 231. Accordingly, the finding must be vacated. *Albertson's v. Employment Security, supra.*

Finding of Fact No. 17 reads as follows: “Continuation of the nonparental custody of J.M. and C.B. diminishes these children’s prospects for early integration into a stable and permanent home.” CP 72. There was no testimony or other evidence introduced on the children’s prospects for integration into a stable and permanent home, other than the testimony that a permanent return home could be accomplished within six to twelve months. RP 228-230. Because of this, the finding is unsupported and must be vacated. *Albertson's v. Employment Security, supra.*

Finding of Fact No. 18 reads as follows: “It would be a minimum of six months to a year in order for these children to be returned to the C.B.-J.M. home, which is a considerable length of time in these children’s lives.” CP 72. The evidence suggested that the children could be moved home within six to twelve months; there was no suggestion that this was a minimum period, rather, Dr. Hawkins testified (and the social worker

agreed) that a permanent return home could be accomplished within that period. RP 228-230; 232. Because the finding is unsupported by substantial evidence, it must be vacated. *Albertson's v. Employment Security, supra*.

Finding of Fact No. 19 reads as follows: "The environment of the C.B.-J.M. home would be detrimental to [D.M.] and [S.R.]'s physical, mental and emotional health, should they be returned to their care. There has been a substantial change in the circumstances of C.B.-J.M.'s since the placement of these children in the C.B.-J.M. home." CP 72. Concerns about the custodians' home had been resolved by the time the hearing concluded on June 21, 2005. At that time, given the progress the parents had made since being evaluated in 2003, there was no evidence that the home environment continued to threaten the children's health. Furthermore, there was no evidence presented to establish the circumstances at the time of the original placement; thus, the court's finding of a substantial change in circumstances is without support in the record. Accordingly, the finding must be vacated. *Albertson's v. Employment Security, supra*.

Finding of Fact No. 20 reads as follows: "It is clearly in the best interests of [D.M.] that the nonparental custody decree be vacated." CP 72. Finding of Fact No. 21 reads as follows: It is currently in the best

interests of [S.R.] that the nonparental custody decree be vacated.” CP 72. There was no evidence introduced to show the impact of termination on the children. Contrary to the finding, evidence suggested that the children enjoyed having an intact relationship with the couple they knew as mom and dad. Because of this, the finding must be vacated. *Albertson's v. Employment Security, supra*.

Conclusions of law are reviewed *de novo*. See, e.g., *In re Discipline of Haley*, 156 Wn.2d 324 at 333, 126 P.3d 1262 (2006). However, a finding incorrectly denominated a conclusion of law is reviewed as a finding. *Landmark Dev., Inc. v. City of Roy*, 138 Wn.2d 561 at 585, 980 P.2d 1234 (1999). To the extent the court's Conclusions of Law are more properly viewed as findings of fact, they are also without support in the record.

Conclusion No. 2 (that the findings have been established by clear, cogent, and convincing evidence) is not supported by the record, for the reasons outlined above and throughout the rest of this brief. Because of this, it must be vacated. *Albertson's v. Employment Security, supra*.

Conclusions Nos. 3, and 4 (that vacating the nonparental custody decree is in the best interest of the children) is also not supported by the record. There was no testimony as to the effect of a termination of the relationship on the children. In fact, the testimony and evidence

established that the custodians and their children were well bonded, and that the current relationship was characterized by love. In light of this, it is likely that termination was actually not in the best interest of the children. Accordingly, Conclusions Nos. 3 and 4 are unsupported by the record and must be vacated. *Albertson's v. Employment Security, supra*.

CONCLUSION

J.M. and C.B. are the custodians and de facto parents of [S.R.] and [D.M.]. Under RCW 13.34, their status as custodians entitled them to “full participation” in any termination proceeding. *Blume, supra*. Under Washington’s common law, their status as de facto parents entitled them to the same rights as biological or adoptive parents, including the right to a termination trial under RCW 13.34.180 and RCW 13.34.190 prior to termination of their relationships with their children. *Parentage of L.B., supra*. Because the Department and the trial court violated their rights as custodians and their rights as de facto parents, the order vacating their nonparental custody decree must be set aside and the case remanded to the trial court.

Furthermore, even if J.M. and C.B. did not have the right to full participation in a termination action or the right to be treated as a parent in a termination trial, the modification of their nonparental custody decree should have been accomplished in the manner prescribed by Title 26

RCW. The Department's failure to follow the correct procedure, and the court's failure to find facts adequate to justify a modification of the original nonparental custody decree require reversal of the order vacating the decree. Accordingly, the case must be remanded to the trial court for a new trial.

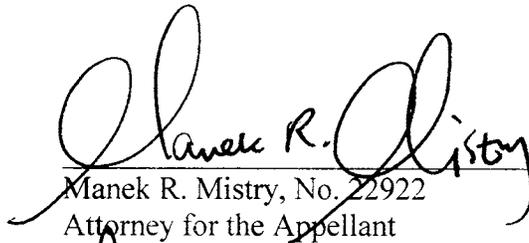
Instead of following any of the recognized procedures that might legally apply to the custodians situation, the Department and the court engaged in an *ad hoc* process to "vacate" the nonparental custody order. This procedure violated the custodians constitutional right to substantive due process. In the absence of a pre-hearing delineation of the standards to be used and the burdens to be assigned, the parties were unable to determine what evidence to present. Because of this, the order vacating the nonparental custody order must be set aside. This court should remand the case to the trial court with instructions on how a termination proceeding against third party custodians is to be initiated and conducted (if appropriate). If the proper procedure does not follow one of the recognized procedures outlined above (participation in a biological or adoptive parent's termination trial, participation as a parent in a termination trial, or modification under Title 26 RCW) this court should outline the proper procedure and standards to be employed, so the parties

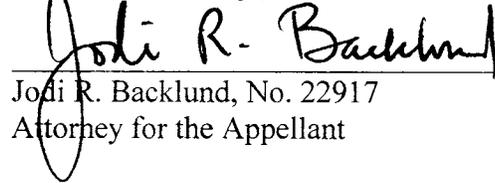
and the court can conduct a meaningful adversarial hearing in which the parties rights children's best interests are protected.

Finally, regardless of what the correct standard is, the trial court erred by entering the order vacating the nonparental custody decree. Contrary to many of the court's written findings, the evidence established that the custodians were making steady progress toward reunification with their children. Despite the fact that few services were offered, all the parties agreed that reunification was possible within six to twelve months of the June 21, 2005 court hearing. Had the court taken this into account and ruled accordingly (instead of on the basis of the trial judge's feelings of regret, RP 235-236), it is possible that the November 2005 ISSP would have reported the final stages of a transition plan, rather than an unsuccessful attempt to transfer the children to a preadopt home and their subsequent return to foster care. [D.M.]'s ISSP (11-16-2005). Because of this, the order vacating the nonparental custody decree must be reversed. In light of the evidence, the case must be remanded to the trial court with instructions to recommence reunification between the children and the custodians.

Respectfully submitted on June 23, 2006.

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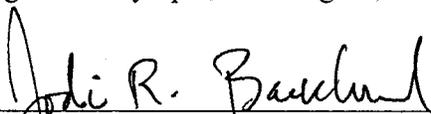
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And to the Office of the Attorney General at their address of record, and that I sent the original and one copy to the Court of Appeals, Division II, for filing,

All postage prepaid, on June 23, 2006.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington, on June 23, 2006.



Jodi R. Backlund, WSBA No. 22917 
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