

No. 44649-9

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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IN RE THE WELFARE OF H.Q.

STATE OF WASHINGTON,  
DEPARTMENT OF SOCIAL AND HEALTH SERVICES,

Respondent,

v.

C.Q.,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KITSAP COUNTY

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MOTION FOR ACCELERATED REVIEW  
APPELLANT'S OPENING BRIEF

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A. SUMMARY OF APPEAL

C.Q. is the father of a five-year-old girl, H.Q. As a result of an intellectual disability, Mr. Q. is unable to care for H.Q. on a full-time basis. But Mr. Q. and his daughter have a strong bond. It is in H.Q.'s best interest to continue her relationship with her father.

The adoption statute provides a means whereby parents who have voluntarily relinquished their parental rights and consented to adoption may enter "open communication" agreements with the prospective adoptive parents and thereby continue to have contact with their children. Mr. Q. was precluded from pursuing this option, however, based on the assumption that he lacked the mental capacity to voluntarily relinquish his rights. But a parent with an intellectual disability may nonetheless have the capacity to voluntarily relinquish his rights. Mr. Q. was denied the opportunity to relinquish his parental rights without a particularized showing that he lacked the requisite capacity. Therefore, his constitutional due process and statutory right to consent to his daughter's adoption was violated. In addition, the decision to preclude Mr. Q. from exercising his constitutional right to consent to his daughter's adoption, based only on his mental disability, denied Mr. Q. the equal protection of the laws.

## B. ASSIGNMENTS OF ERROR

1. The court's finding, "The father has the intellectual level of a six to eight year old" is not supported by substantial evidence. CP 70.

2. The court's finding, "[Mr. Q.] functions at about a first grade level" is not supported by substantial evidence. CP 71.

3. The court's finding, "The father is apparently not capable of voluntarily relinquishing his parental rights" is not supported by substantial evidence. CP 72.

4. The court's finding that it was in the best interests of the child to involuntarily terminate Mr. Q.'s parental rights is not supported by substantial evidence.

5. The court's decision to involuntarily terminate Mr. Q.'s parental rights without first determining if he had the capacity to voluntarily relinquish his rights violated the adoption statute.

6. The court's decision to involuntarily terminate Mr. Q.'s parental rights without first determining if he had the capacity to voluntarily relinquish his rights violated Mr. Q.'s right to due process.

7. The court's decision to involuntarily terminate Mr. Q.'s parental rights violated his right to equal protection of the laws.

### C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A parent has a fundamental constitutional right to make choices about his child's future even if he does not have the ability to care for the child himself. That right encompasses the right to consent to adoption. In addition, a parent has a statutory right to consent to adoption, as long as the consent is voluntary. Were Mr. Q.'s constitutional and statutory rights violated when he was denied the opportunity to consent to adoption, based only on the assumption that he lacked the mental capacity to provide such consent, where there was no particularized showing that in fact he did not have that capacity?

2. The government may not deny a fundamental right to a citizen based only his status as mentally disabled if there is no compelling reason to deny the right for that reason. Here, the State denied Mr. Q. his fundamental right to consent to his daughter's adoption based only on his status as mentally disabled. The State had no compelling reason to deny Mr. Q. the right for that reason because continuing the parent-child relationship was in the child's best interest. Was Mr. Q.'s constitutional right to equal protection violated?

#### D. STATEMENT OF THE CASE

Mr. Q. is a 30-year-old man with a disability resulting from brain damage he suffered when he was about eight or nine years old. RP 28, 31. His mother had slammed his head in a car door. RP 28, 31. Mr. Q. was diagnosed with cognitive disorder affecting executive decision-making; social judgment dementia due to head trauma, provisional; and mild mental retardation. RP 28. He performs at about a first grade level in academic achievement. RP 30. He has a global assessment functioning scale of 40. RP 28.

Although Mr. Q. has a disability, he also has the capacity to live independently and perform many of the tasks necessary for everyday life. He lives alone in Belfair, in an RV trailer that he bought, near friends. RP 33. He bathes, dresses, and grooms himself and prepares his own meals. RP 29, 34. He cleans his own home and keeps it impeccably clean. RP 33. He has held a job as a stock clerk. RP 30.

While he was growing up, Mr. Q. lived with his foster parents, the Ps. RP 35. He moved in with them when he was about eight years old. RP 35. When he turned 18, the Ps became his guardians. RP 35-36. Ms. P. takes care of Mr. Q.'s finances and provides him with

transportation when he needs to go somewhere. RP 33. She is responsible for making his major medical decisions. RP 36.

Mr. Q. is the father of a five-year-old girl, H.Q., who was born on July 1, 2008. CP 69-70. H.Q.'s mother is C.H. CP 70. Mr. Q. and Ms. H. lived together for a few years, around the time the child was born. RP 33.

In summer 2010, the Department filed a dependency petition regarding H.Q.<sup>1</sup> RP 11; CP 70. The reason for the petition was the "filthy" condition of the home. RP 14. Ms. H. had pets and did not properly clean up after them. RP 14. There were dog feces on the floor, which created an unsafe environment for H.Q. because she spent much of her time on the floor. RP 14.

H.Q. was placed in Department custody in August 2010 and has remained out of the parents' care since then. CP 70. At the time of trial, she was living with her maternal great aunt, who intended to adopt her. RP 21-22, 38.

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<sup>1</sup> An earlier agreed dependency order was entered February 2009. Exhibit 1. The Department filed the petition after H.Q. was brought to the hospital with a broken leg. RP 12. That dependency was dismissed in December 2009 on the State's motion. Exhibit 3. The State's witnesses agreed Mr. Q. did not cause H.Q.'s broken leg. RP 24, 41.

A contested order of dependency was entered as to Mr. Q. Exhibit 6. The court found Mr. Q.'s parental deficiency was his "significant mental health issues and head trauma causing developmental and cognitive delays." Exhibit 6 at 2. The court ordered Mr. Q. to participate in parent coaching. Exhibit 7 at 5. The court also ordered supervised visits with H.Q. Exhibit 7 at 6.

Mr. Q.'s visits with H.Q. were always positive and healthy and it was apparent the two had a loving, comfortable relationship. RP 37, 40. Mr. Q. generally presented himself during the visits as a "kindly" eight- or nine-year-old. RP 19. He and H.Q. would play together and enjoy each other's company. RP 19. They had pleasant interactions. RP 19. Their relationship was more like a peer relationship than a parent-child relationship. RP 19, 40. There is no evidence that Mr. Q. was ever inappropriate or unsafe during the visits.

Mr. Q.'s guardian, Ms. P., testified she had observed Mr. Q. and his daughter together. RP 34-35. Mr. Q. is able to prepare meals for H.Q. and help her eat at the table. RP 34. He is concerned about her safety and can keep her safe. RP 34-35. To Ms. P.'s knowledge, Mr. Q. has never harmed H.Q. RP 35. Mr. Q. loves his daughter very much. RP 34.

All of the witnesses at the termination trial agreed Mr. Q. did not have the capacity to take care of H.Q. alone on a full-time basis. RP 21, 35-36, 39-40. But at the same time, everyone agreed he and H.Q. had a loving relationship and it was in H.Q.'s best interest to continue to have contact with him. RP 25, 38.

The Department offered Mr. Q. parent coaching as ordered by the court, but the service was terminated after two sessions. RP 17-18. The provider told the Department that further coaching would not help Mr. Q. because he was unable to acquire the skills she was trying to teach him. RP 17-18. The social worker concluded there were no other services that could help remedy Mr. Q.'s deficiencies. RP 18. Therefore, the Department determined that involuntary termination of his parental rights was the only option to pursue to ensure that H.Q. would have a stable home. RP 21-23.

H.Q.'s mother voluntarily relinquished her parental rights and entered an "open communication agreement" with H.Q.'s prospective adoptive parent. RP 3; CP 60-66. An "open communication agreement" is an agreement between a birth parent and an adoptive parent that permits the birth parent to have ongoing communication or contact with his or her child. RCW 26.33.295. But that option was not

offered to Mr. Q., based on the assumption that he did not have the mental capacity to relinquish his rights or to enter such an agreement.

Instead, the Department filed a termination petition, with the purpose to terminate Mr. Q.'s parental rights involuntarily. CP 1. The Department alleged it had offered Mr. Q. all reasonable services but he had not made sufficient progress to remedy his deficiencies. CP 2.

At the beginning of the termination trial, the assistant attorney general asserted that the court must terminate Mr. Q.'s parental rights involuntarily, pursuant to the dependency statute, chapter 13.34 RCW, because Mr. Q. was "not able to enter into any type of voluntary agreement, whether it's to voluntarily relinquish his parental rights or to voluntarily enter into the open adoption agreement." RP 6-7.

Mr. Q.'s attorney also stated that Mr. Q. was "not in a position where he is competent to relinquish."<sup>2</sup> RP 4. But counsel provided no further information to the court about whether Mr. Q. in fact lacked the specific capacity to understand the nature and effect of a decision to relinquish his rights. RP 4. To the contrary, there is no evidence in the record that anyone ever asked Mr. Q. whether he wanted to relinquish

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<sup>2</sup> Counsel argued that Mr. Q. was denied the equal protection of the laws because, unlike the child's mother, he was unable to enter an open adoption agreement, even with his guardians' consent. RP 4-5; CP 48.

his rights so that he could take advantage of an open communication agreement, or whether he understood what that would mean.

Although Mr. Q.'s guardian, Ms. P., testified at the termination trial, she was never asked whether she had investigated or determined that Mr. Q. did not have the capacity to voluntarily relinquish his parental rights.

The court simply accepted at face value the attorney general's assertions that Mr. Q. was "not capable of voluntarily relinquishing his parental rights." CP 72. The court did not specifically inquire whether Mr. Q. had the mental capacity to understand the nature and effect of a decision to relinquish.

The court found that Mr. Q. did not have the mental capacity to be a parent and that conditions were unlikely to improve sufficiently to enable him to parent H.Q.<sup>3</sup> CP 71. Therefore, the court terminated his parental rights involuntarily. RP 51-52; CP 74-75. At the same time, the court expressed regret that Mr. Q. could not enter an open adoption agreement with H.Q.'s adoptive parent because "[f]rom all respects, it sounds like [Mr. Q. and H.Q.] have a loving relationship." RP 51.

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<sup>3</sup> A copy of the court's written findings and conclusions is attached as an appendix.

E. ARGUMENT

1. **Mr. Q.’s constitutional due process and statutory rights were violated when he was denied the opportunity to relinquish his parental rights voluntarily without a particularized showing that he lacked the capacity to do so**

- a. The court’s findings that Mr. Q. had “the intellectual level of a six to eight year old” and that he “functions at about a first grade level” are not supported by substantial evidence.

In reviewing a termination order, this Court upholds a juvenile court's findings of fact only if the findings are supported by substantial evidence from which a rational trier of fact could find the necessary facts by clear, cogent and convincing evidence. In re Dependency of K.S.C., 137 Wn.2d 918, 925, 976 P.2d 113 (1999). Clear, cogent and convincing evidence exists when the ultimate fact in issue is “highly probable.” Id. Substantial evidence is evidence that would persuade a fair-minded rational person of the truth of the declared premise. In re Welfare of C.B., 134 Wn. App. 942, 953, 143 P.3d 846 (2006).

No expert testified as to Mr. Q.’s “mental age.”<sup>4</sup> The social worker testified Mr. Q. had been diagnosed with mild mental

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<sup>4</sup> “Mental age” is “the level of a person’s intellectual ability esp. as measured by an intelligence test and expressed as the numerical equivalent of the chronological age of the typical person having the same level of

retardation. RP 28. A person with mild mental retardation has an IQ level between 50 and 70. American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders: DSM-IV 46 (4th ed. 1994). The social worker also testified Mr. Q. performs at about a first grade level in academic achievement, but she did not say he performs at that level in other areas of functioning. RP 30. She also said he “presents himself during visits [with H.Q.] as a kindly eight- or nine-year-old,” but again she did not say he functions at that level in other arenas. RP 19.

Thus, substantial evidence in the record does not support the court’s findings that Mr. Q. had the intellectual level of a six- to eight-year-old or that he functioned generally at a first grade level.

- b. Mr. Q. had a fundamental constitutional right, as well as a statutory right, to choose to relinquish his parental rights.

It is well established that natural parents have a “fundamental liberty interest in the care, custody, and management of their children” which is protected by the Fourteenth Amendment. Santosky v. Kramer, 455 U.S. 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982); U.S. Const. amend. XIV; In re Welfare of Sumey, 94 Wn.2d 757, 767, 621 intellectual ability.” Webster’s Third New International Dictionary 1411 (1993).

P.2d 108 (1980) (“Because the right to raise one's children is fundamental, any proceeding by the State to deprive a person of that right must take place under the aegis of the equal protection and due process clauses of the Fourteenth Amendment.”). A parent’s liberty interest includes the freedom to make personal choices in matters of family life. Santosky, 455 U.S. at 753 Natural parents do not lose this constitutionally protected interest “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.” Id.

A parent’s constitutionally protected right to make personal choices about family life includes the right to make choices about what will happen to a child if the parent is unable to care for him or her. In re T.J., 666 A.2d 1, 12-15 (D.C. 1996). Simply because a parent is unable to care for a child does not mean the parent is unable to make decisions about her future. As long as the parent’s rights have not been terminated, and there is no finding that the parent should not be permitted to influence the child’s future, the parent has a right to consent, or to withhold consent, to the child’s adoption. Id. “This right

to consent must be guarded just as zealously as the Constitution guards the right of a natural parent to the custody and companionship of his or her child.” Id.

In Washington, a parent’s right to consent to adoption is guaranteed by statute, chapter 26.33 RCW.<sup>5</sup> In re Dependency of M.S., 156 Wn. App. 907, 912-13, 236 P.3d 214 (2010). Adoption is a two-step process under the statute. First, the biological parent-child relationship is terminated and then, a new adoptive parent-child relationship is created. Id.; RCW 26.33.130, .240. Termination can be either voluntary or involuntary. RCW 26.33.090, .120, .130; RCW 13.34.180 (involuntary termination under juvenile dependency statute). A parent who wishes to terminate voluntarily begins by filing a petition for relinquishment. RCW 26.33.080. “Relinquishment” is defined as “the voluntary surrender of custody of a child to the department, an agency, or prospective adoptive parents.” RCW 26.33.020(11). A petition for relinquishment must be accompanied by the parent’s

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<sup>5</sup> The Court’s goal in interpreting the statute is to carry out the Legislature’s intent. M.S., 156 Wn. App. at 912-13. To determine legislative intent, the Court first looks to the plain language of the statute. Id. As part of this inquiry, the Court may look to the statute’s context, related provisions, and the statutory scheme as a whole. Id. The Court interprets the statute to give effect to all its language and avoid rendering any portion of it meaningless or superfluous. Id.

written consent to adoption. RCW 26.33.080. If the court determines it is in the child's best interest, the court must grant the petition for relinquishment. RCW 26.33.090(3). The court then awards custody to the Department, agency, or prospective adoptive parent, who is appointed the child's guardian. RCW 26.33.090(3), (4). At the same time, the court must enter an order of termination, which "divests the parent and the child of all legal rights, powers, privileges, immunities, duties, and obligations with respect to each other" except for past-due child support.<sup>6</sup> RCW 26.33.090(4), .130(2).

Once executed, a parent's consent to the adoption of his or her child is deemed valid and irrevocable as long as it is "voluntary," that is, as long as it is an act of the parent's own volition, free from duress,

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<sup>6</sup> The adoption statute provides a limited exception to the general rule that a parent whose rights have been terminated has no further legal rights in regard to his child. RCW 26.33.295 authorizes parties to an adoption proceeding to "enter[] into agreements regarding communication with or contact between child adoptees, adoptive parents, siblings of child adoptees, and a birth parent or parents." RCW 26.33.295(1). This option is available only to parents whose rights have not previously been terminated. RCW 26.33.295(2). The terms of the agreement must be set forth in a written court order and be approved in writing by the prospective adoptive parents and the birth parent; by a representative of the Department or a child-placing agency, if the child is in the custody of the Department or a child-placing agency; and by the child's representative, if the child is represented by an attorney or guardian ad litem. RCW 26.33.295(2). The court may not approve a proposed open communication agreement unless it finds that it would be in the child adoptee's best interest. RCW 26.33.295(2).

fraud, or consent-vitiating factors. In re Adoption of Baby Girl K., 26 Wn. App. 897, 904-06, 615 P.2d 1310 (1980). The relinquishment and adoption statutes are intended to protect the best interests of the child, and there is a strong public interest in the finality of these procedures. Id. at 905. It would be contrary to these policies, as well as the policy of protecting new family relationships from disturbance by the natural parent, to allow the parent to subject a child to another change of custody after a volitional execution of a surrender agreement. Id.

- c. Even a parent of Mr. Q.'s limited intellectual abilities can have the "capacity" to voluntarily relinquish his parental rights and consent to adoption.

In order for a parent's consent to adoption be voluntary and irrevocable, the parent must have the "mental competency" to enter the agreement. RCW 26.33.160(3), (4)(g). A parent is deemed to be mentally incompetent to consent to adoption if "he does not possess sufficient mind or reason to enable him to comprehend the nature, terms and effect" of the transaction. In re Adoption of Hernandez, 25 Wn. App. 447, 607 P.2d 879 (1980); Peterson v. Eritslund, 69 Wn.2d 588, 594, 419 P.2d 332 (1966). The same standard applies whether the questioned mental condition is the product of disease, age, alcohol, or

drugs. Peterson, 69 Wn.2d at 594. The question of mental competency is a factual issue to be determined by the trier of fact. Id.

Even if a court previously determined a parent was in need of a guardian, or a guardian ad litem, to represent his interests, that does not mean the parent is incompetent for the purposes of relinquishing his parental rights. Under the guardianship statute, a guardian or guardian ad litem is appointed for an “incapacitated” person, which is defined as a person who “has a significant risk of personal harm based upon a demonstrated inability to adequately provide for nutrition, health, housing, or personal safety,” or who “is at significant risk of financial harm based upon a demonstrated inability to adequately manage property or financial affairs.” RCW 11.88.010(1)(a), (b); RCW 11.88.090(1); see also RCW 26.33.020(10) (authorizing court to appoint guardian ad litem in adoption proceeding). A person is also “incapacitated” if he or she is under the age of 18. RCW 11.88.010(1)(d). Plainly, a person deemed to be “incapacitated” for purposes of the guardianship statute is not necessarily incompetent to understand the nature, terms and effect of a consent to adoption.

In enacting the guardianship statute, the Legislature expressed its understanding that persons who are “incapacitated” in some areas of

their lives are not necessarily incapacitated in all areas. The

Legislature stated:

The legislature recognizes that people with incapacities have unique abilities and needs, and that some people with incapacities cannot exercise their rights or provide for their basic needs without the help of a guardian. However, their liberty and autonomy should be restricted through the guardianship process only to the minimum extent necessary to adequately provide for their own health or safety, or to adequately manage their financial affairs.

RCW 11.88.005. In the realm of mental retardation, in particular, medical science recognizes that retardation is not a monolithic disability and that, instead, there is wide variation among retarded persons in their intellectual functioning and adaptive behavior. See Helvey v. Rednour, 86 Ill. App. Ct. 154, 159, 408 N.E.2d 17 (1980).

In the adoption statute, the Legislature expressly recognized that a parent with a court-appointed guardian or guardian ad litem may nonetheless have the capacity to voluntarily relinquish his parental rights. RCW 26.33.070(1) requires a parent's guardian ad litem to "make an investigation and report to the court concerning whether any written consent to adoption or petition for relinquishment signed by the parent or alleged father was signed voluntarily and with an understanding of the consequences of the action." In other words,

simply because a parent has a disability and requires a guardian or guardian ad litem does not mean the parent cannot sign a consent to adoption “voluntarily and with an understanding of the consequences of the action.” Id.

In Washington case law, the degree of mental competence required to render a consent to adoption voluntary and valid is not considerable. The standard of voluntariness applied in the adoption context is not equivalent to the standard of voluntariness applied in the criminal law arena. Baby Girl K., 26 Wn. App. at 904-05. That is, a parent need not fully understand the legal effects of surrendering his rights. Unlike in the criminal law, a lack of understanding is not equated with involuntariness. Id. Statutory procedures, such as requiring the parent to wait a length of time after birth before relinquishing his rights, and requiring the court to make a determination of the validity of the relinquishment after a hearing, help to prevent parents from making ill-conceived and abrupt decisions to relinquish their rights. Id.; see RCW 26.33.090.

Mr. Q. is aware of no published Washington case in which the Court concluded that a parent did *not* have the mental capacity to consent to adoption. To the contrary, several cases have held that a

parent had the requisite capacity and therefore could not revoke his or her consent after the fact. See In re Welfare of J.N., 123 Wn. App. 564, 95 P.3d 414 (2004) (mother had requisite capacity to relinquish custody of child despite depression and emotional stress at time of making decision); Baby Girl K., 26 Wn. App. at 904-05 (mother had requisite capacity despite her inexperience, lack of understanding of consequences of decision, and emotional stress at time of signing relinquishment); Adoption of Hernandez, 25 Wn. App. at 454-55 (mother was competent because she admitted she understood nature and effect of decision to relinquish custody and expert testified she had intellectual capacity to understand it was a final decision).

In cases from other states, courts have held that parents with intellectual abilities similar to Mr. Q.'s had the requisite mental capacity to consent to the adoption of their children. See, e.g., Good v. Zavala, 531 So.2d 909, 910 (Ala. Civ. App. 1988) (mother who was retarded and on borderline range of function was competent to consent to custody of child because she understood that, if her daughter was adopted, she would not be the child's mother in the eyes of the law and her daughter would be the child of the adopting parents); In re Surrender of Minor Children, 344 Mass. 230, 234, 236-37, 181 N.E.2d

836 (1962) (mother, classified as a “moron”<sup>7</sup> with 60 IQ, had capacity to consent to adoption voluntarily with “full understanding of every fact necessary to such consent”).

- d. The record does not support the court’s finding that Mr. Q. lacked the capacity to voluntarily relinquish his parental rights.

Like the parent in In re Surrender of Minor Children, 344 Mass. at 234, 236-37, Mr. Q. was diagnosed with mild mental retardation. RP 28. There was no reason for the court or the parties to conclude that because of this condition—without a further inquiry—Mr. Q. did not have the mental capacity to understand the essential nature and effect of a decision to relinquish his parental rights. To the contrary, the record suggests that Mr. Q. *did* have adequate capacity. He had sufficient capacity to live alone in a trailer and bathe, dress, and groom himself and prepare his own meals. RP 29, 34. He had the capacity to clean his own home and hold down a job. RP 30, 33. He had the capacity to prepare meals for his daughter, help her eat at the table, and keep her safe from danger. RP 34-35. There is a good chance that a man with

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<sup>7</sup> The term “moron” is no longer used but once referred to an adult with a mental age between eight and twelve. [http://en.wikipedia.org/wiki/Mental\\_Retardation](http://en.wikipedia.org/wiki/Mental_Retardation). The term “mild mental retardation” is now used for this condition. Id.

these abilities also had the capacity to voluntarily relinquish his parental rights.

Indeed, in the earlier 2009 agreed dependency, the court specifically found that Mr. Q. had the mental capacity to understand the terms of the dependency order as well as its effect. Exhibit 1 at 2. The court found he “understands the terms of the order or orders s/he has signed,” and “understands that entry of the order starts a process which could result in the filing of a petition to terminate his/her relationship with the child.” *Id.* The court found he “knowingly and willingly stipulated and agreed to and signed the order or orders, without duress, and without misrepresentation by fraud or any other party.” *Id.*

Instead of determining in the termination trial whether in fact Mr. Q. had the requisite mental competency to consent to his daughter’s adoption, the court and the parties simply assumed he did not. It is not clear from the record why they made that assumption. It is possible they assumed he was not competent because he was earlier found incompetent to stand trial on criminal charges that he assaulted his daughter and caused her broken leg.<sup>8</sup> See CP 47-48. But the standards used to determine whether a person accused of a criminal

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<sup>8</sup> As noted, everyone at the termination trial agreed that, despite the criminal charge, Mr. Q. did not cause H.Q.’s broken leg. RP 24, 41.

charge is competent to stand trial are not the same standards used to determine whether a parent is competent to relinquish custody of his child. See Baby Girl K., 26 Wn. App. at 904-05. Furthermore, simply because a person is incompetent in one arena of life does not mean the person is incompetent in another. RCW 11.88.005; Helvey, 86 Ill. App. 3d at 159.

Undoubtedly, the court relied on the assertion of Mr. Q.'s attorney that Mr. Q. was not competent to relinquish his parental rights. RP 4. But the court was not permitted simply to rely on the attorney's assertions without determining whether in fact Mr. Q. had the competency to exercise his constitutional right to consent to his daughter's adoption. Although an attorney is impliedly authorized to enter into stipulations and waivers concerning procedural matters to facilitate a hearing, an attorney has no authority to waive any substantial right of her client. Quesnell v. State, 83 Wn.2d 224, 238, 517 P.2d 568 (1973). Even if a client is determined to be incompetent and a guardian ad litem is appointed, the attorney is no more permitted to waive a substantial right of the client than an attorney for a competent client, in the absence of a knowing consent by the person alleged to be mentally ill. Id. at 238-40.

In particular, an attorney may not stipulate, in the absence of her client's consent, to the client's incompetency, especially where such stipulation results in the waiver of substantial rights of the client. In re Welfare of Houts, 7 Wn. App. 476, 483, 499 P.2d 1276 (1972). Here, Mr. Q.'s attorney stipulated that he was incompetent to consent to an adoption, but there is no showing that Mr. Q. was in fact incompetent. There is no showing that Mr. Q. authorized his attorney to make such a stipulation. The result was the waiver of Mr. Q.'s fundamental right to choose whether to consent to H.Q.'s adoption. Because Mr. Q.'s attorney was not authorized to make the stipulation or waive her client's fundamental rights, Mr. Q.'s right to due process was violated.

**2. The decision to preclude Mr. Q. from exercising his constitutional right to consent to his daughter's adoption—based only on his mental disability—denied Mr. Q. the equal protection of the laws**

Any proceeding by the State to deprive a parent of his fundamental right to consent to his child's adoption must take place under the aegis of the Equal Protection Clause of the Fourteenth Amendment. See Sumey, 94 Wn.2d at 767; U.S. Const. amend. XIV. The Equal Protection Clause requires that people similarly situated under the law receive similar treatment from the State. State v. Haq,

166 Wn. App. 221, 253-54, 268 P.3d 997, review denied, 174 Wn.2d 1004, 278 P.3d 1111 (2012). In order to determine whether a state action violates equal protection, one of three different bases of review is employed—strict scrutiny, intermediate scrutiny, or rational basis review. Id. The appropriate level of scrutiny depends upon the nature of the alleged classification and the rights involved. Id. Strict scrutiny applies to laws burdening fundamental rights or liberties, such as a parent’s right to make choices about his child’s future. Id.; Santosky, 455 U.S. at 753; Sumey, 94 Wn.2d at 767; In re T.J., 666 A.2d at 12-15. “Strict scrutiny” requires the government classification be necessary to effectuate a compelling governmental interest. State v. Garcia-Martinez, 88 Wn. App. 322, 327, 944 P.2d 1104 (1997). In addition, if a compelling interest is to be advanced, the means employed through the statute must be the least restrictive available. Helvey, 86 Ill. App. 3d at 158-59.

A statute may not deny a fundamental right to a citizen based only on the person’s status as mentally retarded if there is no compelling reason to deny the right for that reason. Helvey, 86 Ill. App. 3d at 159. Mental retardation is not a “monolithic disability.” Id. Some mentally retarded persons are more capable and able than others.

Id. In order to satisfy strict scrutiny, government attempts to classify individuals based on mental retardation must generally take into account the individuals' actual abilities. Id.

Thus, a statute may not deny a parent his fundamental right to make choices about the future of his child based only on his status as intellectually disabled. Instead, the denial of the right must be compelling in light of the parent's actual abilities. Id.

Here, there is no compelling reason for the State to deprive Mr. Q. of his fundamental right to choose to continue a relationship with his child and be a presence in her life. The principal purpose of the surrender, relinquishment and adoption statutes is to protect the best interests of the child. Baby Girl K., 26 Wn. App. at 905. In this case, the record is unequivocal that it would be in H.Q.'s best interest to maintain contact with her father. The witnesses uniformly agreed that Mr. Q. and H.Q. loved each other and got along well together, and that the relationship was healthy and beneficial to H.Q. RP 19, 25, 34, 37-38, 40. The social worker and the child's guardian ad litem explicitly testified it was in H.Q.'s best interest to maintain contact with her father. RP 25, 38. Even the court agreed H.Q. should be able to continue to see him. RP 51-52.

Yet, because Mr. Q. was not allowed to relinquish his rights, his rights were involuntarily terminated. As a result, he could not enter an open communication agreement with the adoptive parent, which was the only means that would provide him with a legal right to continue contact with his child. RCW 26.33.295.

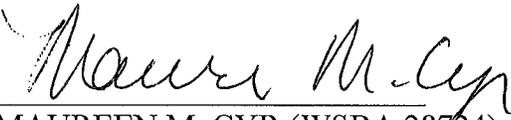
If Mr. Q. were not intellectually disabled, he would be able to voluntarily relinquish his rights and enter an open communication agreement. There is no compelling reason why Mr. Q. should not also have an opportunity to maintain contact with his daughter. In fact, allowing Mr. Q. to maintain contact with his daughter is more consistent with the best interests of the child. Because the State has no compelling reason to treat Mr. Q. differently from parents without a mental disability in this respect, the application of the statute to his case violates his constitutional right to equal protection of the laws.

#### F. CONCLUSION

Precluding Mr. Q. from relinquishing his parental rights, which prevented him from entering an “open communication agreement” with the prospective adoptive parent, denied Mr. Q. his constitutional right to due process and violated the adoption statute. The order of termination should be reversed and the case remanded to the superior

court with instructions to conduct a particularized inquiry to determine whether Mr. Q. has the capacity to voluntarily relinquish his rights. If the court determines Mr. Q. does not have such capacity, and is not entitled to enter an open communication agreement, the statute violates the Equal Protection Clause as applied to Mr. Q.

Respectfully submitted this 15th day of July, 2013.

  
MAUREEN M. CYR (WSBA 28724)  
Washington Appellate Project - 91052  
Attorneys for Appellant

## **APPENDIX**

RECEIVED AND FILED  
IN OPEN COURT

MAR 13 2013

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF KITSAP  
JUVENILE DEPARTMENT

In Re the Welfare of:

HAYLIE QUIGLEY, 07/01/08

NO. 11-7-00451-1

**AMENDED**  
FINDINGS OF FACT AND CONCLUSIONS  
OF LAW AS TO CHRISTOPHER QUIGLEY,  
FATHER

THIS MATTER having come on regularly for hearing for a termination of parental rights before the undersigned Judge of the above-entitled court on February 12, 2013; CHRISTOPHER QUIGLEY, father of the child, was served notice hereof by personal service and did appear personally, along with his legal guardian KATHERINE PECK, and counsel, LAURA JORGENSEN; the Washington State Department of Social and Health Services Social Worker, JEAN AUSTIN, was personally present and represented through attorneys, ROBERT FERGUSON, Attorney General, and PETER KAY, Assistant Attorney General; KYLE BARBER appeared as Guardian ad Litem for the child; and the court having considered the files and records herein, and listened to the evidence, the arguments of counsel, and the court makes and enters the following:

FINDINGS OF FACT

I.

HAYLIE QUIGLEY was born on July 1, 2008.

II.

A petition setting forth allegations for the termination of parental rights relative to the aforesaid child, who is within or resides within KITSAP County, has been filed.

## III.

The parents of the child are CRYSTAL HATCHER, mother, and CHRISTOPHER QUIGLEY, father. CHRISTOPHER QUIGLEY has been in a legal guardianship out of Mason County with the Pecks since he turned eighteen, almost twelve years ago.

## IV.

HAYLIE QUIGLEY was originally found dependent in December 2010, pursuant to RCW 13.34.030(5), and the court subsequently entered a dispositional order. The child was previously dependent in 2009 as well.

## V.

Since being found to be a dependent child, the Kitsap County Juvenile Court has continued to find HAYLIE QUIGLEY to be a dependent child pursuant to RCW 13.34.030(5).

## VI.

HAYLIE QUIGLEY was placed in the custody of the Department of Social and Health Services in August 2010, and has remained out of the parents' care continuously since then.

## VII.

All services ordered under RCW 13.34.130 have been expressly and understandably offered and/or provided to CHRISTOPHER QUIGLEY, including: hands on parenting coaching and casework services. A psychological evaluation and parenting assessment by Dr. O'Leary was offered/provided to the father in the prior dependency.

## VIII.

All services reasonably available, capable of correcting the parental deficiencies within the foreseeable future, have been offered or provided to the father. Dr. O'Leary had recommended that the Department try hands on parenting coaching for the father to see if he could possibly learn parenting skills. The father has the intellectual level of a six to eight year old, and has been functioning as an eight or nine year old during the visits with HAYLIE. The hands on parenting provider recommended that the service end as it was not working. The dependency court did not

1 order any further services for the father. A parent's inability to take advantage of services provided  
2 by the State excused the State from offering additional possibly beneficial services to the father.  
3 There was no testimony that if any other services had been provided to the father that the result  
4 would have been any different in this case, due to the father's limitations.

5 IX.

6 There is little likelihood that conditions will be remedied so that the child can be returned to  
7 the father in the near future. The father is currently unfit to parent. CHRISTOPHER QUIGLEY  
8 cannot function as a parent as it appears that he does not have the mental capacity to be a parent. He  
9 functions at about a first grade level. His visits with five year old HAYLIE were of the nature of a  
10 peer relationship, playing together, not that of a parent and a child. CHRISTOPHER QUIGLEY  
11 appears frozen in terms of his abilities. Even his legal guardian acknowledged that  
12 CHRISTOPHER QUIGLEY cannot parent the child in her testimony to the court.

13 X.

14 HAYLIE QUIGLEY is not an Indian child as defined by the Indian Child Welfare Act.

15 XI.

16 The Service members Civil Relief Act of 2003, 50 U.S.C. §501, et. seq., does not apply.

17 XII.

18 Continuance of the parent-child relationship clearly diminishes the child's prospects for  
19 early integration into a stable and permanent home. The father cannot serve as a parent for the child  
20 and thus continuing the relationship prevents the child from having the parents she needs.

21 XIII.

22 An order terminating all parental rights is in the best interests of the minor child. The child  
23 needs parents who can help prepare her for the future. CHRISTOPHER QUIGLEY is not a parent  
24 to the child, but rather more of a sibling to this five year old child. As the child gets older, it is likely  
25 that she would end up having to parent CHRISTOPHER QUIGLEY, which would not be healthy  
26 for the child.

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XIV.

The Guardian ad Litem for the child, KYLE BARBER, appeared at the hearing and recommended that the parental rights of the father be permanently terminated.

XV.

The child has the following siblings: None.

XVI.

Under Washington law, there cannot be an open adoption in involuntary termination cases under RCW 13.34. An open adoption requires a voluntary relinquishment of parental rights under RCW 26.33, and the agreement of all of the parties, and the adoptive parents, to an open adoption under RCW 26.33.295. The father is apparently not capable of voluntarily relinquishing his parental rights, and thus this case had to proceed to trial. His legal guardian participated in the trial.

FROM THE FOREGOING FINDINGS OF FACT, THE COURT NOW MAKES AND ENTERS THE FOLLOWING:

CONCLUSIONS OF LAW

I.

That this court has jurisdiction of the person of said minor child, of CHRISTOPHER QUIGLEY, father, and of the subject matter of this case.

II.

That it would be in the best interest of the minor child, including the child's health and safety, that the parent-child relationship between the above-named child and CHRISTOPHER QUIGLEY, father, be terminated and that the child be placed in the custody of the Washington State Department of Social and Health Services for placement as best suits the needs of the child. The Department of Social and Health Services has the authority to consent to the adoption of the child and to place said child in temporary care and authorize any needed medical care, dental care or evaluations of the child until the adoption is finalized.

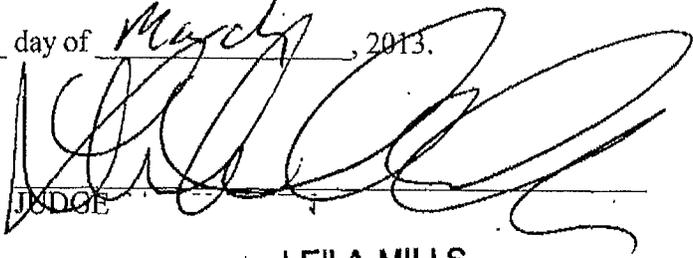
III.

That all the allegations contained in the termination petition, as provided in RCW 13.34.180(1)(a) through (f), have been established by clear, cogent and convincing evidence.

IV.

That an order terminating the parent and child relationship between HAYLIE QUIGLEY and CHRISTOPHER QUIGLEY, father, is in the best interests of the child.

DONE IN OPEN COURT this 13 day of March, 2013.

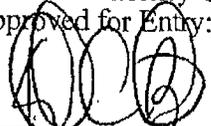
  
JUDGE

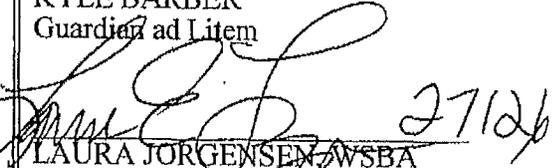
LEILA MILLS

Presented by:

ROBERT FERGUSON  
Attorney General

  
PETER KAY, WSBA #24331  
Assistant Attorney General  
Approved for Entry:

  
KYLE BARBER  
Guardian ad Litem

  
LAURA JORGENSEN, WSBA  
Attorney for Father

RECEIVED AND FILED  
IN OPEN COURT

MAK 13 2013

DAVID W. PETERSON  
KITSAP COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF KITSAP  
JUVENILE DEPARTMENT

In Re the Welfare of:

NO. 11-7-00451-1

HAYLIE QUIGLEY, 07/01/08

**AMENDED**  
ORDER OF TERMINATION  
AS TO CHRISTOPHER QUIGLEY, FATHER

THIS MATTER having come on regularly for a hearing for a termination of parental rights before the undersigned Judge of the above-entitled court on February 12, 2013; ; CHRISTOPHER QUIGLEY, father of the child, was served notice hereof by personal service and did appear personally, along with his legal guardian KATHERINE PECK, and counsel, LAURA JORGENSEN; the Washington State Department of Social and Health Services Social Worker, JEAN AUSTIN, was personally present and represented through attorneys, ROBERT FERGUSON, Attorney General, and PETER KAY, Assistant Attorney General; KYLE BARBER appeared as Guardian ad Litem for the minor child, and the court having listened to all the evidence presented by all parties, the arguments of counsel, and the court having made and entered its Findings of Fact and Conclusions of Law, and being in all matters fully advised, NOW, THEREFORE, it is hereby

ORDERED, ADJUDGED and DECREED that said child, HAYLIE QUIGLEY is hereby declared to be a dependent child as defined by RCW 13.34.030 and under the permanent jurisdiction of the court, and that CHRISTOPHER QUIGLEY FATHER, no longer retain parental rights and all rights, powers, privileges, immunities, duties and obligations, including any rights to custody, control, visitation or support existing between CHRISTOPHER QUIGLEY, father, and the

OFFICE OF THE ATTORNEY GENERAL  
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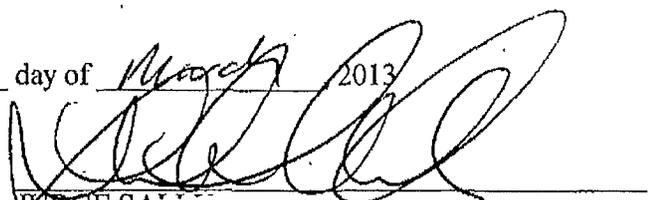
1 child are severed and terminated, and CHRISTOPHER QUIGLEY FATHER, shall have no  
2 standing to appear at any further legal proceedings concerning the child. It is further

3 ORDERED, ADJUDGED and DECREED that any support obligation existing prior to the  
4 effective date of this order is not severed or terminated. It is further

5 ORDERED, ADJUDGED and DECREED that the child is committed to the custody of the  
6 Department of Social and Health Services, and said Department has the right and authority to give  
7 consent to travel and consent to medical, minor surgery, and dental care deemed necessary for the  
8 welfare of said child without further order of the court until adoption is finalized. It is further

9 ORDERED, ADJUDGED and DECREED that the Department of Social and Health  
10 Services has the authority to place said child for adoption and must consent to the adoption of said  
11 child pursuant to RCW 26.33.160.

12 DONE IN OPEN COURT this 13 day of March 2013

13   
14 JUDGE S

15 Presented by:

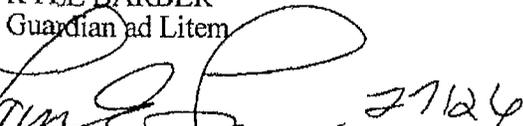
16 ROBERT FERGUSON  
17 Attorney General

LEILA MILLS

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19 PETER KAY, WSBA #24331  
Assistant Attorney General

20 Approved for Entry:

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22 KYLE BARBER  
Guardian ad Litem

23   
24 LAURA JORGENSEN, WSBA 27124  
25 Attorney for Father



# WASHINGTON APPELLATE PROJECT

July 15, 2013 - 3:56 PM

## Transmittal Letter

Document Uploaded: 446499-Appellant's Brief.pdf

Case Name: IN RE H.Q.

Court of Appeals Case Number: 44649-9

**Is this a Personal Restraint Petition?** Yes  No

### The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: \_\_\_\_

Answer/Reply to Motion: \_\_\_\_

Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_

Hearing Date(s): \_\_\_\_\_

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: \_\_\_\_\_

### Comments:

No Comments were entered.

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