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No. 51060-0-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

In re the Dependency of: J.W., A.W., and D.W.

APPEAL FROM THE LEWIS COUNTY SUPERIOR COURT
Honorable James W. Lawler, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. Reply to Department's Introduction

The Department opens its response brief by making an inflammatory statement that “a deceased, broken-bodied three-year old child” was found “in D.W.’s care.” This statement is not based on evidence in the record, seeks to inflame the passions of this Court, and should be disregarded and stricken from the Department’s response brief.

The Department goes on to claim “D.W. asks this Court to - again - address the effectiveness of his first attorney.” No Court has addressed the merits of Mr. D.W.’s assignment of error to the ineffective assistance rendered by his first attorney, Brian Gerhart, nor any other attorney for Mr. D.W. His first appeal that sought to raise the issue, COA No. 50974-1-II and Supreme Court Cause No. 95606-5, was terminated without considering the merits of the appeal. The Department has failed to show otherwise.

2. Reply to Department's Statement of Facts

Although at pages 2 and 3 of the Department’s response brief, the Department restates the allegations made in law enforcement’s report about J.H-W.’s death, the Department fails to concede that it never established the cause of J.H-W.’s death. No cause of death was offered or

admitted in the dependency or termination proceedings. Thus, the Department cannot cite law enforcement's allegations as fact.

The Department further misstates the facts when it claims on page 3 of its brief that Mr. D.W. "was represented by court-appointed attorney Brian Gerhart" at a shelter care hearing on October 9, 2014. Attorney Gerhart was not appointed to represent Mr. D.W. until October 14, 2014. Clerk's Papers (CP) 27. Mr. D.W. also maintains that the declaration and stipulation regarding the dependency findings were not knowing and intelligent waivers of his rights.

Also unsupported by the record is the Department's statement that "[t]he court then appointed Pier Petersen . . . after having difficulty finding an attorney to represent D.W. *due to his behavior toward his previous attorneys.*" *Department's Response to Brief of Appellant* (hereinafter "*Dep't's Response*") at 4 (emphasis added). None of the record cited by the Department states that court-appointed counsel could not be found *because of Mr. D.W.'s behavior.*

Mr. D.W. did move the trial court for a finding of ineffective assistance of counsel; however, contrary to the Department's claim, Judge Lawler addressed the motion only as it concerned Attorney Pier Petersen during a hearing where Mr. D.W. was representing himself *pro se* despite

requesting counsel and denied the motion on the basis that it was “not a decision for me to make at this point and I can’t make that decision, having not heard the trial yet.” Report of Proceedings (RP) (1/20/2017) at 9. The *Order Denying Father’s Request for Finding of Ineffective Assistance of Counsel* states only, “IT IS HEREBY ORDERED: The father’s motion for finding of ineffective assistance of counsel is hereby denied.” CP at 753. Further, the Department relies upon rulings and orders outside the record of this appeal to claim that the trial court’s *Order Denying Father’s Request for Finding of Ineffective Assistance of Counsel* has been decided on its merits. Not only is the Department’s claim false, but also the rulings and orders upon which the Department relies to support its false claim do not address the merits of the *Order Denying Father’s Request for Finding of Ineffective Assistance of Counsel*.

Later in its Statement of the Facts, the Department contends that Mr. “D.W. never filed a motion to accompany these affidavits” of prejudice against Judge Lawler. *Dep’t’s Response* at 6. As will be discussed in detail later, Mr. D.W.’s affidavit of prejudice was properly filed and notice was provided as required by statute.

3. Reply To Department's Argument

a. The Court Should Grant Mr. D.W.'s Motions to Supplement the Record.

Arguments related to supplementing the appellate record will be set forth and addressed in more detail in *Appellant D.W.'s Second Motion to Supplement the Record - RAP 9.10/9.11*.

The Department, however, argues that Mr. D.W. should not be permitted to cite to hearings and documents filed in the termination proceedings, claiming that the termination proceedings are separate from the dependency proceedings and should not have been or be included. *Department's Response* at 11. The Department's argument must fail. First and foremost, the Department relies on portions of the record in the termination proceedings to further its arguments. Additionally, the termination proceedings and dependency proceedings involve the same facts, the same parties, and the same judge. Judge Lawler was presiding over the termination proceedings when he heard Mr. D.W.'s motion to vacate the dependency and disposition orders.

Although the orders appealed in this case were entered in the dependency proceedings, a hearing held before Judge Lawler under the related termination proceedings while Mr. D.W. was against representing himself *pro se* despite his request for counsel, shows Mr. D.W. notified

Judge Lawler on October 21, 2016, that he had filed an affidavit of prejudice against the Judge in the dependency **and** termination cause numbers. RP (10/21/2016) 12:10-16. He also objected to Judge Lawler presiding over his matters at the next hearing on October 31, 2016, where he was against representing himself *pro se*, despite his request for counsel. RP (10/31/2016) 5:13-17. The affidavits of prejudice **on file in the dependency proceedings** confirm that Mr. D.W. filed his affidavits of prejudice against Judge Lawler in all of the dependency and termination cause numbers. CP 562-63. The Reports of Proceedings dated October 21, 2016, and October 31, 2016, are necessary to fairly decide the merits of the disqualification issue presented for review in this case. Without these transcripts, the record on this issue is incomplete and Mr. D.W. will be substantially prejudiced because they contain proof of the fact that he put Judge Lawler on actual notice of the affidavit of prejudice filed against him in the dependency proceedings. The Court should consider the transcripts.

b. Mr. D.W.'s Appeal is Not Moot and Should Not Be Dismissed.

Mr. D.W.'s appeal of the trial court's order denying his motion to vacate the dependency orders is not moot because a court can provide effective relief and the case presents issues of continuing and substantial

public interest in any event. *Mukilteo Citizens for Simple Government v. City of Mukilteo*, 174 Wn.2d 41, 272 P.3d 227 (2012); *In re Marriage of Horner*, 151 Wn.2d 884, 891-92, 93 P.3d 124 (2004). The Department contends that, even if the dependency and disposition orders were invalidated, Mr. D.W.’s parental rights would still be terminated.

The Department’s argument is illogical. Termination orders require proof of dependency. RCW 13.34.180(1)(a). And the dependency orders are the only evidence of this finding in the termination orders. The Department has failed to show otherwise; its reference to CP 987 is not a reference to the termination orders or a court order that makes dependency findings. If the dependency orders are invalidated, then the termination orders cannot stand. *Cf. In re Dependency of K.N.J.*, 171 Wn.2d 568, 582, 257 P.3d 522 (2011) (“We cannot rely on the termination trial court’s finding that K.N.J. is dependent because the court simply relied on the void dependency order”). Similarly, vacating the dependency and disposition orders entered here provides effective relief because Judge Lawler’s termination orders lack legal effect as a result of his refusal to honor his timely disqualification. An appeal of the termination orders is pending under consolidated COA No. 50710-2-II and 51210-6-II. This Court has not ruled on the pending issues related to the *Dependency and*

Disposition Orders in that appeal. Thus, it is probable that this Court can still provide relief because setting aside orders entered by a judge who failed to honor Mr. D.W.'s timely affidavit of prejudice is effective relief.

c. The Trial Court's Order Denying Mr. D.W.'s Motion to Vacate the Dependency Orders Are Void And Lack Legal Effect.

Although the Department concedes that lack of trial court jurisdiction may be raised for the first time on appeal¹, it argues that the issue concerning the affidavit of prejudice against Judge Lawler cannot be raised for the first time on appeal because it does not concern jurisdiction.

The issue of Judge Lawler's disqualification pursuant to RCW 4.12.040 and .050 is not raised for the first time on appeal. It was raised to Judge Lawler, who refused to acknowledge his disqualification. RP (10/21/2016) 12; RP (10/31/2016) 5:13-17; CP 562-63. No order was entered from which Mr. D.W. could have appealed, and Mr. D.W. was forced to represent himself *pro se* over his objection at the October 21 and 31, 2016 hearings.

A disqualification of judge issue is preserved if the party apprises the judge that he is seeking the judge's removal before the judge makes a discretionary decision. *Cf. State v. Gentry*, 183 Wn.2d 749, 760-61, 356

¹ CR 12(h)(3).

P.3d 714 (2015), *as amended* (Oct. 19, 2015) (holding that appellant failed to preserve claim that judge was required to recuse under RCW 4.12.040(1) where appellant did not suggest he was bringing an affidavit of prejudice or “even hint that the trial judge was *obligated* to recuse under RCW 4.12.040(1), either in his initial letter, during the hearing, or in his subsequent written motion for recusal”). The record shows Mr. D.W. apprised Judge Lawler of the affidavit of prejudice. RP (10/21/2016) 12; RP (10/31/2016) 5:13-17; CP 562-63.

Moreover, our State Supreme Court confirms that a judge loses **jurisdiction** over a case once a party complies with RCW 4.12.040 and RCW 4.12.050:

Once a party timely complies with the terms of these statutes, prejudice is deemed established “and the judge to whom it is directed is divested of authority to proceed further into the merits of the action.” *State v. Dixon*, 74 Wash.2d 700, 702, 446 P.2d 329 (1968). **Under the plain wording of the rule, the judge loses all jurisdiction over the case.**

State v. Cockrell, 102 Wn.2d 561, 565, 689 P.2d 32 (1984) (emphasis added); *Harbor Enters., Inc. v. Gudjonsson*, 116 Wn.2d 283, 285, 803 P.2d 798 (1991) (quoting *Cockrell*, 102 Wn.2d at 565). Regardless, RAP 1.2(c) allows this Court to “waive or alter the provisions of any of these

rules in order to serve the ends of justice.” Justice requires that Judge Lawler’s disqualification be reviewed.

Contrary to the Department’s argument, the issue before this Court is not whether Mr. D.W. has the statutory right to file an affidavit of prejudice. The issue is the effect that notice and a timely affidavit has upon a trial court judge’s jurisdiction and his refusal to honor the affidavit and accept his disqualification. This issue was preserved and is properly before this Court.

Moreover, the Department cites no authority for its argument that Mr. D.W. had to “challenge Judge Lawler’s authority to hear his CR 60 motions” at the time of the hearing on the CR 60 motions in order to preserve the disqualification issue. Mr. D.W. apprised Judge Lawler of his affidavit of prejudice orally on October 21, 2016, and October 31, 2016, and in writing on October 27, 2016, less than four months before the hearing on Mr. D.W.’s CR 60 motions. Judge Lawler disregarded his disqualification as untimely twice. The disqualification issue is preserved for appeal. *Gentry*, 183 Wn.2d at 760-61.

4. Judge Lawler Lacked Authority to Hear Mr. D.W.’s CR 60 Motions.

a. Mr. D.W. Withdraws His Argument and Request Regarding the December 2015 Motion and Affidavit.

The Department contends that the *Motion* and *Affidavit* filed by Mr. D.W. on December 1, 2015, in Lewis County Cause Nos. 14-7-00377-0, 14-7-00378-8, and 14-7-00379-6 (the dependency cause numbers) did not satisfy RCW 4.12.040 and .050. Mr. D.W. withdraws his argument as to the December 1, 2015 *Motion* and *Affidavit* and withdraws his request to supplement the record in this appeal with the December 1, 2015 *Motion* and *Affidavit*. Mr. D.W. concedes that the *Motion* and *Affidavit* was a motion to change venue pursuant to RCW 4.12.030(2) and (3). The Motion was never ruled upon.

b. Mr. D.W.’s October 27, 2016 Affidavits of Prejudice Comply With CR 7 and CR 11 and Were First Called to Judge Lawler’s Attention on October 21, 2016.

The Department argues that Judge Lawler had authority to hear Mr. D.W.’s CR 60 motion “because Mr. D.W. never established prejudice as required under former RCW 4.12.040 and former RCW 4.12.050.” *Dep’t’s Response* at 16. According to our Supreme Court, a litigant may disqualify a judge under RCW 4.12.040 and .050 without showing actual prejudice:

Under our statutes, RCW 4.12.040 and .050, a litigant has the right to disqualify a trial judge, without establishing actual prejudice, if the statutory requirements of RCW 4.12.050 are met. The statute speaks of prejudice, but in reality the litigant who exercises this right seeks a change of judge despite the absence of prejudice.

Harbor Enters., Inc., 116 Wn.2d at 285. To establish the “prejudice” mentioned in Former RCW 4.12.040(1) (2009) and .050(1) (2009), “a party must file a motion supported by an affidavit indicating that the party ‘cannot’ or ‘believes’ that it cannot ‘have a fair and impartial trial before such judge.’” *Gentry*, 183 Wn.2d at 759–60 (quoting Former RCW 4.12.050(1) (2009)). “[C]ourts do not read this requirement in a hypertechnical way[.]” *Id.* at 760.

The Department contends that Mr. D.W.’s declarations filed on October 27, 2016, failed to include “an accompanying motion or set a hearing to address them.” *Dep’t’s Response* at 17. No statute or case law requires that an affidavit of prejudice be noted for hearing. Even the Department acknowledges, “To establish prejudice, a party or attorney was required to file a motion and affidavit and **call them to the judge’s attention** before the judge made a discretionary ruling.” *Dep’t’s Response* at 16 (citing Former RCW 4.12.050(1) (2009) (emphasis added)). Indeed, requiring a hearing before a judge whom a party seeks to disqualify would contradict the purpose of the disqualification statutes.

Once a party complies with RCW 4.12.040 and .050, prejudice is deemed established (i.e., no hearing is necessary to substantiate the claim of prejudice) and the judge to whom it is directed is divested of authority to proceed further into the merits of the action and loses all jurisdiction over the case. *Cockrell*, 102 Wn.2d at 565. “[A]utomatic recusal” is required under Former RCW 4.12.040(1) and .050(1). *Gentry*, 183 Wn.2d at 760.

Contrary to the Department’s claim, both of Mr. D.W.’s declarations include a motion. According to CR 7(b)(1), a motion must be (1) in writing and (2) “state with particularity the grounds therefore, and shall set forth the relief or order sought.” This rule “shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.” CR 1; *In re Recall of Lindquist*, 172 Wn.2d 120, 129, 258 P.3d 9 (2011).

Mr. D.W. filed a written *Declaration of Prejudice re Judge Lawler* and an *Amended Declaration of Prejudice re Judge Lawler* on October 27, 2016. CP 562-63. These declarations state:

The undersigned declares under penalty of perjury that he does not believe he can receive a fair hearing from Judge Lawler, so he hereby asks for a change of judge.

CP at 562; *see also* CR 563. Each of these declarations is in writing. Each states the ground therefore: Mr. D.W. believed he could not have a fair hearing before Judge Lawler. And each states the relief sought: a change of judge. Mr. D.W. notified Judge Lawler about these affidavits at a hearing on October 21, 2016, where he was unrepresented by counsel despite his request for counsel pursuant his right to counsel under RCW 13.34.090(1), and again on October 31, 2016, where he was again unrepresented by counsel despite his request for counsel.

The Department relies upon *Lindquist* to support its argument that Mr. D.W. was required to file a separate motion. In *Lindquist*, the Court affirmed the dismissal of an affidavit of prejudice because it was not accompanied by a *signed* request for relief. 172 Wn.2d at 126. The Court analyzed the issue under CR 7(b)(1) and CR 11(a), noting that a motion must set forth the relief sought and be signed or stricken unless signed promptly after the omission is called to the movant's attention. *Id.* at 129. Referring to the *unsigned* request for relief, the Court further noted, "this defect could have been remedied if petitioners had chosen to attend the scheduled hearing." *Id.*

Mr. D.W.'s case is factually distinguishable from *Lindquist*. Unlike in *Lindquist*, Mr. D.W. signed both declarations. CP 562-63. Both

of Mr. D.W.'s October 2016 declarations satisfy CR 7(a)(1)'s and CR 11(a)'s requirements for a motion and the statutory requirements (as clarified by the Court in *Gentry* and *Lindquist*) for disqualifying a judge under RCW 4.12.040 and .050.

No evidence in the record shows an omission was called to Mr. D.W.'s attention. There was no omission. The fact that Mr. D.W.'s court filings are both titled "Declaration" is not dispositive. Concluding that neither declaration is a motion or that neither includes a motion within it elevates form over function and is contrary to *Gentry*, CR 1, CR 7(a)(1), and CR 11(a). Mr. D.W.'s two declarations satisfy the requirements of a motion and a declaration and the requirements for disqualifying Judge Lawler under RCW 4.12.040 and .050.

Finally, the record shows the Department asserted none of the deficiencies it now raises for the first time on appeal at the time Mr. D.W. notified Judge Lawler that he had filed an affidavit of prejudice against him in the dependency and termination proceedings. Judge Lawler did not find that Mr. D.W.'s affidavit lacked an accompanying motion or note for hearing. He erroneously found only that it was untimely.

The Department next asserts that the *Declaration of Prejudice re Judge Lawler* and *Amended Declaration of Prejudice re Judge Lawler*

“fail to establish prejudice” because (1) they were not filed in the dependency proceedings; (2) they name more than one judge; (3) they were not called to Judge Lawler’s attention prior to a discretionary ruling; and (4) it is unclear that the affidavits were intended for the dependency proceedings. The record expressly belies each of the Department’s assertions.

The *Declaration* and *Amended Declaration* show they were filed in the dependency cause numbers - Lewis County Superior Court Cause Nos. 14-7-00377-0, 14-7-000378-8, 14-7-00379-6 - as well as in the termination cause numbers on October 27, 2016. CP 562-63.

These declarations name only Judge Lawler. *Id.* Mr. D.W., who was forced to represent himself *pro se* over his own objection and requested for counsel at all stages of the proceedings under RCW 13.34.090(1)² and as confirmed by *In re Key*, 119 Wn.2d 600, 611, 836 P.2d 200 (1992). Mr. D.W. expressly called the affidavit of prejudice to Judge Lawler’s attention on October 21, 2016, as to both the dependency (“14”) and termination (“15”) cause numbers:

² CP 357 (Ronnie Soriano, Jr. authorized to withdraw on September 14, 2016); CP 564-65, 567 (Pier Petersen appointed November 3, 2016).

MR. WING: Your Honor?

THE COURT: Yes.

MR. WING: I just make the court aware for the record that on 10-19, per Criminal Civil 3.1 I filed an affidavit of prejudice against yourself.

THE COURT: In what case?

MR. WING: In the ones we're hearing currently today.

THE COURT: On all three of them?

MR. WING: Yeah. And it also references the 14. It

RP (10/21/2016) at 12. The colloquy between Mr. D.W. and Judge Lawler at this hearing shows Judge Lawler understood that Mr. D.W. sought to disqualify him from presiding over all of his dependency and termination proceedings and stated he would “take a look” at the file. *Id.* at 12:25.

The Department cites no authority that the affidavit of prejudice must be brought to the trial judge’s attention during a hearing under the same cause number. Case law requires only that the judge be apprised of the affidavit of prejudice. *Gentry*, 183 Wn.2d at 760-61.

Finally, the cause numbers listed on the filed declarations and Mr. D.W.’s response to Judge Lawler’s question, “In what case?”, shows that Mr. D.W. was filing the affidavit of prejudice against Judge Lawler in the termination proceedings and “also . . . the 14,” meaning also the 2014 dependency cause numbers. CP 562-63; RP (10/21/2016) at 12. The record fails to support any of the Department’s speculative, hypothetical

interpretations of what “the 14” might mean. And the Department fails to identify what discretionary decision Judge Lawler made *before* Mr. D.W. filed and notified Judge Lawler about his affidavit of prejudice. Mr. D.W.’s filings were timely and meet the statutory requirements of Former RCW 4.12.040(1) and .050(1) (2009). He did not waive his right to have his dependency proceedings, including his CR 60 motion, heard by a different judge.

c. Judge Lawler Did Not Make a Discretionary Ruling that Waived Mr. D.W.’s Right to Disqualify Judge Lawler Before October 27, 2016.

The Department contends that Mr. D.W. waived his right to disqualify Judge Lawler because Judge Lawler made a discretionary ruling appointing new counsel for Mr. D.W. on October 31, 2016, where Mr. D.W. was against forced to represent himself *pro se* over his own objection. *Dep’t’s Response* at 24 (citing CP 564-65) (Status Conference Order). The Department cites *State v. Smith*, 13 Wn. App. 859, 860-61, 539 P.2d 101 (1975), *Bargreen v. Little*, 27 Wn.2d 128, 177 P.2d 85 (1947), and *Gentry* for support.

The facts of this case stand in stark contrast to those in *Smith*, *Bargreen*, and *Gentry*. Here, Mr. D.W. filed the affidavit of prejudice on October 27, 2016, and notified Judge Lawler of the affidavit on October

21, 2016, and again on October 31, 2016. There was no hiatus between the notice provided and the filing of the affidavit of prejudice. Both times the affidavit was brought to Judge Lawler's attention, he disregarded it as untimely.

In *Smith*, the defendant filed an affidavit of prejudice almost one year before his post-judgment revocation hearing and failed to mention the affidavit to the court before the revocation hearing began. 13 Wn. App. 861. In *Bargreen*, an affidavit of prejudice was timely filed but not brought to the court's attention. 27 Wn.2d at 132. In *Gentry*, the appellant did not suggest he was bringing an affidavit of prejudice or "even hint that the trial judge was *obligated* to recuse under RCW 4.12.040(1), either in his initial letter, during the hearing, or in his subsequent written motion for recusal." *Gentry*, 183 Wn.2d at 760-61. Because these cases are factually distinct from the facts of Mr. D.W.'s case, *Smith*, *Bargreen*, and *Gentry* do not support the conclusion that Mr. D.W. waived his right to disqualify Judge Lawler.

Moreover, the October 31, 2016, hearing upon which the Department relies was reported under the termination cause numbers. Thus, the Department's argument creates a double-standard. First, the Department argued that Mr. D.W. did not notify Judge Lawler of his

affidavit of prejudice because the notice was provided during a hearing in the termination proceedings. Now the Department relies upon a hearing held in the termination proceedings to argue that Judge Lawler made a discretionary ruling that waives Mr. D.W.'s right to a new judge in the dependency proceedings.

The October 31, 2016 hearing transcript shows Mr. D.W. objected to Judge Lawler hearing his case because he had filed a timely affidavit of prejudice:

MR. WING: Yes, Your Honor. First I am objecting to you hearing the case because a timely affidavit of prejudice was filed.

THE COURT: We've already been through that. There was not a timely affidavit of prejudice.

RP (10/31/2016) at 5:13-17. This hearing transcript and the *Status Conference Order* entered after the hearing also show the trial court dealt with Mr. D.W.'s dependency and termination cases simultaneously. The matters should not be artificially segregated for purposes of this issue.

Mr. D.W. notified Judge Lawler of his affidavit of prejudice on October 21, 2016 - 10 days before entry of the October 31, 2016, *Status Conference Order* appointing counsel. Notably, the Department does not dispute that the decisions made by Judge Lawler in the October 21, 2016

hearing were **not** discretionary decisions that would cause the loss of a right to disqualification under Former RCW 4.12.050(2) (2009).

Mr. D.W.'s affidavit of prejudice was filed on October 27, 2016 - 4 days before entry of the October 31, 2016, *Status Conference Order* appointing counsel.

Judge Lawler already had been automatically disqualified and divested of authority to proceed further into the merits of the dependency actions by October 31, 2016 (the date of the Status Conference) and November 3, 2016 (the date of entry of the order appointing counsel for Mr. D.W.). *Cockrell*, 102 Wn.2d at 565.

Requiring Mr. D.W. to represent himself *pro se* at these hearings despite his request for counsel per RCW 13.34.090(1) violated Mr. D.W.'s statutory and constitutional due process rights. All orders entered by Judge Lawler after October 27, 2016, were void and lacked legal effect pursuant to RCW 4.12.040, .050, *Cockrell*, and *Gentry*, including Judge Lawler's order denying Mr. D.W.'s CR 60 motion to vacate the dependency and disposition orders.

5. Judge Lawler's Orders Denying Mr. D.W.'s CR 60 Motions Should Be Reversed.

The Department argues that Mr. D.W. should have been estopped from bringing the CR 60 motions because the core issue of ineffective assistance of counsel was previously decided on the merits. Mr. D.W.'s attorney's ineffective assistance of counsel caused the dependency fact-finding to be waived. No court decided the core issue of dependency on the merits to Mr. D.W.'s prejudice. And no court has previously decided the merits of any of Mr. D.W.'s ineffective assistance of counsel claims.

a. Mr. D.W.'s CR 60 Motions Were Reasonably Timely.

The Department contends Mr. D.W.'s CR 60 Motions were untimely. During the time between the entry of the dependency and disposition orders and the filing of the CR 60 motions, Mr. D.W. asked multiple court-appointed attorneys to move to vacate the dependency orders. *See* CP 313-19, 681-82, 687-88, 698, 707; *accord* CP 273. They failed to do so (even though Attorney Pier Petersen promised to file the motion). Attorney Petersen stated in an email dated December 5, 2016: "I have done additional research with respect to Mr. [D.W.]'s motion to vacate the Commissioner's orders, and expect to file that expanded motion shortly." CP at 688. She filed no such motion.

The Department argues that Mr. D.W. failed to timely file his declaration in support of vacating the dependency and disposition orders even after learning that his former attorney misinformed him about his rights. Mr. D.W. is legally blind, suffers from Fetal Alcohol Syndrome, which is an intellectual disability, and requires assistance from others to file any court document, including his declaration supporting his motions to vacate the dependency and disposition orders. He received ineffective assistance from his attorneys, each of whom was aware or should have been aware that Mr. D.W. had these disabilities and family ready to be guardians for his children as is evident from the record in these proceedings. CP 94, 147-49, 162-63, 183-84, 197, 223-24, 241, 324; *see Appellant Mr. D.W.'s Motion to Supplement Record Pursuant to RAP 9.11*, Appendices 3-7.

A “reasonable time” under CR 60(b) depends on the case’s facts and circumstances. *In re Marriage of Thurston*, 92 Wn. App. 494, 500, 963 P.2d 947 (1998). “The mere passage of time between the entry of the [order] and the motion to set it aside is not controlling.” *Id.* Although the Department claims Mr. D.W.’s CR 60 motions were not reasonably timely because these are dependency proceedings, it fails to acknowledge that the dependency proceedings were still pending when the motions were filed

and heard. The motions were brought before trial. The Department fails to show the nonmoving parties were prejudiced by the delay, and Mr. D.W. has shown good reason for not taking action sooner. *Id.*

b. Mr. D.W.’s CR 60 Motions Are Not Barred By Collateral Estoppel.

The Department contends that Judge Lawler had already ruled on Mr. D.W.’s ineffective assistance of counsel claim against Attorney Gerhart four months before the hearing on Mr. D.W.’s CR 60 motion and by this Court in COA No. 50974-1-II, and the Supreme Court in Cause No. 95606-5.

Collateral estoppel effects flow only from a “final judgment on the merits” entered “after the party estopped has had a full and fair opportunity to present its case” by a court having jurisdiction to enter the judgment. *Hanson v. City of Snohomish*, 121 Wn.2d 552, 561-62, 852 P.2d 295 (1993). If an affidavit of prejudice is timely, a subsequent ruling by the disqualified judge has no legal effect. *Harbor Enters, Inc.*, 116 Wn.2d at 285. And application of the doctrine must not work injustice. *Id.*

None of the rulings or orders relied upon by the Department was a “final judgment on the merits.” The January 20, 2017, hearing transcript on the ineffective assistance of counsel issue shows that the trial court did not rule on the merits or even mention Attorney Brian Gerhart:

THE COURT: All right. So let's deal then -- I guess let's deal first with the issue of counsel. That seems to be a primary thing that we need to deal with.

All right. Mr. Wing, you have filed a motion here of one to -- basically making a claim of legal malpractice and ineffective assistance of counsel of your attorney, Ms. Petersen.

RP (01/20/2017) at 4;

THE COURT: All right. So did you hear I wanted to hear from you with regard to your claim of ineffective assistance of counsel from your attorney, Ms. Petersen.

Id. at 5. Judge Lawler said he could not decide that Attorney Petersen had rendered ineffective assistance of counsel because there had been no trial:

THE COURT: Well, so let me ask this question, Mr. Wing. So you're wanting to fire Ms. Petersen? Is that what I'm hearing from you? Mr. Wing?

MR. WING:: No. I'm asking the Court to decide whether her assistance has been effective.

THE COURT: Well, that's not a decision for me to make at this point and I can't make that decision, having not heard the trial yet. So if that's what your request is, no, I'm not going to make that finding. I will not find that she's been ineffective at this point because we're not even -- we haven't started the trial. So, with that, are you --

Id. at 9.

Judge Lawler's ruling and subsequent written order had no legal effect in any event because he had been timely disqualified on October 27, 2016. Neither this Court nor the Supreme Court decided the merits of Mr. D.W.'s appeal from the order denying a finding of ineffective assistance of counsel. The Court of Appeals dismissed COA No. 50974-1-II without addressing the merits, declining to accept review of the issue:

(4) D.W.'s March 6, 2017 notices of discretionary review of the February 15, 2017 orders entered in the termination matters² are docketed as:

15-7-00409-21	COA No. 50974-1-II
15-7-00410-21	COA No. 50980-6-II
15-7-00411-21	COA No. 50984-9-II

And are consolidated under **COA No. 50974-1**.

Because the mother has voluntarily relinquished her parental rights and because D.W.'s parental rights have been terminated, this court informs the parties that it intends to dismiss these consolidated motions for discretionary review. Because final judgment has been entered against D.W. in the termination matters, he no longer needs to seek interlocutory review pursuant to RAP 2.3(b). Rather, any issues related to the termination trial may be raised by the father in his appeal as of right of the termination orders. Any

COA No. 50974-1-II, *Commissioner's Ruling* dated October 13, 2017. The Supreme Court denied review in Cause No. 95606-5. Indeed, in denying review, the Supreme Court Commissioner Michael E. Johnston stated:

¹ I offer no view on the merits of D.W.'s ineffective assistance claim.

Supreme Court Cause No. 95606-5, *Ruling Denying Review* dated April 30, 2018, at 4 n.1.

Mr. D.W. has not had a full and fair opportunity to present his ineffective assistance of counsel claims against Attorney Brian Gerhart or any other trial attorney who rendered ineffective assistance to him. Applying collateral estoppel to the ineffective assistance of counsel issue in the context of Mr. D.W.'s CR 60 motions would work an injustice and deprive Mr. D.W. of his right to appeal. RAP 2.2.

c. Mr. D.W. was prejudiced by Attorney Gerhart's ineffective assistance of counsel.

In response to Mr. D.W.'s ineffective assistance of counsel argument, the Department claims, "It is insufficient to argue that a legal course of action existed that might, in the abstract, have been successful." *Dep't's Response* at 35 (citing *In re Dependency S.M.H.*, 128 Wn. App. 45, 61, 115 P.3d 990 (2005)). This claim misrepresents the rule stated in *S.M.H.*, which says: "To satisfy the prejudice prong, a party must show a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different.'" 128 Wn. App. at 61 (quoting *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984)).

The Department claims Mr. D.W. has failed to produce evidence of or to argue the prejudice prong. Mr. D.W.'s opening brief at pages 31 to 34 argues the prejudice prong and *Appellant D.W.'s Motion to Supplement*

the Record produces some of the evidence supporting the prejudice prong. To clarify, according to Washington's Standards for Indigent Defense, SID 14.1, Attorney Gerhart had to (1) be familiar with the statutes, court rules, constitutional provisions, and case law relevant to dependency proceedings, (2) be familiar with the consequences of a conviction, and (3) be familiar with mental health issues and be able to identify the need to obtain expert services, in order to ensure Mr. D.W.'s constitutional right to effective assistance of counsel:

In order to assure that indigent accused receive the effective assistance of counsel to which they are constitutionally entitled, attorneys providing defense services shall meet the following minimum professional qualifications:

...

B. Be familiar with the statutes, court rules, constitutional provisions, and case law relevant to their practice area; and

...

E. Be familiar with the consequences of a conviction or adjudication, including possible immigration consequences and the possibility of civil commitment proceedings based on a criminal conviction; and

F. Be familiar with mental health issues and be able to identify the need to obtain expert services[.]

WA R STDS INDIG DEF SID 14.1. As court-appointed counsel in a dependency matter, Attorney Gerhart was also required to be familiar with expert services and treatment resources for substance abuse:

L. Dependency Cases. Each attorney representing a client in a dependency matter shall meet the following requirements:

- i. The minimum requirements as outlined in Section 1; and
- ii. Attorneys handling termination hearings shall have six months' dependency experience or have significant experience in handling complex litigation.
- iii. Attorneys in dependency matters should be familiar with expert services and treatment resources for substance abuse.

WA R STDS INDIG DEF SID 14.2.

Attorney Gerhart's lack of familiarity with the dependency statutes and constitutional provisions relevant to dependency proceedings as it relates to Mr. D.W.'s right to remain silent at a dependency fact-finding hearing, the consequences of a criminal conviction on dependency proceedings, and lack of apparent familiarity with Fetal Alcohol Syndrome and expert services³ and treatment resources for substance abuse caused prejudice to Mr. D.W.

Specifically, it resulted in the unauthorized surrender of Mr. D.W.'s substantial rights under RCW 13.34.090(1), including his rights to be represented by effective counsel in all proceedings, to introduce evidence, to be heard in his own behalf, to examine witnesses, to receive a decision based solely on the evidence adduced at the hearing, and to an

³ In fact, Lewis County Superior Court has ordered FAS services for Mr. D.W. in his criminal proceedings. Appellant D.W.'s Motion to Supplement the Record - RAP 9.10/9.11, App. J.

unbiased fact finder. In short, Attorney Gerhart's deficient performance prejudiced Mr. D.W. by depriving him of his right to dependency fact-finding hearings for his three children. That deprivation is uncontested and, in and of itself, establishes prejudice. "Where [counsel's] deficiency deprives the defendant of fair proceedings, the defendant has suffered prejudice because there is 'a breakdown in the adversary process that renders the result unreliable.'" *In re Personal Restraint of Yung-Cheng Tsai*, 183 Wn.2d 91, 99, 351 P.3d 138 (2015)(quoting *Strickland*, 466 U.S. at 687).

Finally, even if required, Mr. D.W. has satisfied his burden of demonstrating a reasonable probability of a different outcome but for his attorney's ineffective assistance of counsel. He satisfied this burden in his opening brief and *Appellant Mr. D.W.'s Motion to Supplement Record Pursuant to RAP 9.11* filed October 8, 2018.

d. Mr. D.W. produced sufficient evidence of Attorney Brian Gerhart's ineffective assistance of counsel.

The Department has cited no authority to show that Mr. D.W.'s declarations had to be corroborated. At the trial court, the Department had the opportunity to respond to Mr. D.W.'s motions to vacate by producing competing declarations. It failed to do so.

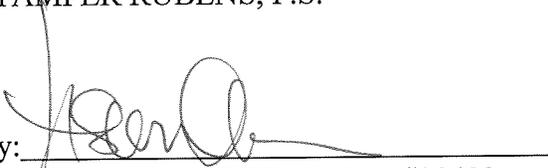
The Department attempts to undercut the Declaration of Mackenzie Sorich by claiming the declaration “has no evidentiary value.” *Dep’t’s Response* at 37. The Department’s claim is futile. Appellate courts do not weigh the persuasive value of evidence or credibility of witnesses. *Davis v. Dep’t of Labor & Indus.*, 94 Wn.2d 119, 124, 615 P.2d 1279 (1980).

E. CONCLUSION

For the reasons stated above, Mr. D.W. respectfully requests that this Court reverse the order denying Mr. D.W.’s motions to vacate the dependency and disposition orders as void and without legal effect, or alternatively, for abuse of discretion, and vacate the dependency and disposition orders.

Respectfully submitted this 10th day of December, 2018.

STAMPER RUBENS, P.S.

By: 

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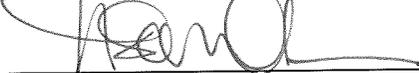
**COURT OF APPEALS, DIVISION II OF THE STATE OF
WASHINGTON**

IN RE THE WELFARE OF:)
) COA NO. 51060-0-II
)
J.W., A.W., D.W.) PROOF OF SERVICE
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_____)

I, HAILEY L. LANDRUS of STAMPER RUBENS, P.S., assigned counsel for the Appellant herein, do hereby certify as follows: On December 10, 2018, I served the attached document on the Court of Appeals at CourtneyL@atg.wa.gov and shsappealnotification@atg.wa.gov via Washington State Appellate Courts' Secure Portal Electronic Filing system.

Dated and served this 10th day of December, 2018.

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