

FILED  
Court of Appeals  
Division II  
State of Washington  
10/9/2018 12:42 PM

NO. 51060-0-II

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

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In re the Dependency of:

J.W., A.W., and D.W., Jr.,

Minor Children.

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**DEPARTMENT'S RESPONSE TO BRIEF OF APPELLANT**

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## I. INTRODUCTION

This case is about three children: J.W., A.W., and D.W., Jr., who are now ten, six, and four years old, but who were six years old, two years old, and five months old when the Department removed them from D.W.'s care. The Department removed them and sought a finding of dependency as to these young children after law enforcement found a deceased, broken-bodied three-year old child in D.W.'s care and then pursued criminal charges against D.W. related to that child's gruesome death.

D.W. agreed to a finding of dependency as to all three of his children. During the course of their dependencies, D.W. went through five attorneys, accusing them all of being ineffective, committing malpractice, or both. Now, after two and a half years of dependency proceedings and termination of his parental rights as to all three children, D.W. asks this Court to—again—address the effectiveness of his first attorney, and he asks this Court to invalidate the agreed dependency orders. Meanwhile, J.W., A.W., and D.W., Jr. remain in out-of-home care, and D.W. remains incarcerated.

D.W.'s challenge to the agreed dependency orders entered two and a half years ago must fail. He proffers information that is not in the record. His challenge to the dependency orders is moot because the superior court

has terminated his parental rights. Additionally, he raises issues that the superior court and this Court has addressed and raises claims for the first time on appeal. The record shows that the superior court properly decided the merits of his motions to vacate the dependency orders, and that Judge Lawler had authority to do so. The orders denying D.W.'s motions to vacate are correct, and this Court should uphold them.

## **II. STATEMENT OF THE ISSUES**

- 1. Whether this appeal is moot due to the termination of D.W.'s parental rights.**
- 2. Whether filings and transcripts of proceedings outside the record should be considered without a motion.**
- 3. Whether prejudice was established against the Superior Court judge that ruled on the Court Rule (CR) 60 motion, where D.W.'s affidavits did not meet several statutory requirements.**
- 4. Whether D.W.'s claim is barred by collateral estoppel, where D.W.'s claim of ineffective assistance against his first attorney had already been decided.**
- 5. Whether the CR 60 motion was properly denied on the grounds that it was untimely, or in the alternative, properly denied on the merits.**

## **III. STATEMENT OF THE FACTS**

On October 5, 2014, the Department received a referral from law enforcement reporting negligent treatment or maltreatment of three children, J.W., A.W., and D.W., Jr. Clerk's Papers (CP) at 2. The report

alleged that a three-year old child had been abused to death in D.W.'s home, while under his care. *Id.* Bruises and injuries all over the deceased child's body had been covered with makeup. *Id.* Neither D.W. nor his wife had sought medical treatment for this child's extensive injuries before his death, even though the child had been acting lethargic. *Id.* Law enforcement initiated a criminal investigation and took J.W., A.W., and D.W., Jr. into protective custody. *Id.*

On October 9, 2014, the juvenile court entered an agreed shelter care order during a hearing at which D.W. appeared and was represented by court-appointed attorney Brian Gerhart. CP at 11-13, 20. About a month later, law enforcement arrested D.W. and his wife on charges of Homicide by Abuse. CP at 39, 45-47, 928. Since then, D.W. has remained in custody, and all three children have remained in out-of-home care. CP at 987.

On November 20, 2014, D.W. agreed to findings of dependency as to J.W., A.W., and D.W. Jr. pursuant to RCW 13.34.030(6)(c). CP at 75-85. Along with the agreed Orders of Dependency, D.W. filed a declaration and stipulation, acknowledging and agreeing that he could not challenge the finding of dependency at a subsequent review hearing or termination hearing, and waiving his right to appear for entry of the agreed dependency orders. CP at 67-69.

**A. D.W.'s Court-Appointed Attorneys**

The juvenile court appointed four attorneys to represent D.W. in the dependency proceedings between March 8, 2016, and February 27, 2017. Brian Gerhart was appointed on October 9, 2014, but withdrew on March 8, 2016. CP at 213. Matthew Kuehnel substituted for Mr. Gerhart on the same day but withdrew three months later. CP at 255. The court then appointed Ronnie Soriano Jr. to represent D.W. *Id.* About three months later, Mr. Soriano sought and received permission from the court to withdraw as D.W.'s attorney based on a breakdown in communication. CP at 353-54, 357. The court then appointed Pier Petersen on or around October 31, 2016, after having difficulty finding an attorney to represent D.W. due to his behavior toward his previous attorneys. *See* CP at 564-67; VRP (9/08/16) at 89-91; VRP (10/27/16) at 105. Pier Petersen withdrew as D.W.'s counsel on February 27, 2017. CP at 757.

Over the course of the children's two-and-a-half year dependencies, D.W. accused all four of his attorneys of being ineffective, having committed malpractice, or both. CP at 259-301, 580-625, 666-76. On January 18, 2017, D.W. filed motions in the dependency proceedings, seeking findings of ineffective assistance of counsel against all four attorneys. CP at 666-76. Lewis County Superior Court Judge

James Lawler denied the motions following a hearing on February 15, 2017. CP at 753-56. These February 15, 2017, orders have been upheld on appeal. *See* CP at 831; *Ruling of Dismissal*, 50974-1-II (Nov. 7, 2017); *Order Denying Motion to Modify*, 50974-1-II (Feb. 9, 2018); *Ruling Denying Review*, 95606-5 (April 30, 2018); *Order*, 95606-5 (July 11, 2018).

**B. D.W.'s Purported Affidavits of Prejudice Against Judge Lawler, and Judge Lawler's Discretionary Rulings**

D.W. filed purported affidavits of prejudice in the termination proceedings on December 1, 2015 that said in part, "Judges Nelson E. Hunt, Richard Brosey, and Judge Lawler" should not preside over the dependency proceedings of J.W., A.W., and D.W. Jr. *See* App. Br. at 8, fn.4. On October 21, 2016, Judge Lawler presided over a status conference hearing in the termination of parental rights proceeding. Report of Proceedings (RP) (10/21/16) at 1, 9-13. At the time of this hearing, the court had not yet appointed Pier Peterson to represent D.W., so D.W. appeared *pro se*. CP at 357, 567. During that hearing, D.W. stated to Judge Lawler that he had sent the purported affidavits of prejudice. RP (10/21/16) at 12. Because they were not filed, however, Judge Lawler declined to consider them at the hearing. *Id.*

D.W. filed purported affidavits of prejudice in the dependency proceedings on October 27, 2016. CP at 562-63. However, D.W. never filed a motion to accompany these affidavits or scheduled a hearing to address them. *See*, CP at 564-976. Judge Lawler presided over a status conference hearing in the termination of D.W.'s parental rights proceedings on October 31, 2016. CP at 564-66. D.W. appeared telephonically. *Id.* During the hearing, Judge Lawler ruled that D.W. should be appointed a new attorney in both the dependency and the termination proceedings. *Id.* An ex parte order was entered in the dependency proceedings appointing Pier Petersen shortly thereafter. CP at 567.

**C. D.W.'s CR 60 Motion to Vacate the Children's Agreed Orders of Dependency**

Six months after filing his declarations, D.W. filed CR 60 motions in the dependency proceedings to vacate each Order of Dependency under CR 60(b). RP (6/15/17) at 159-68. He argued that the court should vacate the November 20, 2014 agreed Orders of Dependency because his agreement to them had been based upon his attorney being ineffective. CP at 927-39. Specifically, he argued that his court-appointed attorney Brian Gerhart misled him regarding his ability to invoke the Fifth Amendment and remain silent if called to testify during a dependency

trial. RP (6/15/17) at 159-68. D.W. claimed in a declaration that he had also received incorrect advice regarding his ability to avoid dependency by obtaining a guardianship or custodianship with relatives, although he failed to argue that claim in his motions. CP at 927-35. D.W. did not object to Judge Lawler presiding over the hearing on his CR 60 motions. RP (6/15/17), at 159-68, CP at 564-66, 712-14, 751-52, 754-56.

Judge Lawler denied D.W.'s motions on June 15, 2017, because the motions were untimely, because D.W. would not likely have prevailed on the merits of the Department's Dependency Petitions, and because the motions were based solely on D.W.'s statements. CP at 953-54. He also commented during the ruling that he believed D.W. had brought his motions as "an attempt to delay the termination trial." VRP (6/15/17) at 167. On June 29, 2017, D.W. filed a notice of discretionary review of Judge Lawler's orders denying his CR 60 motions. App. Br. Appendix (Appx.) C.<sup>1</sup> On July 28, 2017, the juvenile court terminated D.W.'s parental rights as to all three children. CP at 987.

D.W. challenges the superior court's June 15, 2017 orders denying his CR 60 motions to vacate the November 20, 2014 agreed Orders of Dependency. In support of his challenge, he argues that: (1) the orders denying his motions to vacate are void because Judge Lawler lacked

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<sup>1</sup> As discussed in the standard of review section, CR 60 motions are appealable as a matter of right. RAP 2.2(a)(10).

jurisdiction to decide the merits of his motions; and (2) alternatively, the trial court abused its discretion in denying the motions to vacate. App. Br. at 9, 15.

#### **IV. ARGUMENT**

The superior court's orders denying D.W.'s CR 60 motions are correct and should be upheld. In his brief, D.W. cites to many documents not in the record, which the court should not consider. The appeal is moot in light of the termination orders entered against D.W. in a separate proceeding. This Court should not consider the purported affidavits of prejudice issue raised in D.W.'s brief, as it is brought for the first time on appeal. Even if this Court does consider the issue, Judge Lawler had the authority to rule on the motion to vacate. For various reasons, all of the filings that D.W. claims were affidavits of prejudice were not effective. D.W. should be estopped from litigating the CR 60 motions, as the motions relied on an issue already decided against D.W.'s favor. Judge Lawler's ruling on the CR 60 motions was correct, as the motions were untimely, and failed on the merits.

##### **A. Standard of Review**

CR 60(b) outlines circumstances in which a party may seek relief from a judgment or order. In particular, CR 60(b)(11) allows the court to grant relief based on "any other reason justifying relief from the operation of

the judgment.” Granting relief under CR 60(b)(11) is confined to extraordinary circumstances that are substantial deviations from a prescribed rule. *In re Marriage of Furrow*, 115 Wn. App. 661, 673–74, 63 P.3d 821 (2003). A CR 60 motion is appealable as a matter of right. Rules of Appellate Procedure (RAP) 2.2(a)(10).

This court reviews the denial of a CR 60(b) motion for abuse of discretion. *Haley v. Highland*, 142 Wn.2d 135, 156, 12 P.3d 119 (2000). A trial court abuses its discretion when its decision is manifestly unreasonable or made on untenable grounds or for untenable reasons. *In re Welfare of R.S.G.*, 172 Wn. App. 230, 243, 289 P.3d 708 (2012). “A decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard or if the facts do not meet the requirements of the correct standard.” *In re Dependency of M.R.*, 166 Wn. App. 504, 517, 270 P.3d 607 (2012).

On review of an order denying a CR 60 motion, only the propriety of the denial, not the impropriety of the underlying judgment, is before the reviewing court. *Barr v. MacGugan*, 119 Wn. App. 43, 48 n.2, 78 P.3d 660 (2003). D.W. argues that the trial court's orders denying his motions to vacate are based on untenable grounds and reasons and are manifestly unreasonable. App. Br. at 16. D.W.'s arguments must fail; he cannot meet

this standard, and therefore this Court should affirm the trial court's orders denying his CR 60 motions.

**B. The Court should decline to consider D.W.'s December 1, 2015 affidavits and all other information outside of the record**

This Court should decline to consider information in D.W.'s Opening Brief that is outside the record of this appeal. This includes App. Br. Appx. B; a declaration filed December 1, 2015, that D.W. contends was an affidavit of prejudice. Supplementation of the record is only appropriate if the record is not sufficiently complete to permit a decision on the merits of the issues presented for review. RAP 9.10. Further, a party to whom the Court has granted permission to supplement the record must file a designation of clerk's papers or a statement of arrangements within the time set by the appellate court. *Id.*

This Court should decline D.W.'s request to supplement the record because supplementation is not appropriate under RAP 9.10. D.W. asks this Court to supplement the record with a copy of the motions and declarations dated December 1, 2015, that asserts in part, "Judges Nelson E. Hunt, Richard Brosey, and Judge Lawler" should not preside over the dependency proceedings of J.W., A.W., and D.W. Jr. *See* App. Br. at 8, n.4. D.W. failed to properly seek permission from this Court or file a statement of arrangements or a designation of clerk's papers

as required under RAP 9.10 to include these documents as part of the record. These motions and declarations are not part of the record before this Court because D.W. never filed them in the dependency proceedings. CP at 196-211. Here, the record is complete without the inclusion of these documents. Supplementing the record on appeal is not appropriate under RAP 9.10, and this Court should therefore deny D.W.'s request.

This Court should also decline to consider all of D.W.'s references to information outside of the record that is not properly before this Court. RAP 10.3(5), 10.7; *In re R.L.M.*, 138 Wn. App. 276, 282, 156 P.3d 940 (2007). All factual statements in briefs must be supported by reference to the record. RAP 10.3(5).

In general, D.W. relies heavily on information not part of the record, citing to hearings and documents filed in the termination proceedings. *E.g.*, App. Br. at 8, 11; CP at 712-14, 787-89; RP (10/21/16) at 1-2. Those are separate cases under separate cause numbers from the dependency proceedings and should not have been included in the record here. *See In re R.L.M.*, 138 Wn. App. at 282.

However, even though this Court should not consider such information, given D.W.'s heavy reliance on it in his Opening Brief, the State shall proceed assuming *arguendo* that the documents and records of proceedings D.W. references are part of the record.

**C. This Court should dismiss D.W.'s appeal as moot.**

This Court should dismiss D.W.'s Notice of Discretionary Review because the issue it raises is moot. In this appellate proceeding, the relief that D.W. seeks is to have his Orders of Dependency vacated as invalid or void. Br. of Appellant at 34. Ruling in D.W.'s favor would not provide effective relief because the dependency matter has been superseded by the orders terminating D.W.'s parental rights. Nothing would change as a result of this Court determining that the dependency orders were invalid or void. See *In re Dependency of K.N.J.*, 171 Wn.2d 568, 582-83, 257 P.3d 522 (2011). Because this Court cannot provide effective relief, this matter is moot. See *In re Marriage of Horner*, 151 Wn.2d 884, 891, 93 P.3d 124 (2004).

The mootness of this issue is a result of the Washington State Supreme Court's decision in *K.N.J.* In that case, the court reviewed a termination of parental rights order. *K.N.J.*, 171 Wn.2d at 574. The Court concluded that the dependency order entered in the dependency proceedings was void. *Id.* at 578. Nonetheless, it affirmed the order terminating parental rights, holding that even where a dependency order is void, termination may nonetheless be justified if "findings of fact entered at the termination trial . . . sufficiently establish dependency . . . ." *Id.* at 584-85.

In light of the Court's ruling in *K.N.J.*, D.W.'s challenge to the agreed Orders of Dependency is moot. This Court should not invalidate the agreed Orders of Dependency, as review should be confined to the propriety of the trial court denying D.W.'s motions to vacate, and the agreed Orders of Dependency are valid. *Barr v. MacGugan*, 119 Wn. App. 43, 48 n.2, 78 P.3d 660 (2003). However, even if this Court were to invalidate those agreed orders, D.W.'s parental rights would still be terminated by orders entered in the termination proceedings. CP at 987. Any challenge to the termination orders should be brought as part of this Court's review of the termination orders, No. 50710-2-II, No. 51210-6-II, not in any appellate review of orders entered in the dependency proceedings.

Because this matter is moot, this Court need not consider the merits of D.W.'s claims. The remainder of this brief consists of alternative arguments, in the event that this Court concludes that the issue is not moot. In sum, this Court should uphold the trial court's orders denying D.W.'s untimely CR 60 motions because Judge Lawler had authority to decide the merits of those motions, and his denial of those motions was proper.

**D. This Court should decline to invalidate the superior court's orders that deny D.W.'s CR 60 motions.**

This Court should uphold Judge Lawler's orders denying D.W.'s untimely CR 60 motions. As a threshold matter, the issue of whether Judge Lawler had authority to decide D.W.'s CR 60 motions is not properly before this Court because D.W. did not raise it before the trial court, and the exceptions set forth in RAP 2.5(a) for raising an issue for the first time on appeal do not apply. That said, Judge Lawler had authority to decide issues in the dependency proceedings, including D.W.'s CR 60 motions, because D.W. never established prejudice as required under former RCW 4.12.040 and former RCW 4.12.050. Thus, his orders on D.W.'s motions are valid and should be upheld.

**1. The Court should decline to consider new claims that D.W. raises for the first time on appeal.**

The Court should decline to consider D.W.'s claims regarding purported affidavits of prejudice against Judge Lawler because they are brought for the first time on appeal. Appellate courts generally do not consider claims raised for the first time on appeal, unless they concern (1) lack of trial court jurisdiction; (2) failure to establish facts upon which relief can be granted; or (3) manifest error affecting a constitutional right. RAP 2.5(a); *State v. Ague-Masters*, 138 Wn. App. 86, 109, 156 P.3d 265 (2007) (declining to address an issue brought for the first time on appeal,

where the issue was statutory right). The purpose of RAP 2.5(a) is to prevent litigants from bringing claims on appeal that could have been remedied at the trial court had they been raised. *State v. O'Hara*, 167 Wn.2d 91, 217 P.3d 756 (2009). Affidavits of prejudice are a matter of statutory right, not subject matter jurisdiction. *See State v. Gentry*, 183 Wn.2d 749, 759-60, 356 P.3d 714, as amended (2015).

D.W. cites case law related to subject matter jurisdiction. App. Br. at 10. Subject matter jurisdiction is defined as “Jurisdiction over the nature of the case and the type of relief sought; the extent to which a court can rule on the conduct of persons or the status of things.” Black’s Law Dictionary, 9th edition at 931. Former RCWs 4.12.040 and 4.12.050 address the authority of a particular judge to hear a specific case, not the court’s subject matter jurisdiction. Superior Courts have jurisdiction over dependency cases. *See, e.g., In re H.S.*, 94 Wn. App. 511, 523-24, 973 P.2d 474 (1999); RCW 13.34.040(1).

Here, D.W. failed to challenge Judge Lawler’s authority to hear his CR 60 motions at the trial court level, though he could have done so. RP (6/15/17). This Court should decline to consider his claim that Judge Lawler lacked authority to hear and decide his motions and instead affirm the trial court’s orders. Alternatively, however, it should decline to

invalidate the superior court's orders on D.W.'s CR 60 motions because Judge Lawler had authority to decide them.

**2. Alternatively, Judge Lawler had authority to decide D.W.'s CR 60 motions**

Judge Lawler had authority to decide issues in the dependency proceedings, including D.W.'s CR 60 motions, because D.W. never established prejudice as required under former RCW 4.12.040 and former RCW 4.12.050.

Former RCW 4.12.040(1), which was in effect at all times relevant to D.W.'s appeal, provided that "[n]o judge of a superior court of the state of Washington shall sit to hear or try any action or proceeding when it shall be established ... that said judge is prejudiced against any party or attorney, or the interest of any party or attorney appearing in such cause." Former RCW 4.12.040(1), amended via Laws of 2017, ch. 42, § 1. To establish prejudice, a party or attorney was required to file a motion and affidavit of prejudice and call them to the judge's attention before the judge made a discretionary ruling. Former RCW 4.12.050(1). Parties were expressly prohibited from filing more than one affidavit in the same proceeding. Former RCW 4.12.050(1).

Here, D.W. failed to establish prejudice as required to deprive Judge Lawler of authority to preside over the dependency proceedings.

D.W. filed declarations in the termination proceedings on December 1, 2015, that said in part, “Judges Nelson E. Hunt, Richard Brosey, and Judge Lawler” should not preside over the dependency proceedings of J.W., A.W., and D.W. *See* App. Br. at 8, n.4. D.W. also filed purported affidavits of prejudice in the dependency proceedings on October 27, 2016, but failed to submit an accompanying motion or set a hearing to address them. CP at 562-63. These documents fail to establish prejudice for four reasons: (1) D.W. failed to file them in the dependency proceedings; (2) they name more than one judge; (3) D.W. failed to call them to Judge Lawler’s attention; and (4) it is unclear that the affidavits were intended for the dependency proceedings.

Neither the October 27, 2016, nor the December 1, 2015 filings established prejudice as to Judge Lawler. An unfiled affidavit of prejudice does not meet the statutory requirement that a motion and affidavit must be filed to establish prejudice. Former RCW 4.12.050(1), amended via Laws of 2017, ch. 42, § 1. As stated above, the December 1, 2015 declarations were never filed in the dependency proceedings. App. Br. at 8, n. 4. They were filed in the termination proceedings, which is why they appear as part of the record in the appeal of the termination of parental rights cases. *Id.* The Court should not consider a purported affidavit of prejudice that was not filed in the dependency proceedings.

Additionally, the Court should find that both sets of D.W.'s filings did not meet the statutory requirements of former RCW 4.12.050(1). Thus, this Court should uphold the superior court's orders denying D.W.'s CR 60 motions.

- a. **D.W.'s December 1, 2015 affidavits, had they been filed, would not have not properly established prejudice under former RCW 4.12.040 and .050.**

Even if this Court were to supplement the record and consider D.W.'s December 2015 affidavits, it should still reject D.W.'s arguments because those affidavits fail to comply with former RCW 4.12.050(1). That section states: "That no party or attorney shall be permitted to make more than one such application in any action or proceeding under this section and RCW 4.12.040." Former RCW 4.12.050(1).

First, the document lists Judge Hunt, Judge Brosey, and Judge Lawler as the judicial officers that D.W. sought to establish prejudice against in the case. This clearly violates former RCW 4.12.050(1), which prohibits filing more than one affidavit of prejudice on any matter under the statute. On that basis alone, this document would fail to establish prejudice. *State v. Dixon*, 74 Wn.2d 700, 702, 446 P.2d 329 (1968) (holding that parties cannot file successive affidavits and obtain any additional change of judges); *see also State ex*

*rel. Mauerman v. Superior Court for Thurston County*, 44 Wn.2d 828, 832, 271 P.2d 435 (1954).

Second, D.W.'s brief provides no evidence that this affidavit was called to the attention of Judge Lawler, as the plain language of the statute requires. Former RCW 4.12.050(1). Again, this defect alone is sufficient to conclude that the affidavit did not establish prejudice. *State v. Smith*, 13 Wn. App. 859, 860-61, 539 P.2d 101 (1975).

Third, it is unclear that the document filed on December 1, 2015, was intended as a motion and affidavit of prejudice in the dependency cases. The language of the document does not give a clear indication that it is an affidavit of prejudice for the dependency cases. *See* App. Br. Appx. B. There does not appear to be any notice setting a hearing for the motion, and it does not appear that a hearing on this motion was ever held. *Id.*; CP at 196-321 (The record includes no hearing set for a motion on an affidavit of prejudice).

The declaration references a hearing that was set for December 17, 2015. App. Br. Appx. B at 2. There was no hearing in the dependency cases heard or set to be heard on that date. CP at 196-214 (showing no hearings between November 12, 2015, and March 10, 2016). It would be reasonable to conclude from these facts that D.W. intended the filing to apply to the termination cases. While this document appears to be

written and filed by the D.W. *pro se*, throughout this period D.W. was represented by court appointed counsel who presumably could have successfully executed an affidavit of prejudice. CP at 12, 20, 27, 213.

**b. The October 27, 2016 affidavits against Judge Lawler did not establish prejudice because they were not filed with a motion, and the filing was not called to his attention.**

D.W. further alleges that Judge Lawler lacked jurisdiction to hear the CR 60 motions because another affidavit of prejudice was filed on October 27, 2016, against Judge Lawler in the dependency cases. App. Br. at 8, 11-15. Two purported affidavits of prejudice were filed on that day, one an amended version of the other, entitled "Amended Declaration of Prejudice Re Judge Lawler." CP at 562-63. The affidavit states in part: "1. He does not believe he can receive a fair hearing from Judge Lawler, so he hereby asks for a change of judge." *Id.* The October 2016 affidavits do not appear to have an accompanying motion or notice setting a hearing. CP at 554-80. These affidavits did not establish prejudice because they were not filed with a motion or called to Judge Lawler's attention prior to a discretionary ruling.

Prejudice of judge is established upon party's timely filing of motion and affidavit of prejudice against the judge. *State v. Detrick*, 90 Wn. App. 939, 942, 954 P.2d 949 (1998). An affidavit of prejudice is

insufficient to seek change of judge when not accompanied by a signed motion and petitioners have opportunity to remedy the error. *In re Recall of Lindquist*, 172 Wn.2d 120, 129, 258 P.3d 9 (2011). Parties appearing *pro se* are bound by the same rules of procedure and substantive law as attorneys. *Westberg v. All-Purpose Structures*, 86 Wn. App. 405, 411, 936 P.2d 1175 (1997). An affidavit of prejudice is untimely once a trial court has made discretionary rulings. *Brister v. Council of City of Tacoma*, 27 Wn. App. 474, 482, 619 P.2d 982 (1980). The right to peremptory removal of a judge without substantiating a claim of actual prejudice is not of constitutional dimension, but statutory. *Gentry*, 183 Wn.2d at 759-60.

The statute requires that the motion and affidavit be filed *and* called to the attention of the judge. That did not occur in this case. On October 21, 2016, a hearing was held before Judge Lawler as to the termination of parental rights and guardianship petition cases. RP (10/21/16) at 1, 9-13. At the time of this hearing, D.W. was not represented by counsel. CP at 353, 567 (showing that previous counsel withdrew on September 8, 2016, and new counsel was appointed on October 27, 2016, with an order appointing the new counsel filed November 3, 2016). This October 21, 2016 hearing was not as to the dependency cases that are the subject of this appeal. RP (10/21/2016) at 1, 9-13. In that hearing, D.W. stated to Judge Lawler that he had *sent*

purported affidavits of prejudice to the court. *Id.* at 12. When the Court asks for clarification regarding what cases the affidavits were to be filed under, D.W. responds:

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 was put in legal mail from the prison on the 14<sup>th</sup>.

RP (10/21/2016) at 12.

No mention was made during the October 21, 2016, hearing that purported affidavits of prejudice were filed in the dependency cases. RP (10/21/2016). Only an oblique comment was made that the affidavits 'references the 14'. *Id.* at 12. One could argue that "the 14" in this statement refers to the dependency cases, as their cause numbers begin with 14. But D.W.'s statement that the affidavit 'references' the dependency cases is insufficient to notify to a judge under former RCW 4.12.050(1). At the time of the October 21, 2016 hearing, the affidavits were not filed. D.W. filed the affidavits on October 27, 2016, without a motion and without a notice to set a hearing. CP at 562-63.

Nothing clearly indicates to the listener that 'the 14' indicates the dependency cases. The number 14 at the beginning of the cause numbers

indicates what year the action began, not the type of case. The comment was made in a hearing on the termination and guardianship cases, not in a hearing in the dependency cases. RP (10/21/2016) at 1, 9-13. While there is little in the way of case law that defines what constitutes a motion and affidavit being “called to the attention of the judge” under former RCW 4.12.050(1), surely the above statement would not meet the plain language requirement of the statute. *See, e.g., State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007).

If anything, the statement could be interpreted to mean that the affidavits were not sent to be filed in the dependencies. If the listener were aware that “the 14” meant the dependency cases, then D.W.’s statement might be interpreted to mean the purported affidavits of prejudice reference events that occurred in the course of the dependency cases. By any measure, a “call to attention” requires a greater level of clarity than what the record demonstrates. Because the purported affidavits of prejudice was not filed and called to the attention of the judge before a discretionary decision was made, it was untimely. However, even if D.W. validly filed and called to the judge’s attention the affidavits, D.W. waived his statutory right to have the CR 60 motion heard by another judge.

**c. D.W. waived his rights under former RCW 4.12.040 and .050 because Judge Lawler made discretionary rulings.**

In the alternative, if either of the above affidavits were considered to have properly established prejudice, D.W. waived his rights to automatic disqualification long before the hearing on the CR 60 motions on June 16, 2017. The failure to call a previously filed affidavit of prejudice to the attention of the challenged judge, either before or while such judge presides at a particular proceeding, constitutes a waiver of any rights created by the filing of the affidavit. *State v. Smith*, 13 Wn. App. 859, 860-61, 539 P.2d 101 (1975). A party is deemed to have waived his rights on motion and affidavit of prejudice, where motion and affidavit were never called to judge's attention and he went to trial without objection. *Bargreen v. Little*, 27 Wn.2d 128, 177 P.2d 85 (1947); *see also Gentry*, 183 Wn.2d at 760.

On October 31, 2016, Judge Lawler made a discretionary ruling regarding appointment of new counsel for the father. CP at 564-65. The father appeared telephonically at that hearing. *Id.* During that hearing, Judge Lawler ruled that the father should be appointed a new attorney in both the dependency and the termination matters. *Id.* The order appointing Pier Petersen was entered November 3, 2016. CP at 567. Despite various motions filed by D.W. from November 2016 until the termination of his

parental rights in July 2017, a hearing regarding the October 27, 2016, purported affidavits of prejudice was never set. CP at 564-976. During the hearing on the CR 60 motions on June 15, 2017, D.W. did not object to Judge Lawler hearing the motions. RP (6/15/17) at 159-68. D.W.'s statutory right to have a different judge rule over the issue was waived, even if at one time Judge Lawler knew of the purported affidavits of prejudice. *State v. Smith*, 13 Wn. App. 859, 861, 539 P.2d 101 (1975).

In summary, the affidavits filed on December 1, 2015, and October 27, 2016, do not meet the statutory requirements under former RCW 4.12.050. Since the filing of these documents, D.W. waived his rights under former RCW 4.12.050 by allowing Judge Lawler to make rulings in the dependency cases without objection. Judge Lawler was not in any way disqualified from hearing and ruling on the CR 60 motion. Further, the orders denying the CR 60 motions are correct, and this Court should therefore affirm them.

**E. This Court should uphold Judge Lawler's orders denying D.W.'s CR 60 motions to vacate the Orders of Dependency because they are correct.**

Judge Lawler's ruling on the CR 60 motions was correct. D.W. alleges that the trial court's denial of the motion to vacate is based on untenable grounds and reasons and is manifestly unreasonable. App. Br. at 16. D.W. should have been estopped from bringing the CR 60

motions, as the core issue was previously decided on the merits. However, the trial court's orders are correct because D.W.'s motions were untimely, D.W. would not likely have prevailed on the merits of a dependency trial and so was not prejudiced, and there was no other evidence besides D.W.'s statements. CP at 953.

**1. The CR 60 motions were untimely.**

D.W.'s CR 60(b) motions were untimely because they were not "made within a reasonable time." CR 60(b). D.W. filed his CR 60(b) motion two-and-a-half years after the dependency orders were entered and over one year after he claims to have learned the basis for his motion. CP at 927-35. Because neither period of time was reasonable, the trial court correctly denied D.W.'s CR 60(b) motions.

CR 60(b) outlines the circumstances under which a party may seek relief from an order. Examples include: mistake, excusable neglect, newly discovered evidence, and fraud. *See* CR 60(b)(1)-(10). None of these were argued as the basis for the CR 60 motion at the trial court. CP at 927-35. D.W. instead relied on CR 60(b)(11). *Id.* CR 60(b)(11) is a catch-all provision that allows the court to grant a CR 60 motion for "[a]ny reason justifying relief from the operation of the judgment." CR 60(b)(11), should only be used as a basis to vacate in extraordinary circumstances not covered by any other section of this rule. *Lane v. Brown & Haley*,

81 Wn. App. 102, 107, 912 P.2d 1040 (1996). Showing of a meritorious defense is a critical prerequisite to vacating a judgment under subdivision (b)(11). *Allstate Ins. Co. v. Khani*, 75 Wn. App. 317, 325 n.5, 877 P.2d 724 (1994); *see also Calhoun v. Merritt*, 46 Wn. App. 616, 619, 731 P.2d 1094 (1986).

In this case, the trial court entered Orders of Dependency as to all three children on November 20, 2014. CP at 75-85. D.W. filed his motions to vacate those dependency orders on June 6, 2017, two-and-a-half years later. CP at 927-35. D.W. argues that his untimeliness is reasonable because a triggering event occurred well after the entry of the orders. App. Br. at 30. Specifically, he argues that around March 2016 he learned that his former attorney had misinformed him about his rights. *Id.*

Even taking D.W.'s self-serving assertions as true, his CR 60 motions to vacate the Orders of Dependency were still untimely. Nine months had passed between when D.W. discovered his attorney had allegedly misinformed him and when he filed his declaration in support of a CR 60 motions. CP at 936-37. One year and three months passed between when D.W. discovered his attorney had allegedly misinformed him and when he brought the CR 60 motions. CP 927-28. D.W. gives little explanation for these delays. App. Br. 30-31. The alleged refusal of three of his five attorneys to bring the CR 60 motion cannot explain D.W.

waiting nine months to file the declaration, which he submitted *pro se*. CP at 927-28. By January 2017, D.W. had filed many motions and documents with the court *pro se*. CP at 215-19, 284-335, 366-553, 441-42, 554-60, 562-63, 568-79.

The delay in bringing these motions is particularly unreasonable in the context of a dependency proceeding. In a dependency case, time is of the essence to achieve permanency for children. Permanency for a child should be achieved within 15 months. RCW 13.34.145(1)(c); *see also* RAP 18.13A(a); RCW 13.34.020 (“The right of a child to basic nurturing includes ... a speedy resolution of any proceeding under this chapter.”). In this context, a delay in permanency between 24 and 36 months is particularly unreasonable. In other contexts (such as newly discovered evidence or excusable neglect) a CR 60 motion must be brought within a year. CR 60(b). What constitutes a reasonable time depends on the facts and circumstances of each case. *In re Marriage of Thurston*, 92 Wn. App. 494, 500, 963 P.2d 947 (1998). Dependency cases are time sensitive. RCW 13.34.145(1)(c).

Here, D.W.’s motion had so little merit that the trial court concluded that the motion to vacate was a veiled “attempt to delay the termination trial.” VRP (6/15/17) at 167. The superior court had denied D.W.’s motion for a finding of ineffective assistance of counsel four

months earlier. CP at 753-56. Two-and-a-half years after D.W. had agreed to dependency, he brought this CR 60 motion based solely on claims the trial court had already decided against D.W. *Id.* Because the motion was untimely, it was unnecessary for the court to make rulings on the substance of the motion. Thus, the trial court properly denied D.W.'s CR 60 motions to vacate the Orders of Dependency, and this Court should affirm that decision.

**2. The claim underlying the CR 60 motions is barred by collateral estoppel.**

D.W.'s is barred from bringing the CR 60 motions to vacate the Orders of Dependency by collateral estoppel. The CR 60 motions are based on a claim of ineffective assistance of counsel by the first of D.W.'s five attorneys, Brian Gerhart. CP at 927-35. D.W. has repeatedly raised the argument, and the courts have repeatedly rejected it. *See* CP at 753-56, 831; *Ruling of Dismissal*, 50974-1-II (Nov. 7, 2017); *Order Denying Motion to Modify*, 50974-1-II (Feb. 9, 2018); *Ruling Denying Review*, 95606-5 (April 30, 2018); *Order*, 95606-5 (July 11, 2018). D.W.'s attempt to relitigate the issue of ineffective assistance by Mr. Gerhart should be barred by collateral estoppel.

The requirements of collateral estoppel are: (1) the identical issue was decided in the prior action; (2) the prior action resulted in a final

judgment on the merits; (3) the party to be estopped was a party or in privity with a party in the earlier proceeding; and (4) precluding relitigation of the issue will not work an injustice. *Williams v. Leone & Keeble, Inc.*, 171 Wn.2d 726, 731, 254 P.3d 818 (2011). An issue meets the first factor when the issue is “identical in all respects” in both proceedings. *LeMond v. Dep’t of Licensing*, 143 Wn. App. 797, 805, 180 P.3d 829 (2008). To the extent that a claim relies on an issue that has been previously decided, collateral estoppel applies. *See Schibel v. Eymann*, 189 Wn.2d 93, 104, 399 P.3d 1129 (2017) (holding that collateral estoppel barred a legal malpractice claim based on withdrawal where the court had authorized the attorney’s withdrawal after a contested hearing on the merits). Collateral estoppel is appropriate where a full and fair hearing on the issue occurred in the first proceeding. *Hadley v. Maxwell*, 144 Wn.2d 306, 311, 27 P.3d 600 (2001). When the elements of collateral estoppel are met, the doctrine serves to prevent inconvenience or harassment of parties and provides for finality in adjudications. *Christensen v. Grant County Hosp. Dist. No. 1*, 152 Wn.2d 299, 306-07, 96 P.3d 957 (2004).

D.W. filed a motion for a finding of ineffective assistance of counsel on January 18, 2017. CP at 580-90. The court denied D.W.’s motion for a finding of ineffective assistance of counsel on

February 15, 2017. CP at 753-56. D.W. appealed the February 15, 2017 order denying his motion for a finding of ineffective assistance of counsel. *See* 50974-1-II Ruling of Dismissal, November 7, 2017. That appeal has been exhausted, as the Washington Supreme Court denied D.W.'s motion for discretionary review. 95606-5 Order, July 11, 2018.

The issue of ineffective assistance of counsel by Mr. Gerhart presented in the CR 60 motions and in the February 2017 hearing is identical. Nothing about Mr. Gerhart's representation of D.W. changed between these two motions, as Mr. Gerhart withdrew long before either of the motions were filed. CP at 213. No new information was discovered between these motions. D.W. alleges he was aware that he received ineffective counsel from Mr. Gerhart with respect to the Fifth Amendment as of March 2016, well before either motion was filed. App. Br. at 30. The motion filed in January 2017 was less detailed than the CR 60 motions. CP at 580. It did not specifically mention any advice given by Mr. Gerhart about the Fifth Amendment. *Id.* However, the only rationale D.W. offered to support the CR 60 motions were allegations of ineffective assistance by Brian Gerhart. CP at 927-39; VRP (6/15/17). That issue was heard and decided on February 15, 2017, four months earlier. CP at 753-56. The first motion is for a finding of ineffective assistance of counsel. The second is a

motion to vacate based entirely on the same claim of ineffective assistance. CP at 753-56

The issue of ineffective assistance of counsel by Mr. Gerhart is identical in all respects in these two proceedings. *LeMond v. Dep't of Licensing*, 143 Wn. App. 797, 805, 180 P.3d 829 (2008). The difference between these motions is a matter of the relief requested; the issue presented is identical. *See Schibel*, 189 Wn.2d at 101-02.

The order denying the motion for ineffective assistance was final and on the merits, as demonstrated by the exhaustion of appeals. 95606-5 Order, July 11, 2018. D.W. is the same party, and precluding relitigation will not work an injustice. As demonstrated below, there is no injustice in precluding relitigation because D.W.'s claim that he received ineffective assistance is deficient on several grounds.

**3. D.W. failed to demonstrate that he was prejudiced by the alleged ineffective assistance of counsel.**

D.W. claims that he would not have agreed to dependency had his attorney not given erroneous advice regarding his Fifth Amendment rights. App. Br at 22. D.W. claims that, had he not agreed to dependency, he would have prevailed at trial because relatives were available and willing to take custody of the children as either third party custodians or guardians. *Id.* at 22-23. D.W. would not have been available for the

children, as he remained incarcerated throughout the dependencies. CP at 927-35. D.W. argues that, had his attorney pursued these possibilities, the court would have granted these relatives third party custodianship or guardianship, thereby preventing a finding of dependency. App. Br at 23. This claim has no basis in fact or law.

To establish prejudice, a defendant must demonstrate that, but for the deficient representation, the outcome of the trial would have differed. *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002). This requires showing that counsel's errors were so serious as to deprive the defendant of a "fair" trial, or a trial whose result is reliable. *State v. Lord*, 117 Wn.2d 829, 883, 822 P.2d 177 (1991). Under any standard, a party must show actual prejudice, and the burden is on the petitioner. *In re Moseley*, 34 Wn. App. 179, 184, 660 P.2d 315 (1983). "To satisfy the prejudice prong, a party must show a 'reasonable probability that, but for counsels [sic] unprofessional errors, the result of the proceedings would have been different.'" *In re Dependency of S.M.H.*, 128 Wn. App. 45, 61, 115 P.3d 990 (2005), citing *Strickland v. Washington*, 466 U.S. at 694.

Neither the facts of this case nor the law supports the notion that D.W. would have prevailed at a contested dependency trial because of the existence of relatives willing to take the child. The questions of law in a

dependency case only address whether the child is “dependent” according to the definitions provided in RCW 13.34.030. A “dependent” child “[h]as no parent, guardian, or custodian capable of adequately caring for the child, such that the child is in circumstances which constitute a danger of substantial damage to the child's psychological or physical development.” RCW 13.34.030(6)(c). This definition, by its plain language, focuses on the parents, legal guardians, and legal custodians and their ability to care for the child. *See In re M.R.*, 78 Wn. App. 799, 799, 899 P.2d 1286 (1995). A dependency determination requires a showing of parental deficiency but not necessarily a finding of parental unfitness. *In re Schermer*, 161 Wn.2d 927, 943, 169 P.3d 452 (2007) (emphasis in original), *citing In re Welfare of Key*, 119 Wn.2d 600, 836 P.2d 200 (1992). Rather, “it allows consideration of both a child's special needs and any limitations or other circumstances which affect a *parent's* ability to respond to those needs.” *Id* (emphasis added). The parenting ability of relatives or non-related caregivers is irrelevant to the legal issue of whether a child is dependent. *See id.*

In arguing the CR 60 motions, D.W. failed to present legal argument that the existence of relatives willing to be guardians or legal custodians would have prevented a finding of dependency at trial. CP at 927-39. D.W. also failed to provide evidence that there were

relatives willing and able to act as guardians or legal custodians. *Id.* The burden is on the party alleging ineffective assistance of counsel to demonstrate that there was a reasonable probability of a different outcome had there been effective assistance from their assigned counsel. *In re Dependency of S.M.H.*, 128 Wn. App. at 61, *citing Strickland*, 466 U.S. at 694. It is insufficient to argue that a legal course of action existed that might, in the abstract, have been successful. *Id.* D.W.'s burden is to provide evidence that the alternative course of action had a reasonable probability of success. *Id.* D.W. has failed to meet that burden at the trial court or here on appeal. *See* RAP 10.3(a)(6) (stating that appellant's brief should contain argument in support of issues presented in addition to citations to legal authority and to the relevant parts of the record); *State v. Harris*, 164 Wn. App. 377, 389 n.7, 263 P.3d 1276 (2011) (holding assignment of error waived where appellant failed to present supporting argument and legal authority).

Finally, it is unclear from D.W.'s brief whether he claims that the alleged failure by Mr. Gerhart to pursue guardianship in itself constitutes ineffective assistance of counsel. If so, that claim would also fail based on there being no reasonable probability of a different outcome in the Orders of Dependency. Again, D.W. has not demonstrated that pursuit of

potential relatives at the time the Orders of Dependency were entered would have resulted in a different outcome.<sup>2</sup>

**4. D.W. produced insufficient evidence of the alleged ineffective assistance of counsel.**

D.W. did not produce sufficient evidence that his attorney provided ineffective assistance in the manner D.W. alleged. D.W.'s brief proceeds upon the assumption that D.W.'s allegations against his former attorney are true. However, the trial court assessed the evidence presented and found D.W. had not produced sufficient evidence to meet his burden on the motion. The trial court was under no obligation to assume the truth of D.W.'s allegations.

A claim of ineffective assistance of counsel is a question of law reviewable *de novo*. *State v. White*, 80 Wn. App. 406, 410, 907 P.2d 310 (1995). In a criminal case, a defendant claiming ineffective assistance of counsel must show that (1) his attorney's performance was objectively unreasonable; and (2) he was prejudiced by the performance. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 647 (1984); *see also In re Dependency of S.M.H.*, 128 Wn. App. at 49. Even in criminal cases, higher courts give great judicial deference to trial counsel's

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<sup>2</sup> While it is not the burden of the State to disprove D.W.'s unsupported claims that suitable relatives were available, the Court may take note that all evidence points to the contrary. D.W. did pursue three separate sets of guardianship petitions with relatives; the court denied or dismissed all of them. The order denying those guardianship petitions are the subject of an ongoing appeal. 51210-6-II.

performance and begin their analysis with a strong presumption that counsel was effective. *Strickland*, 466 U.S. at 689; *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

The evidence D.W. produced at the hearing on the CR 60 motions consisted of two declarations. CP at 936-39. One declaration was written and signed by D.W. In that declaration, he claimed that his former attorney advised him erroneously that if he went to trial in the dependency cases, the Department could call him as a witness and he would not be able to invoke the Fifth Amendment. CP at 936-37. No evidence was produced to corroborate D.W.'s claims. CP at 927-39. The other declaration was written and signed by an attorney, Mackenzie Sorich. CP at 938-39. The attorney stated that they have been practicing in dependency law for eleven years, and they are careful not to waive their client's rights in the criminal arena. *Id.* In essence, this declaration was legal argument masquerading as evidence. This declaration has no evidentiary value because the question of ineffective assistance is an objective standard; it is not defined by the common practices of attorneys in a particular area of the law. *See In re Yates*, 117 Wn.2d 1, 35, 296 P.3d 872 (2013); *State v. Stenson*, 132 Wn.2d 668, 705, 40 P.2d 1239 (1997).

D.W. argues that he should have prevailed on the motion because his allegations were not contradicted by any evidence produced by the Department. App. Br. at 25-26. D.W. further argues that his declaration satisfied the requirement of CR 60(e)(1). *Id.* This argument confuses a procedural requirement for a CR 60 motion to be heard with evidence sufficient for the court to grant a CR 60 motion. Fulfilling the requirements of CR 60(e)(1) does not guarantee a party that their motion will be granted.

The trial court was not obligated to accept the narrative in D.W.'s declaration as true. It is a self-serving statement made long after the alleged advice occurred. CP at 927-39. D.W. claims that correspondence between himself and the fourth of his five attorneys, Pier Petersen, "tends to confirm" D.W.'s allegations. App. Br. at 27. However, the cited clerk's papers are a letter to Ms. Petersen from D.W. in which he simply repeats the allegations. CP at 595-97. Repetition of an allegation is not confirmation of its truth. Further, this evidence was not produced for the trial court to consider at the hearing, and therefore should not be considered on appeal. RAP 2.5(a).

D.W.'s argument ignores the heavy burden he bears in this appeal. The Court reviews CR 60 orders for abuse of discretion. When assessing an ineffective assistance of counsel claim, the court begins the analysis

with a strong presumption that counsel was effective. *Strickland*, 466 U.S. at 689; *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). On appeal, D.W. must demonstrate that the evidence of ineffective assistance of counsel in this case was so overwhelming that denial of the CR 60 motions constituted an abuse of discretion. The only substantive evidence produced was a declaration from D.W., in which he alleges he was given inaccurate legal advice. Doubtless, litigants produce such evidence in nearly every claim of ineffective assistance of counsel. It was not manifestly unreasonable for the trial court to conclude that D.W. had not made a showing sufficient to vacate the dependency orders entered 31 months prior.

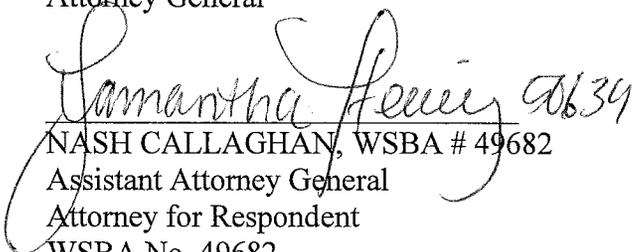
## V. CONCLUSION

D.W. has not demonstrated that the trial court abused its discretion in denying the CR 60 motions to vacate the Orders of Dependency in these cases. The appeal is moot in light of the termination orders entered against D.W. Judge Lawler was not disqualified from hearing the motion under former RCW 4.12.040 and .050. The issue of ineffective assistance of counsel by D.W.'s first dependency attorney has already been fully litigated and appealed, and therefore the issue should be barred by collateral estoppel. The CR 60 motions were untimely. D.W. could not demonstrate prejudice, as the court would have found the children

dependent at trial. Finally, D.W. did not provide sufficient evidence that the alleged ineffective assistance of counsel occurred. For the reasons stated above, the Department respectfully requests that this Court affirm the order denying the motion to vacate.

RESPECTFULLY SUBMITTED this 9 day of October, 2018.

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**CERTIFICATE OF SERVICE**

I certify that on the date indicated below, I served a true and correct copy of the foregoing document on all parties or their counsel of record as follows:

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- State Campus Delivery
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- Hand delivered by \_\_\_\_\_

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 09<sup>th</sup> day of October, 2018 at Tumwater, WA.

  
\_\_\_\_\_  
KRIS ORCUTT, Legal Assistant

**OFFICE OF THE ATTORNEY GENERAL**

**October 09, 2018 - 12:42 PM**

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**Appellate Court Case Number:** 51060-0  
**Appellate Court Case Title:** In re the Dependency of: J.W., A.W. & D.W.  
**Superior Court Case Number:** 14-7-00377-0

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