

NO. 29368-8-III

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

BETTYJEAN TRIPLETT, et al.,

Respondents,

v.

WASHINGTON STATE DEPARTMENT OF SOCIAL AND HEALTH
SERVICES, et al.,

Appellants.

RESPONDENTS' RESPONSIVE APPEAL BRIEF

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TABLE OF CONTENTS

I.	INTRODUCTION AND SUMMARY OF ARGUMENT	1
II.	RESTATEMENT OF ISSUES	3
III.	STATEMENT OF FACTS	3
IV.	ARGUMENT	6
A.	Standard of Review	6
B.	RCW 4.20.020 Does not Apply to Persons With Mental Disabilities Where Such Disabilities Render Them Incapable of Providing Financial Support or Services with Economic Value to the Deceased's Parents, Sisters, or Brothers	7
C.	Applying RCW 4.20.020 to Kathleen Smith Would Violate her Constitutional Right of Access to the Court	11
D.	Kathleen Smith Should be Considered the Equivalent of a Minor Under Washington Law for Purposes of Applying the Wrongful Death Statutes	16
E.	Independent of RCW 4.20.020, a Common Law Remedy Should Exist for Profoundly Mentally Disabled Adults and Their Parents and Siblings	20
V.	CONCLUSION	23

TABLE OF AUTHORITIES

CASES

<u>Aba Sheikh v. Choe</u> 156 Wn.2d 441, 447, 128 P.3d 574 (2006).....	6
<u>Armantrout v. Carlson,</u> 166 Wn.2d 931, 214 P.3d 914 (2009)	8, 10, 13, 19
<u>Atherton Condo Ass'n v. Bloom Dev. Co.,</u> 115 Wn.2d 506, 516, 799 P.2d 250 (1990)	7
<u>Beggs v. State Dep't of Social and Health Services,</u> 247 P.3d 421 (2011), citing <u>State v. Schultz</u> , 146 Wn.2d 540, 544, 48 P.3d 301 (2002)	6, 7
<u>Bortle v. N. Pac. Ry.,</u> 60 Wash. 552, 111 P. 788 (1910)	8
<u>Carter v. University of Washington,</u> 85 Wn.2d 391, 398, 536 P.2d 618, 623 (1975)	13
<u>Childers v. Childers,</u> 89 Wn.2d 592, 575 P.2d 201 (1978)	18, 19
<u>Dahl – Smyth, Inc. v. City of Walla Walla,</u> 110 Wn.App. 26, 32, 38 P.3d 366 (2002) citing <u>Dep't of Transp. v. State Employees' Ins. Bd.,</u> 97 Wn.2d 454, 458, 645 P.2d 1076 (1982)	9
<u>Erwin v. Cotter Health Ctrs., Inc.,</u> 161 Wn.2d 676, 687, 167 P.3d 1112 (2007) citing <u>Tapper v. Employment Sec. Dep't,</u> 122 Wn.2d 397, 402, 858 P.2d 494 (1993)	7
<u>Federated Services Ins. Co. v. Personal Representatives of the Estate of Norberg,</u> 101 Wn.App. 119, 126, 4 P.3d 844 (2000) citing <u>Bingaman v. Grays Harbor Community Hosp.,</u>	

37 Wn.App. 825, 685 P.2d 1090 (1984), rev'd in part on other grounds, 103 Wn.2d 831, 699 P.2d 1230 (1985)	14
<u>Huntington vs. Samaritan Hosp.</u> , 101 Wn.2d 466, 680 P.2d 58 (1984)	20
<u>John Doe v Bloodsender</u> , 117 Wn.2d 772, 780, 819 P.2d 370 (1991)	13
<u>Kelso v. City of Tacoma</u> , 63 Wn.2d 913, 917-18, 390 P.2d 2 (1964)	9
<u>Lundgren v. Whitney's, Inc.</u> , 94 Wn.2d 91, 614 P.2d 1272 (1980)	21
<u>Miller v. City of Tacoma</u> , 138 Wn.2d 318, 328, 979 P.2d 429 (1999)	9
<u>Moragne v. States Marine Lines, Inc.</u> , 398 US 375 (1970)	22
<u>Philippides v. Bernard</u> , 151 Wn.2d 376, 88 P.3d 939 (2004)	2, 5, 8, 10, 13, 15, 19, 20
<u>Roe v. Ludtke Trucking, Inc.</u> , 46 Wn.App. 816, 819-20, 732 P.2d 1021 (1987)	21
<u>Rozner v. City of Bellevue</u> , 116 Wn.2d 342, 347, 804 P.2d 24 (1991)	9
<u>Schumacher v. Williams</u> , 107 Wn.App. 793, 801, 28 P.3d 792 (2001)	8
<u>State v. Blilie</u> , 132 Wn.2d 484, 492, 939 P.2d 691 (1997)	11
<u>Strode v. Gleason</u> , 9 Wn.App. 13, 16, 510 P.2d 250 (1973)	22, 23

<u>Sundquist Homes v. Snohomish Pud #1,</u> 140 Wn.2d 403, 409, 997 P.2d 915 (2000)	10
<u>Tait v. Wahl,</u> 97 Wn.App. 765, 987 P.2d 127 (1999)	8
<u>Tennessee v Lane,</u> 541 US 509, 124 S.Ct. 1978, 158 L.Ed.2d 820 (2004)	12
<u>Tingey v. Haisch,</u> 159 Wn.2d 652, 664, 152 P.3d 1020 (2007) citing <u>State v. JP,</u> 149 Wn.2d 444,450, 69 P.3d 318 (2003)	10, 11
<u>Ueland v. Pengo Hydra-Poll Corp.,</u> 103 Wn.2d 131, 136, 691 P.2d 190 (1984)	21, 22, 23
<u>Whittlesey vs. Seattle,</u> 94 Wash. 645, 163 P. 193 (1917)	20
<u>WWP v. Graybar Elec. Co.,</u> 112 Wn.2d 847, 854-56, 774 P.2d 1199 (1989)	20

STATUTES

42 U.S.C. § 12132	12
RCW 4.20.020	2, 3, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 20, 21
RCW 4.20.046	5
RCW 26.09.100	18
RCW 26.28.015	16, 17
RCW 51.08.030	17

CONSTITUTION

Washington State Constitution
Article I, Section 10 12, 13

MISCELLANEOUS

Black's Law Dictionary 1577-78 (9th ed. 2009) 9
Title II of the American with Disabilities Act 12
Restatement (second) of Torts, § 925, comment k (1977) 21
1F Harper F James, The Law of Torts § 8.5 (1956) 22

I. INTRODUCTION AND SUMMARY OF ARGUMENT

This appeal involves the death of 52-year-old Kathleen Smith (Ms. Smith) who died by drowning in a bathtub at Lakeland Village (Lakeland) due to a lack of supervision as required by Lakeland's written policies. At the time of her death, Ms. Smith had been assessed by medical professionals at functioning at the mental age of five (5) to six (6) years from the time of her birth. Ms. Smith had been residing at Lakeland since April 2, 1967 and was subject to a DSHS written policy mandating that she be supervised while bathing with an attendant within an arm's length of her at all times due to a seizure disorder she suffered from. Despite this requirement, Ms. Smith's attendant, Lakeland employee Michael Noland (Mr. Noland), left Ms. Smith unsupervised for approximately 20 minutes while she was taking a bath. Secondary to a presumed seizure, Ms. Smith drowned while Mr. Noland was away. Ms. Smith was discovered unconscious in the bathtub by another attendant, Jennifer Olmstead, R.N. Despite resuscitative efforts, Ms. Smith passed away. Ms. Smith had never been married and thus, had no children. She was survived by her mother, Bettyjean Triplett (Ms. Triplett) and a brother, Kevin Smith (Mr. Smith) who were appointed as Co-Personal Representatives of her Estate.

On April 8, 2010, Appellant DSHS, moved for a dismissal of all Respondents' claims arguing that Ms. Smith was an adult with no surviving spouse or children. Further, DSHS maintained that because Ms. Triplett and Mr. Smith were not dependent on her for support, Ms. Smith had no standing to maintain a cause of action. On August 17, 2010, The Honorable Linda G. Tompkins denied DSHS's motion. Thereafter, on September 20, 2010, Judge Tompkins certified the following question to this Court:

“Whether RCW 4.20.020 applies to limit and exclude potential beneficiaries of a 52 year old decedent who was from birth with a mental age of 8 at the time of death.”

DSHS relies principally upon Philippides v. Bernard, 151 Wn.2d 376, 88 P.3d 939 (2004) and argues that Ms. Smith's claims should have been dismissed. By contrast, Ms. Smith contends that Washington's Wrongful Death Statutes, including, but not limited to, RCW 4.20.020, do not apply to developmentally disabled adults such as Ms. Smith where her mental functioning age of five (5) to six (6) years of age makes her reliant upon others including her family for financial and other support. Ms. Smith further contends that if this Court finds that the statutes apply, then application would deny Ms. Smith her Constitutional Right of Access to the Court as she would have no net accumulations given her limited mental functioning capacity and thus, would have no basis upon which to

bring a wrongful death action against DSHS. Additionally, Ms. Smith maintains that she should be considered the equivalent of a minor for purposes of applying the Wrongful Death Statutes. Finally, Ms. Smith argues that a common law remedy should exist for profoundly mentally disabled adults and their parents and siblings.

II. RESTATEMENT OF ISSUES

a. Whether Ms. Smith's mental disability from the time of birth places her outside the intended scope of RCW 4.20.020;

b. If RCW 4.20.020 applies to Ms. Smith, whether the statute denies Ms. Smith her Constitutional Right of Access to the Court;

c. Whether Ms. Smith should be considered the equivalent of a minor for purposes of the Wrongful Death Statutes; and

d. If Ms. Smith's mental disability places her outside the intended scope of RCW 4.20.020, whether a common law remedy should exist for the wrongful death of Ms. Smith and her mother and brother.

III. STATEMENT OF THE CASE

Respondent, Kathleen Gail Smith (Ms. Smith) was born on September 10, 1953 and was the natural child of Bettyjean Triplett (Ms. Triplett) and the sister of

Kevin Smith (Mr. Smith), both of whom are co-personal representatives of the Estate of Kathleen Smith in the underlying lawsuit as well as individual Plaintiffs. CP at 4, 18, 19, 36-37. Ms. Smith was born developmentally disabled and, at the time of her death, was 52 years of age. CP at 5, 11, 19, 35-37. However, she had been assessed by medical professionals at functioning at the mental age of five (5) to six (6) years old. CP at 5, 19, 35, 61. At the time of her death, Ms. Smith had never been married and had no children. CP at 36-37.

Ms. Smith had been a resident at Lakeland since April 2, 1967 at which time she was 14 years of age. CP at 5, 35, 37. In short, she had resided at Lakeland for 39 years prior to her death. CP at 5, 35, 37. Lakeland is an institution for mentally disabled individuals operated and maintained by Appellant, DSHS. CP at 5. During the time Ms. Smith was at Lakeland, she carried a DSM IV AXIS II diagnosis for profound mental retardation. CP at 37, 60-62. Additionally, she had also been provided an AXIS III diagnosis of mental retardation associated with unknown influence; with seizure disorder. CP at 37, 60-62. Although her parents were initially reluctant to place Ms. Smith out of the house, she ultimately was sent to live at Lakeland at age 14. CP at 37, 60. While there, her mother and brother were frequent routine visitors despite having to travel across the state from Seattle to see Ms. Smith. CP at 37.

Because of her seizure disorder, Lakeland had implemented an IMR Plan of Care which required that during bathing, staff provide “visual supervision within an arm’s reach”. CP at 37, 63-65. Notably, Ms. Smith’s attendant Mr. Noland signed the Plan of Care indicating that he had read and understood the requirements of visual supervision as it applied to Ms. Smith. CP at 65. Unfortunately, on March 21, 2006, Mr. Noland left Ms. Smith unattended while she was taking a bath thereby violating the Plan of Care that had been implemented for her safety. CP at 37, 52, 53, 67, 94. While he was away, which Mr. Noland stated to Medical Lake Police was approximately 20 minutes, Ms. Smith drowned in the bathtub. CP at 37, 67, 94. She was found by Jennifer Olmstead, R.N., as opposed to Mr. Noland. CP at 37, 94. Despite resuscitative efforts, Ms. Smith passed away. CP at 37.

A subsequent investigative review by Dr. Barry Smith conducted on June 20, 2006 determined that the bathtub Ms. Smith drowned in was without any traction strips or other non-skid appliques and that the bottom of the bathtub was very smooth. CP at 37-38, 69. Additionally, Mr. Noland was charged with Manslaughter in the Second Degree by Spokane County and to the best information, knowledge and belief of Plaintiffs, was terminated from his place of employment. CP at 38, 94, 95. An investigation by DSHS resulted in a Summary Statement of Deficiencies which verified that Ms. Smith had been left

unsupervised by Mr. Noland in violation of the IMR Plan of Care. CP at 38, 49-58, 94, 95.

On April 8, 2010, DSHS filed a Motion to Dismiss Ms. Smith's claims. CP at 15-17. DSHS argued that under Washington Law, Ms. Smith, Ms. Triplett and Mr. Smith had no cause of action pursuant to RCW 4.20.020, RCW 4.20.046 and Philippides v. Bernard, Supra. CP at 18-29, 96-107. On August 17, 2010, Judge Tompkins denied DSHS's motion and on September 28, 2010, she certified this appeal to address:

“Whether RCW 4.20.020 applies to limit and exclude potential beneficiaries of a 52 year old decedent who was from birth with a mental age of 8 at the time of death.”

II. ARGUMENT

A. **Standard of Review**

Ms. Smith agrees that, although not specified in Judge Tompkin's certification, her oral ruling establishes that the wrongful death statutes at issue are RCW 4.20.010 and RCW 4.20.020.

The standard of review of an order of summary judgment is de novo. Aba Sheikh v. Choe, 156 Wn.2d 441, 447, 128 P.3d 574 (2006). Statutory interpretation is a question of law reviewed de novo. Beggs v. State Dep't of Social and Health Services, 247 P.3d 421 (2011), citing State v. Schultz, 146

Wn.2d 540, 544, 48 P.3d 301 (2002). On a summary judgment motion, the burden is on the moving party to demonstrate that there is no genuine issue as to material fact and that, as a matter of law, summary judgment is proper. Atherton Condo Ass'n v. Bloom Dev. Co., 115 Wn.2d 506, 516, 799 P.2d 250 (1990). The moving party is held to a strict standard. Any doubts as to the existence of a genuine issue of material fact is resolved against the moving party. In addition, all facts submitted and the reasonable inferences therefrom are resolved in a light most favorable to the non-moving party. Atherton, at 516. Where there is a mixed question of law and fact, resolution requires establishing the relevant facts, determining the applicable law and then applying that law to the facts. Erwin v. Cotter Health Ctrs., Inc., 161 Wn.2d 676, 687, 167 P.3d 1112 (2007). The process of determining the applicable law and applying it to the facts is a question of law that is reviewed de novo. Erwin at 687 citing Tapper v. Employment Sec. Dep't., 122 Wn.2d 397, 402, 858 P.2d 494 (1993).

B. RCW 4.20.020 Does Not Apply to Persons with Mental Disabilities Where Such Disabilities Render Them Incapable of Providing Financial Support or Services with Economic Value to the Deceased's Parents, Sisters, or Brothers.

The primary issue certified to this Court by Judge Tompkins is as follows:

“Whether RCW 4.20.020 applies to limit and exclude potential beneficiaries of a 52 year old decedent who was from birth with a mental age of eight (8) at the time of death.”

RCW 4.20.020 defines the beneficiaries of wrongful death actions and provides in pertinent part:

“... if there being a wife, husband, state registered domestic partner, or such child or children, such actions may be maintained for the benefit of the parents, sisters, or brothers, or **who may be dependent upon the deceased person for support**, and who are resident within the United States at the time of his death.”

RCW 4.20.020 (emphasis added).

The statute establishes as a condition precedent that where an adult child passes away with no spouse or surviving children, the deceased’s parents, sisters, or brothers must establish that they are dependent upon the deceased for support in order to maintain a cause of action for the deceased’s death. Support has been interpreted as financial dependence. Philippides v. Bernard, 151 Wn.2d 376, 386, 88 P.3d 939 (2004) citing Bortle v. N. Pac. Ry., 60 Wash. 552, 111 P. 788 (1910); Tait v. Wahl, 97 Wn.App. 765, 987 P.2d 127 (1999); Schumacher v. Williams, 107 Wn.App. 793, 801, 28 P.3d 792 (2001). Following Philippides, the Washington State Supreme Court expanded financial dependence to include the provision of services that have economic value. Armantrout v. Carlson, 166 Wn.2d 931, 214 P.3d 914 (2009). Implicit in both Philippides and Armantrout is

the understanding that the decedent while alive had the capability to provide financial support or services equating to financial support.

What has not yet been decided and constitutes an issue of first impression is whether RCW 4.20.020 applies to a profoundly mentally disabled individual such as Ms. Smith where from birth she has not been employable nor capable of providing services with economic value to her mother and brother. When applying fundamental principles of statutory construction, one must reasonably conclude that RCW 4.20.020 does not apply to Ms. Smith and, therefore, does not bar her right of recovery nor her mother and brother's right of recovery.

Where the language of the statute is plain and unambiguous, its meaning must be primarily derived from the language itself. Dahl – Smyth, Inc. v. City of Walla Walla, 110 Wn.App. 26, 32, 38 P.3d 366 (2002) citing Dep't of Transp. v. State Employees' Ins. Bd., 97 Wn.2d 454, 458, 645 P.2d 1076 (1982). The primary goal is to ascertain and give effect to the Legislature's intent. Rozner v. City of Bellevue, 116 Wn.2d 342, 347, 804 P.2d 24 (1991). The statute is read as a whole and the language at issue placed in the context of the overall legislative scheme. Miller v. City of Tacoma, 138 Wn.2d 318, 328, 979 P.2d 429 (1999). In determining the meaning of a statute, the Court should be guided by reason and common sense. Kelso v. City of Tacoma 63 Wn.2d 913, 917-18, 390 P.2d 2 (1964).

Until Armantrout v. Carlson, 166 Wn.2d 931, 214 P.3d 914 (2009), RCW 4.20.020's phrase "dependent for support" has been interpreted to mean financial dependence. Philippides v. Bernard, 151 Wn.2d at 386; other citations omitted. The Supreme Court in Armantrout v. Carlson, *Supra*, expanded the definition of support to include the provision of services with economic value. Armantrout v. Carlson, at 936-37. In reaching its decision, the Armantrout Court looked to Black's Law Dictionary 1577-78 (9th ed. 2009) for the definition of "support". Black's defined support as "[s]ustenance or maintenance; esp., articles such as food and clothing that allow one to live in the degree of comfort to which one is accustomed; and: [o]ne or more monetary payments to a current or former family member for the purpose of helping the recipient maintain an acceptable standard of living". Armantrout, at 938. The Court then concluded that "[p]lainly, the statute does not limit 'support' to monetary contributions". Armantrout, at 938.

It is clear that the Armantrout Court concluded that "support" meant the ability to provide sustenance or maintenance or monetary payments to current or former family members. Statutes are to be construed to affect the purposes, and to avoid an unlikely restrained consequence. Sundquist Homes v. Snohomish Pud #1, 140 Wn.2d 403, 409, 997 P.2d 915 (2000). A reading that produces absurd results must be avoided because "it will not be presumed that the Legislature intended absurd results." Tingey v. Haisch, 159 Wn.2d 652, 664, 152 P.3d 1020

(2007) citing State v. JP, 149 Wn.2d 444, 450, 69 P.3d 318 (2003). To conclude that the Legislature in enacting RCW 4.20.020 intended that parents and siblings of a deceased adult child must show financial dependence upon the deceased even where the deceased was incapable of providing financial support would constitute as absurd result.

The Legislature is presumed to know the rules of statutory construction. See State v. Blilie, 132 Wn.2d 484, 492, 939 P.2d 691 (1997). Consequently, the Court must assume that the Legislature was aware that imposing a financial dependence burden could only be applied where the deceased adult child was capable of providing financial support in the first instance. Any other conclusion would defy common sense.

In Ms. Smith's case from the time of her birth until the time of her death at age 52, she was incapable of employment nor could she provide services that would have economic value equivalent to financial support. As such, RCW 4.20.020 could not apply to Ms. Smith, nor her mother and brother, as she could not, in the first instance, provide financial support to either. Judge Tompkins therefore, correctly and appropriately, denied DSHS's Motion for Summary Judgment holding that RCW 4.20.020 did not apply to Ms. Smith's case and, therefore, would not work to exclude a cause of action for Ms. Smith or her mother nor brother.

C. Applying RCW 4.20.020 to Kathleen Smith Would Violate Her Constitutional Right of Access to the Court.

Because Ms. Smith was profoundly mentally disabled from birth and incapable of earning net accumulations, applying RCW 4.20.020 to her violates her State and Federal Constitutional Right of Access to the Court.

DSHS argues that because Ms. Smith as well as her mother and brother were not Tier 1 or Tier II beneficiaries under RCW 4.20.020, the lawsuit filed against DSHS should have been dismissed by the trial Court. Specifically, DSHS argues that Ms. Smith at the time of her death was an adult with no spouse or children, and, therefore, her recovery, if any, is limited to net accumulations. Further, Ms. Smith's mother and brother were not dependent upon her for financial support thus, their causes of action must be dismissed as well. DSHS's argument, if adopted by the Court, would result in a violation of Ms. Smith's Constitutional Right of Access to the Court.

The United States Constitution provides that "no qualified individual with a disability shall, by reason of such a disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity or be subjected to discrimination by such entity". See 42 U.S.C. § 12132. The United States Supreme Court has held that Title II of the American with Disabilities Act is constitutionally valid and provides that **access to the Courts is**

a protected fundamental right. Tennessee v Lane, 541 US 509, 124 S.Ct. 1978, 158 L.Ed.2d 820 (2004) (emphasis added). Similarly, Article I, Section 10 of the Washington State Constitution guarantees that an individual **shall have access to the Courts** (emphasis added). The Washington State's Supreme Court has held that access to the judicial system is a "preservative ... and fundamental right ... since a judicial system is the central institution for the assertion, protection and enforcement of most other rights in our society". Carter v. University of Washington, 85 Wn.2d 391, 398, 536 P.2d 618, 623 (1975). See also John Doe v Bloodsender, 117 Wn.2d 772, 780, 819 P.2d 370 (1991) (Article I, Section 10 of the Washington State Constitution guarantees Washington citizens a right of access to court and identifies that right as "the Bedrock Foundation upon which rests all the people's rights and obligations").

Under Washington law, recovery for a wrongful death action is limited to the spouse or children of the deceased. RCW 4.20.020. These Tier I beneficiaries have no requirement of demonstrating financial dependency. The statute provides another level of beneficiaries which are regarded as Tier II beneficiaries. Under the second tier, parents or siblings of an adult decedent must demonstrate financial dependency upon the decedent in order to recover. See Philippides v. Bernard, 151 Wn.2d 376, 386, 88 P.3d 939 (2004); See also Armantrout v. Carlson, 166 Wn.2d 931, 214 P.3d 914 (2009). Tier II beneficiaries also include a

deceased's estate where the decedent had no surviving spouse or children. RCW 4.20.020. In this circumstance, the deceased's estate recovery is limited to "net accumulations which the State would have acquired if the decedent had survived to the expected lifetime." Federated Services Ins. Co. v. Personal Representatives of the Estate of Norberg, 101 Wn.App. 119, 126, 4 P.3d 844 (2000). Net accumulations are the "decedent's net earnings over a normal life-span, calculated by determining the decedent's probably gross earnings subtracting personal and family support expenditures, and then reducing the figure to present value." Federated Services, at 126, citing Bingaman v. Grays Harbor Community Hosp., 37 Wn.App. 825, 685 P.2d 1090 (1984), rev'd in part on other grounds, 103 Wn.2d 831, 699 P.2d 1230 (1985).

The phrase "net accumulations" presumes that the decedent had the ability over a normal life span to earn an income. This is the only reasonable conclusion one can draw. If RCW 4.20.020 is applied to Ms. Smith, because she was not capable of working and thus, would have acquired no net accumulations to claim, Ms. Smith could not bring a lawsuit in the first instance as she would have no damages available to her. Therefore, she would effectively be denied her Constitutional Right of Access to the Court.

Throughout the years, great strides have been made to address the disparities, discrimination and inequities faced by the disabled population of our

State. In 2006, the Washington State Department of Health released a report entitled "Disability in Washington State (May 2006)" in which there was an estimated 934,000 Washington residents over the age of five (5) who had a disability as defined by Washington statute. Id. These disabilities ranged from vision or hearing impairment to more severe mental or physical disabilities. Id. **Less than fifty (50) percent (%) of the disabled population is employed compared to seventy five (75) percent (%) of the non disabled population.** Id. (Emphasis added). The report concluded that it was an important task to rectify these disparities as well as to further the protection of that class of individuals with disabilities. Id.

In Ms. Smith's case, it is undisputed that she had a cognitive level of a five (5) to six (6) year old child. It is further undisputed that given her level of profound mental disability, Ms. Smith was incapable of employment and further, incapable of providing services that would have economic value. Because she was not capable of work and, therefore, had no net accumulations to recover, application of RCW 4.20.020 and the holding in Philippides vs. Bernard, 151 Wn.2d at 376, would deny Ms. Smith her fundamental and Constitutional Right of Access to the Court guaranteed by both the Federal and Washington State Constitutions. Given society's, the Legislatures and the Judiciary's commitment to eradicating discrimination against the disabled and providing parity to the

same, it defies rational and meaningful interpretation to conclude that the Legislature intended to bar profoundly mentally disabled individuals from the court system under RCW 4.20.020.

D. Kathleen Smith Should be Considered the Equivalent of a Minor Under Washington Law for Purposes of Applying the Wrongful Death Statutes.

RCW 26.28.015 defines the age of majority and specifies the rights of an adult upon reaching the age of 18 years. This includes:

- (1) To enter into any marriage contract without parental consent if otherwise qualified by law;
- (2) To execute a Will for the disposition of both real and personal property if otherwise qualified by law;
- (3) To vote in any election if authorized by the Constitution and otherwise qualified by law;
- (4) To enter into any legal contractual obligation and to be legally bound thereby to the full extent as any other adult person;
- (5) To make decisions in regard to their own body and the body of their lawful issue whether natural born to or adopted by such person to the full extent allowed to any other adult person including, but not limited to, to consent to surgical operation; and
- (6) To sue and be sued on any action to the full extent as any other adult person in any of the Court's of this State without the necessity for a Guardian ad Litem.

RCW 26.28.015.

Specifically, the statute identifies the rights an adult would have. Conversely, the statute also specifies the rights that are not afforded to a minor. In Ms. Smith's case, given her profound mental disability placing her at the age of five (5) or six (6), she would not be able to exercise the rights set forth in RCW 26.28.015. Despite chronologically having reached the age of 52 at the time of her death, Ms. Smith did not have the mental capacity necessary to be considered an adult. She was for all purposes, the equivalent of a minor child at the time she drowned while under the supervision of Lakeland.

The Washington State Legislature has recognized in other areas of the law that an adult due to a physical, mental or sensory handicap should still be considered a "child". RCW 51.08.030 defines a "child" for purposes of the industrial insurance statutes and provides as follows:

"child" means every natural born child, posthumous child, step child, child legally adopted prior to the injury, child born after the injury where conception occurred prior to the injury, and dependent child in the legal custody and control of the worker, all while under the age of 18 years, or under the age of 23 years while permanently at a full time course in an accredited school, **and over the age of 18 years if a child is a dependent as a result of a physical, mental, or sensory handicap.**

RCW 51.08.030 (emphasis added).

In Ms. Smith's case, there is no dispute that from birth she has suffered from a mental handicap that has limited her development to five (5) or six (6) years of age. She was never employable nor could she have provided services to her mother and brother. Prior to her admission to Lakeland at the age of 14, she was completely dependent upon her family for care and sustenance. This remained the same when Ms. Smith entered Lakeland. This included constant visual supervision within arm's length of Ms. Smith while bathing as specified by Lakeland's own internal written policies. In every aspect of her mental, emotional and physical limitations, Ms. Smith functioned as a five (5) to six (6) year old child.

The question as to whether an adult can be treated as a child has also been addressed in the area of divorce. In Childers v. Childers, 89 Wn.2d 592, 575 P.2. 201 (1978), the Court was faced with the question as to whether in a dissolution proceeding, a parent could be required to support a child beyond the age of majority while a college education was being pursued. Childers, at 594. In answering this question affirmatively, the Court looked to whether an adult could be defined as a dependent child. The Court first defined "dependent" as "one who looks to another for support and maintenance", "one who is, in fact, dependent", and "one who relies upon another for the reasonable necessities of life". Childers, at 598. The Court further stated that "dependency is a question of fact to be

determined from all surrounding circumstances, or as the Legislature put it: “all relevant factors”. RCW 26.09.100 Childers, at 598. “Age is but one factor. Other factors would include the child’s needs, prospects, desires, aptitudes, abilities and **disabilities** ... “. Childers, at 598 (emphasis added). The Childers Court correctly recognized that age alone did not define whether an individual should be regarded as a child. This fact was not lost upon the Court in Philippides v. Bernard, 151 Wn.2d 376, 88 P.3d 939 (2004). In distinguishing the parents of minor child from the parents of adult children, the Court stated that “the need for love and guidance, as well as financial support is a generational characteristic of minor children. Different considerations applied to adult children.” Philippides, at 392.

In Ms. Smith’s case, there can be no dispute that given her level of profound mental disability, she was dependent upon her mother, brother Lakeland to provide her with love, guidance and financial support. She was, in all respects, dependent upon these same individuals for the reasonable necessities of life. See Childers, 89 Wn.2d at 598.

Philippides v. Bernard, 151 Wn.2d at 376 and Armantrout v. Carlson, 166 Wn.2d at 931, recognized the difference between a minor child incapable of providing for his/her own reasonable necessities of life and an adult child who could provide for the same. This constitutes the defining difference between Ms.

Smith and other adults who have no limiting mental disability. Other than the fact that Ms. Smith was chronologically 52 years of age, in every other respect, she was a child.

The Legislature as well as the Courts in other areas of law has recognized that an adult can be considered a child by reason of mental disability. Similarly, Ms. Smith's profound mental disability should render her the equivalent of a minor for purposes of applying Washington's wrongful death statutes.

E. Independent of RCW 4.20.020, a Common Law Remedy Should Exist for Profoundly Mentally Disabled Adults and Their Parents and Siblings.

Should this Court find that RCW 4.20.020 does not apply to Ms. Smith as well as her mother and brother, Respondent's respectfully submit that a common law remedy should exist for Ms. Smith's wrongful death. Generally, wrongful death actions are strictly statutory and were unknown in common law. Whittlesey vs. Seattle, 94 Wash. 645, 163 P. 193 (1917); see also Huntington vs. Samaritan Hosp., 101 Wn.2d 466, 680 P.2d 58 (1984). Moreover, where the Legislature preempts an entire area of the law, the Court retains no authority to allow separate common law claims. See eg WWP v. Graybar Elec. Co., 112 Wn.2d 847, 854-56, 774 P.2d 1199 (1989). However, this is not the case when applied to Ms. Smith. As previously argued herein, RCW 4.20.020 and Philippides v. Bernard, *Supra*, which require a showing of financial dependency, presumes that the deceased

adult child at issue had the capacity to work and, therefore, the ability to provide financial assistance. Given Ms. Smith's profound mental disability and inability to work from the time of her birth. RCW 4.20.020 as well as the case law interpreting the statute does not apply to Ms. Smith. Thus, it cannot be stated that the Legislature has preempted the entire area of wrongful death.

In the absence of a complete preemption, changes in the law concerning remedies for wrongful death may come from the Courts as well as the Legislature. Roe v. Ludtke Trucking, Inc., 46 Wn.App. 816, 819-20, 732 P.2d 1021 (1987). It can be reasonably argued that the Courts have a responsibility to individuals such as Ms. Smith to develop the common law to recognize valid causes of action regardless of whether the Courts have previously refused to do so or the Legislature has acted. See Ueland v. Pengo Hydra-Poll Corp., 103 Wn.2d 131, 136, 691 P.2d 190 (1984) (recognizing a child's common law claim for loss of parental consortium); Lundgren v. Whitney's, Inc., 94 Wn.2d 91, 614 P.2d 1272 (1980) (reassessing common law to allow wife's claim for loss of consortium based on wrongful death of husband). Moreover, it is now generally established that the common law rule disallowing recovery for wrongful death was never well founded in American Law and has no present validity. See Moragne v. States Marine Lines, Inc., 398 US 375 (1970); see also, Restatement (second) of Torts, § 925, comment k (1977). In Moragne, the United States Supreme Court held that

there was no reason to deny a cause of action simply because the Defendant's breach of a recognized duty produced death rather than merely injured. Moragne, at 381. Thus, it is necessary to develop a common law remedy for an action in wrongful death to ensure that wrongful death is not merely a matter of Legislative grace and to assure an adequate remedy consistent with common law principles in similar context.

As the common law has developed in recognizing the parent's remedy for injury to the parent-child relationship, Washington has abandoned the requirement that a parent demonstrate a pecuniary loss of a child's services. Strode v. Gleason, 9 Wn.App. 13, 16, 510 P.2d 250 (1973). In Strode, the Court noted that traditional claims for interference with a parent-child relationship were based on "loss of real or imaginary services but in modern law this has become a complete fiction". Strode, at 16 quoting 1F Harper F James, The Law of Torts § 8.5 (1956). The true ground of a parent's action is based on the loss of companionship, society and love of the child. Strode, at 18 (emphasizing that Court's must exert their power to change the law if it "is to have a current relevance").

As in Strode, *Supra*, the Washington State Supreme Court in Ueland v. Pengo Hydra-Poll Corp, *Supra*, declined to limit the common law cause of action it recognized for a child's loss of parental consortium to only minor children who were dependent upon the parent for financial support. As in Strode, the Ueland

Court concluded that financial dependency is a matter for the jury to consider in fixing damages as opposed to a pre-requisite to recovery. Ueland v. Pengo Hydra-Poll Corp, 103 Wn.2d at 139-40; see also Strode v. Gleason, 9 Wn.App. at 18.

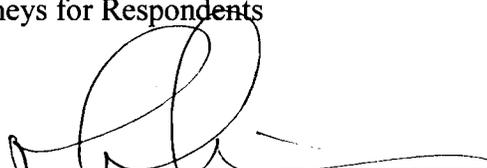
In the case of Ms. Smith as well as her mother Bettyjean Triplett and her brother Kevin Smith, this Court should recognize a common law cause of action for the wrongful death of Ms. Smith given the Legislature's failure to provide a remedy for Ms. Smith's egregious death at the hands of Lakeland and DSHS.

CONCLUSION

For the reasons set forth herein, Respondents' respectfully requests that DSHS's appeal be denied and the Summary Judgment ruling by Judge Tompkins on August 17, 2010 be affirmed. Further, Respondents' respectfully request that this Court find a common law remedy to exist for the wrongful death of Ms. Smith and for the benefit of Ms. Triplett and Mr. Smith.

RESPECTFULLY SUBMITTED this 18 day of April, 2011.

THE MARKAM GROUP, INC., P.S.
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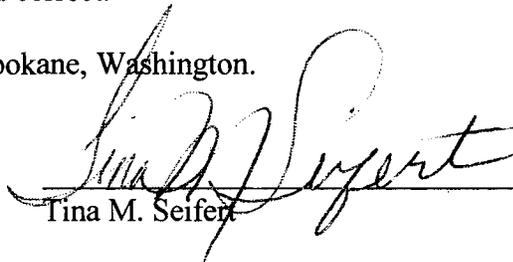
DECLARATION OF SERVICE

I caused to be served a true and correct copy of the foregoing document by the method indicated below and addressed to the following:

Jarold P. Cartwright	<input type="checkbox"/> U.S. Mail
Carl P. Warring	<input type="checkbox"/> Fax
Assistant Attorneys General	<input type="checkbox"/> Overnight Delivery
West 1116 Riverside Avenue	<input checked="" type="checkbox"/> Hand Delivery
Spokane, WA 99201-1194	

I declare under penalty of perjury under the laws of the State of Washington, that the foregoing is true and correct.

Dated April 18, 2011 at Spokane, Washington.


Tina M. Seifert