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No. 59275-1-1

COURT OF APPEALS, DIVISION I,
OF THE STATE OF WASHINGTON

KENT DUCOTE,

Appellant,

vs.

STATE OF WASHINGTON DEPARTMENT OF SOCIAL &
HEALTH SERVICES,

Respondents.

APPEAL FROM THE SUPERIOR COURT
FOR SAN JUAN COUNTY
THE HONORABLE VICKIE I. CHURCHILL

REPLY BRIEF OF APPELLANT

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I. REPLY TO RESTATEMENT OF FACTS

The Department's restatement of facts ignores this court's standard of review, citing to its summary judgment declarations as if they are jury findings and urging affirmance because the Department believes it might win on the merits if its version of the facts surrounding its investigation of the Ducote family is believed. But this court must view the facts in the record in the light most favorable to the appellant Kent Ducote. ***Versuslaw, Inc. v. Stoel Rives, LLP***, 127 Wn. App. 309, 319-20, 111 P.3d 866 (2005), *rev. denied*, 156 Wn.2d 1008 (2006). Under the proper standard of review, this court must reverse because the Department's motion and the trial court's decision were based on the legal conclusion that the Department did not owe Kent a duty of care as a step-parent, no matter how significant his role in the family and no matter how flawed the Department's dependency investigation.

This court has already rejected the State's claim that the declarations filed on reconsideration relevant to Kent's status as a *de facto* parent should not be considered on appeal, correctly denying the State's motion to strike the opening brief because the trial court did not strike, but considered, these pleadings before denying reconsideration. (CP 117-118; see 1/18/07 RP 1;

Commissioner's Notation Ruling of July 30, 2007) As the trial court considered the pleadings on reconsideration, they are properly before this court on appeal. See *Jacob's Meadow Owners Ass'n v. Plateau 44II, LLC*, ___ Wn. App. ___, ¶¶ 20-21, 62 P.3d 1157 (July 23, 2007).

More importantly, however, there was sufficient evidence before the trial court to defeat the State's summary judgment motion before Kent sought reconsideration. The materials submitted by the State itself in its motion for summary judgment establish that Kent's parental role had already been conceded by the State, and confirmed by Judge Hancock, in the dependency proceedings. The Attorney General contended in the dependency proceedings that Kent's parental rights should be limited, arguing "[i]f [the mother] is conceding that parenting to him, he is responsible." (CP 33) The State served Kent, as well as Dixie, with process in the dependency action, notifying him that "if the Court finds the child dependent, [it] could result in substantial restriction or permanent loss of your parental rights." (CP 87)

In dismissing the dependency, Judge Hancock expressed concern that Brittney "felt alienated and needed to be separated from" Kent and Dixie, and that Kent and Dixie should "examine his

or her conduct that lead to Brittany's [stet] removal from the home" and "provide love to her" because she "is in her formative years and needs guidance, understanding, role models to adulthood." (CP 59) Judge Hancock found that Brittney "thought *Kent* and Dixie were unfair and overly strict with their discipline and rules for behavior," recognizing "that adolescent girls are capable of prevaricating and devising schemes to get what they want." (FF 24, CP 75) (emphasis added)

In other words, Kent's parental role was crucial both to the State's allegations of dependency and to Judge Hancock's ultimate rejection of the Department's claims. Having recognized Kent's responsibility to his family by seeking to have him removed from the family home and prosecuted, the State cannot now evade the consequences of its negligent investigation leading to his removal and prosecution.

As to the Department's claims that its investigation was proper and its actions justified, the record on summary judgment is to the contrary. As set out in the opening brief at 5-8, the Department, acting on the inconsistent, ill-motivated, unverified, and fantastic reports of the parties' teen-aged daughter, and with *no* further investigation, pursued dependency actions as to all the

children and had Kent removed from his home and prevented from contacting his family. It did so solely because the Department caseworker claimed that he had “never had an adolescent . . . making allegations of sexual misconduct *by their parent* that did not have some truth in it.” (CP 148) (emphasis added) Besides confirming that the Department knew of and relied upon Kent’s parental role in investigating (or, more accurately failing to investigate) before having him removed from the family home, on review of summary judgment this court must disregard the Department’s version of the “facts.”

II. REPLY ARGUMENT

The State’s extensive historical review of the case law developing the tort of negligent investigation under RCW ch. 26.44 is largely irrelevant to the particular question raised here – whether a step- or *de facto* parent living in the family home has a cause of action against the Department for a negligent investigation that causes him to be removed from the home and ordered to refrain from contacting his step-children. None of the cases relied upon by the State foreclose a claim under RCW 26.44.050 for a member of the affected *family*, which may include step-parents.

Instead, the cases developing the claim all speak in terms of the Department's obligation to a child's "family." ***Tyner v. Department of Soc. & Health Servs.***, 141 Wn.2d 68, 79, 1 P.3d 1148 (2000) ("family members are protected from unwarranted separation from their children" by RCW 26.44.050); ***M.W. v. Department of Social and Health Servs.***, 149 Wn.2d 589, 602, 70 P.3d 954 (2003) (RCW ch. 26.44 addresses "unnecessary interference with the integrity of the family."); ***Roberson v. Perez***, 156 Wn.2d 33, 45, 123 P.3d 844 (2005) (statute intended "to preserve the integrity of the family.") (See Opening Br. 12-13)

The cases relied upon by the State, where claims were rejected, involve compensated, regulated caregivers. ***Pettis v. DSHS***, 98 Wn. App. 553, 990 P.2d 453 (1999) (director of school district's licensed day care center); ***Blackwell v. DSHS***, 131 Wn. App. 372, 127 P.3d 752 (2006) (licensed foster parents). Unlike the plaintiff here, such caregivers can never meet the third factor of *de facto* parentage because they do not "assume[] obligations of parenthood without expectation of financial compensation." ***Parentage of L.B.***, 155 Wn.2d 679, 708, 122 P.3d 161 (2005), *cert. denied*, 126 S. Ct. 2021 (2006). See also ***In re Dependency of J.H.***, 117 Wn.2d 460, 469, 815 P.2d 1380 (1991) (relationship

between foster parent and “child is by its very nature temporary, transitional and for the purpose of supporting reunification with the legal parents”); *In re Adoption of R.L.M.*, 138 Wn. App. 276, 287, 156 P.3d 940 (2007) (“Foster parents have no due process right to participate in proceedings determining the custody of children placed in their care, even if they have become a child's psychological parent.”).

As a step-parent, to the contrary, Kent had an expectation of financial *obligation*, not compensation. (See Opening Br. 18-19) Contrary to the State's claim, Kent's parental role was clearly fostered by the children's mother, his wife, over the six years the family lived together before he was removed as a result of the Department's negligent investigation. The DSHS referrals relied on by the Department as “proof” that Kent cannot meet the first factor of the *de facto* parent standard under *Parentage of L.B.*, 155 Wn.2d at 708, occurred years before (CP 65-66) and in any event could do nothing but raise an issue of fact.

The State also misplaces its reliance on the definition of terms in RCW Title 13 in interpreting the Department's obligations under RCW ch. 26.44. Leaving aside that the sections relied upon by the Department limit their definitions to that title (RCW

13.04.011, providing definitions “[f]or purposes of this title”) and chapter (RCW 13.34.030, providing definitions “[f]or purposes of this chapter”), RCW ch. 26.44 has its own definitional section, which neither references nor incorporates the definitions in RCW Title 13. RCW 26.44.020.

Further, the investigation obligation that creates an actionable duty arises not from RCW Title 13, but from the Department’s obligation to “investigate and . . . report in accordance with chapter 74.13 RCW.” RCW 26.44.050. RCW ch. 74.13 likewise has a definitional section that does not limit the Department’s obligation. See RCW 74.13.020(4) (defining “child welfare services” as [p]rotecting and promoting the welfare of children, including the strengthening of their own homes . . .”) Indeed, RCW 74.13.031 expressly defines the Department’s duty to investigate the acts “of a parent *or caretaker*” and provide services to “parents, legal custodians, *or persons serving in loco parentis.*” RCW 74.13.031(3) (emphasis added) (discussed in Opening Br. 13-14). And RCW 26.44.040 mandates that the report triggering the investigation obligation provide “[t]he name and address of the child’s parents, stepparents, guardians, or other persons having custody of the child.” RCW 26.44.040(2).

Thus, contrary to the Department's argument (Response Br. 28), the "plain language" of the *relevant* statutes neither "specifically excludes" step-parents nor defines the Department's obligation to children and their families in a way that would prevent Kent from having standing to pursue his claim for negligent investigation leading to his removal from the family home. It is true, as the Department argues (Resp. Br. 31-34), that a step-parent's obligation to the family ceases on divorce. Had Kent and Dixie divorced, that might have some relevance to Kent's standing. But they have not, and Kent's parental role in the family, and thus his standing to bring this claim, remains supported by evidence and by statutory and case law. More importantly, Kent's parental role in the family was asserted by the State itself when it relied upon a deficient and incomplete investigation to impose restrictions on Kent's parental role in the dependency action before Judge Hancock.

III. CONCLUSION

For the reasons set out in this and the opening brief, this court should reverse and remand Kent Ducote's claims against the Department for trial.

Dated this 29th day of August, 2007.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on August 29, 2007, I arranged for service of the Reply Brief of Appellant, to the court and to counsel for the parties to this action as follows:

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DATED at Seattle, Washington this 29th day of August, 2007.


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