

SUPREME COURT NO. 83516-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re Dependency of K.N.J., a Minor

STATE OF WASHINGTON, DSHS,

Respondent,

v.

MICHAEL JENKINS,

Appellant.

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable Kenneth L. Cowser, Judge

^P~~PETITIONER~~
SUPPLEMENTAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>SUPPLEMENTAL ISSUES</u>	1
B. <u>SUPPLEMENTAL STATEMENT OF THE CASE</u>	1
C. <u>SUPPLEMENTAL ARGUMENTS</u>	3
I. GIVEN THE DIFFERENT PROTECTIONS AND RIGHTS AFFORDED PARENTS DURING DEPENDENCY FACT-FINDINGS AND REVIEW HEARINGS, A DEPENDENCY CANNOT BE LEGALLY ESTABLISHED AS A RESULT OF A STANDARD REVIEW HEARING.	3
II. THE REVIEW ORDERS FAIL TO ESTABLISH A SUFFICIENT FACTUAL BASIS TO SUPPORT THE JUVENILE COURT'S LEGAL CONCLUSION THAT K.N.J. REMAINS A DEPENDANT CHILD.	16
III. THE STATE'S FAILURE TO OBTAIN A VALID DEPENDENCY ORDER WAS NOT HARMLESS.	18
D. <u>CONCLUSION</u>	21

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

<u>Babcock v. State</u> 116 Wn.2d 596, 809 P.2d 143 (1991)	7, 8, 13
<u>In re Custody of Smith</u> 137 Wn.2d 1, 969 P.2d 21 (1998)	3
<u>In re Dependency of A.C.</u> 123 Wn. App. 244, 98 P.3d 89 (2004)	15
<u>In re Dependency of A.G.</u> 93 Wn. App. 268, 968 P.2d 424 (1998)	7
<u>In re Dependency of A.S.</u> 101 Wn. App. 60, 6 P.3d 11(2000)	12
<u>In re Dependency of A.W.</u> 53 Wn. App. 22, 765 P.2d 307 (1989)	14
<u>In re Dependency of Brown</u> 149 Wn.2d 836, 72 P.3d 757 (2003)	7
<u>In re Dependency of C.R.B.</u> 62 Wn. App. 608, 814 P.2d 1197 (1991)	7
<u>In re Dependency of Chubb</u> 112 Wn.2d 719, 773 P.2d 851 (1989)	8, 9, 10, 11, 14, 16
<u>In re Dependency of K.N.J.</u> 151 Wn. App. 306, 211 P.3d 483 (2009)	1, 3, 4, 7, 11, 12, 17
<u>In re Dependency of R.L.</u> 123 Wn. App. 215, 98 P.3d 75 (2004)	15
<u>In re Frank</u> 41 Wn.2d 294, 248 P.2d 553 (1952)	4

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>In re Luscier</u> 84 Wn.2d 135, 524 P.2d 906 (1974)	4
<u>In re Warren</u> 40 Wn.2d 342, 243 P.2d 632 (1952)	6
<u>In re Welfare of H.S.</u> 94 Wn. App. 511, 973 P.2d 474 (1999)	4, 12
<u>Matter of Welfare of Henderson</u> 29 Wn. App. 748, 630 P.2d 944 (1981)	12
<u>Moore v. Burdman</u> 84 Wn.2d 408, 526 P.2d 893 (1974)	15
<u>National Bank of Wash. v. McCrillis</u> 15 Wn.2d 345, 130 P.2d 901, 144 A.L.R. 1197 (1942).....	5
<u>Painter v. Olney</u> 37 Wn. App 424, 680 P.2d 1066 (1984)	4
<u>State v. Applegate</u> 147 Wn. App. 166, 94 P.3d 1000 (2008)	20
<u>State v. Levy</u> 156 Wash.2d 709, 132 P.3d 1076 (2006).....	20
<u>State v. Norlund</u> 31 Wn. App. 725, 644 P.2d 724 (1982)	12
<u>State v. Ruse</u> 138 Wn.2d 1, 977 P.2d 570 (1999)	16
 <u>FEDERAL CASES</u>	
<u>Santosky v. Kramer</u> 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982)	3

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>Troxel v. Granville</u> 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000)	3

OTHER JURISDICTIONS

<u>Fooks' Executors v. Ghingher</u> 172 Md. 612, 192 A. 782 (1937)	19
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RULES, STATUTES AND OTHER AUTHORITIES

1 Freeman On Judgments, § 322	19
ER 1101	8, 13
RCW 26.44	6
RCW 13.34.030	2, 6, 7, 18
RCW 13.34.060	5
RCW 13.34.065	5
RCW 13.34.070	5
RCW 13.34.090	6
RCW 13.34.110	4, 6, 7, 9, 13, 16, 18, 21
RCW 13.34.130	17
RCW 13.34.138	7, 8, 11
RCW 13.34.150	14
RCW 13.34.180	2, 18, 21
U.S. Const. amend. V	3

TABLE OF AUTHORITIES (CONT'D)

	Page
U.S. Const. amends. XIV.....	3
Wash. Const. art. 1 § 3.....	4

A. SUPPLEMENTAL ISSUES

1. Given the functional and procedural differences between dependency fact-findings and dependency review hearings, is it legally permissible to establish a valid dependency for the first time within the review process?

2. If so, do the dependency review orders (review orders) issued in this case in fact establish a dependency?

3. May the failure of the State to procure a valid dependency order be rendered harmless by subsequent termination proceedings?

B. SUPPLEMENTAL STATEMENT OF THE CASE

K.N.J. was born September 19, 2005. CP 310. Her biological parents are Marquesha Everett and Michael Jenkins (petitioner). CP 310. Everett took custody of K.N.J. after birth. RP 220. Eventually, it was discovered Everett was abusing K.N.J. CP 260-67. With Jenkins' help, K.N.J. was removed from Everett's custody, placed in foster care, and a dependency petition was filed. CP 260-67, 310-11.

A dependency hearing was held April 19, 2006. CP 430. Judge pro tempore (pro tem.) Kathryn Trumbull presided. CP 430. Everett was present and consented to having the matter heard by

Trumbull, stipulating to the facts necessary to support the dependency as to her. CP 225-32, 429. Jenkins did not appear, was not represented by counsel, and thus did not consent to a pro tem. judge. CP 225-32. Despite Jenkins' lack of consent, Trumbull entered a default dependency order as to Jenkins and K.N.J. CP 225-32.

As the case progressed, an elected judge presided over dependency review hearings. CP 81-91, 121-27, 156-163. The review orders included the following factual finding:

2.5 [X] Pursuant to RCW 13.34.030, the child was found dependant as to the father on **April 18, 2006**.

CP 82, 122, 157. Based on this finding, the juvenile court concluded:

3.1 [X] The child remains a dependent child pursuant to RCW 13.34.030. The supervising agency is: Department of Social and Health Services.

CP. 87, 124, 159.

Eventually, the Department filed a termination petition and Jenkins obtained counsel. CP 406-420; RP 65. Defense counsel moved to dismiss on grounds the dependency order was void due to Jenkins' lack of consent to the judge pro tem. and, therefore, the State could not prove RCW 13.34.180(1)(a)-(c). RP 5-10, 216,

354-57; CP 10-11. The trial court denied Jenkins' motion to dismiss and terminated his parental rights. CP 309-327, 358-361.

Jenkins appealed. The Court of Appeals agreed the dependency order was void. It concluded, however, any jurisdictional defect was corrected by the review orders, which it held amounted to an implicit dependency finding. In re Dependency of K.N.J., 151 Wn. App. 306, 312-15; 211 P.3d 483 (2009).

C. SUPPLEMENTAL ARGUMENTS

- I. GIVEN THE DIFFERENT PROTECTIONS AND RIGHTS AFFORDED PARENTS DURING DEPENDENCY FACT-FINDINGS AND REVIEW HEARINGS, A DEPENDENCY CANNOT BE LEGALLY ESTABLISHED AS A RESULT OF A STANDARD REVIEW HEARING.

It is well established in Washington and federal law that the relationship between a parent and his child involves a constitutionally protected, fundamental right that cannot be abridged without due process of law. Santosky v. Kramer, 455 U.S. 745, 754, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982); In re Custody of Smith, 137 Wn.2d 1, 13-14, 969 P.2d 21 (1998), aff'd sub nom, Troxel v. Granville, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000) (citations omitted); U.S. Const. amends. 5, 14; Const. art. 1

§ 3. As such, child deprivation hearings are the “subject of close scrutiny,” and the role of appellate courts is to carefully review the hearing “to assure that the interested parties have been accorded the procedural fairness required by due process of law.” In re Luscier, 84 Wn.2d 135, 137, 524 P.2d 906 (1974).

A threshold element of due process is the establishment of a court’s jurisdiction over a case. Painter v. Olney, 37 Wn. App 424, 427, 680 P.2d 1066 (1984). In the context of a dependency case, the juvenile court must enter a valid dependency order to retain jurisdiction over a particular parent-child relationship. RCW 13.34.110; In re Frank, 41 Wn.2d 294, 295, 248 P.2d 553 (1952), superseded by statute on other grounds. Once a dependency is established, the juvenile court retains jurisdiction until the child has been returned to the parents for six months or termination proceedings begin. In re Welfare of H.S., 94 Wn. App. 511, 524, 973 P.2d 474 (1999).

Here, the juvenile court failed to establish jurisdiction over the relationship between Jenkins and K.N.J. because the default dependency order was entered by a pro tem. judge without Jenkins’ consent. Thus, the order is void. See, National Bank of Wash. v. McCrillis, 15 Wn.2d 345, 356, 130 P.2d 901, 144 A.L.R. 1197

(1942). The Court of Appeals acknowledged this; however, it concluded the review hearing orders served as an implicit finding of dependency sufficient to establish the juvenile court's jurisdiction over the matter. K.N.J., 151 Wn. App. at 315. As shown below, the statutory language and applicable case law does not support this conclusion.

The dependency statutes establish the Legislature did not intend review hearings to be a mechanism for implicitly establishing a dependency where none previously exists.

Under the dependency statutes, the State initially becomes involved with a family on an emergency basis through the shelter care process, with the trial court determining whether the child can be returned home safely while the adjudication of the dependency is pending. RCW 13.34.060-.065. Once a dependency petition is filed, the Legislature directs juvenile courts to hold a fact-finding hearing within 75 days, unless exceptional circumstances exist or a parent waives this right. RCW 13.34.070(1), 13.34.110. The purpose of the dependency hearing is to determine whether the petitioner can meet its burden of showing the child is dependent as

defined by statute¹ and to establish the juvenile court's continuing jurisdiction over the matter. RCW 13.34.110(1); In re Warren, 40 Wn.2d 342, 343, 243 P.2d 632 (1952).

Given the significant rights at stake in dependency fact-findings, the Legislature has provided parents with specific protections and rights to ensure a fundamentally fair process:

The court shall hold a fact-finding hearing on the petition and, unless the court dismisses the petition, shall make written findings of fact, stating the reasons therefore. The rules of evidence shall apply at the fact-finding hearing and the parent, guardian, or legal custodian of the child shall have all of the rights provided in RCW 13.34.090(1).² The petitioner shall

¹ A "dependent child" is statutorily defined as a child who:

(a) Has been abandoned;

(b) Is abused or neglected as defined in chapter 26.44 RCW by a person legally responsible for the care of the child; or

(c) Has 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(5).

² RCW 13.34.090(1) provides:

Any party has a right to be represented by an attorney in all proceedings under this chapter, to introduce evidence, to be heard in his or her own behalf, to

have the burden of establishing by a preponderance of the evidence that the child is dependent within the meaning of RCW 13.34.030.

RCW 13.34.110(1).³

If a juvenile court finds a child dependent within the meaning of RCW 13.34.030, it then enters an order of disposition and placement orders. RCW 13.34.110 and .130. Dispositional hearings establish where children being removed from their parent's care will be placed and what services will be required for reunification. Babcock v. State, 116 Wn.2d 596, 601-02; 809 P.2d 143 (1991). A parent has a right to appeal dependency and disposition orders. In re Dependency of Brown, 149 Wn.2d 836, 840-41, 72 P.3d 757 (2003).

After dependency and disposition orders are put in place, the Legislature directs juvenile courts to undertake regular dependency reviews. RCW 13.34.138(1) provides:

examine witnesses, to receive a decision based solely on the evidence adduced at the hearing, and to an unbiased fact finder.

³ Even in the context of default dependency or termination orders, procedural due process requirements must be met for an order to be valid. See, K.N.J., 151 Wn. App. at 310-11; In re Dependency of A.G., 93 Wn. App. 268, 276-78, 968 P.2d 424 (1998); In re Dependency of C.R.B., 62 Wn. App. 608, 617-18, 814 P.2d 1197 (1991).

The status of all children found to be dependent shall be reviewed by the court at least every six months from the beginning date of the placement episode or the date dependency is established, whichever is first. The purpose of the hearing shall be to review the progress of the parties and determine whether court supervision should continue.

Unlike disposition hearings or dependency fact-findings, review hearings only serve to determine whether an existing dependency should continue or whether a child can be placed back with a parent. Babcock, 116 Wn.2d at 605. Hence, the review process focuses on issues such as visitation rights, parental cooperation with the Department of Social and Health Services, and whether additional services are required. Id. The stakes are not as high as dependency fact-findings and, therefore, procedural protections are more relaxed. The rules of evidence do not apply during review hearings, and parents are not permitted to appeal review orders as a matter of right, given that they are part of an ongoing dependency process. ER 1101(c)(3); In re Dependency of Chubb, 112 Wn.2d at 724, 112 Wn.2d 719, 773 P.2d 851 (1989).

The plain language of RCW 13.34.138(1) demonstrates the Legislature's intent that the review process be predicated on a pre-existing dependency order. In the first sentence, the Legislature specifically directs the juvenile court to review the status of a child

“found to be dependent.” The Legislature provides no mechanism to establish a dependency within the review process. Instead, it presumes a child has been found dependant under RCW 13.34.110 prior to any review hearing.

Additionally, the Legislature’s express statement of the purpose of review hearings – “to determine whether court supervision should continue” – also reveals its intent that a valid dependency order be in place prior to review. Without a valid dependency establishing court supervision in the first place, there is nothing to “continue.” Thus, the statutory language reveals that a valid dependency order is a prerequisite to the review process and, thus, the review process itself cannot result in such an order.

Not only does the statutory language support appellant’s contention a dependency cannot be established implicitly via standard review orders, but so does this Court’s interpretation of the dependency statutes in Chubb. There, the question before this Court was whether the petitioner was entitled to appellate review of each review hearing order. Chubb had been declared a dependent child. After the juvenile court continued the child’s dependent status at a review hearing, the mother sought review of that order as a matter of right. She contended each dependency review was

a reestablishment of the original dependency. Chubb, 112 Wn.2d at 723.

Rejecting the mother's argument, this Court explained the dependency statutes provide for an on-going "built-in review process for the original disposition." Id. at 722 (emphasis added). This Court then described the functional difference between the establishment of a dependency and the ongoing review of an existing dependency:

The juvenile court is not required to make the determination of dependency anew at each [review] hearing. Its function is to determine whether court supervision should continue. Essentially, if this supervision is to continue, then what the juvenile court has decided is to abide by the status quo: the determination of dependency.

... This review process continues until either the status quo changes and the court decides its supervision should not continue or until a petition for termination is made. Because they take place in an ongoing process, the review hearings and orders issued from them are interlocutory: they are not final, but await possible revision in the next hearing,

Chubb, 112 Wn.2d at 724 (emphasis added). It is these functional differences that provided the rationale for this Court's conclusion that disposition orders are reviewable as a matter of right, while review orders are not.

Under the plain language of the statute and this Court's interpretation of it in Chubb, the juvenile court's function during review hearings is not to establish a dependency where none previously exists. Instead, dependency review courts are to review the status of an existing dependency and decide whether to maintain the status quo or to dismiss the dependency. Here, the dependency review orders did nothing more than maintain the status quo and continue a void dependency.

Despite the statutory language and this Court's decision, the State and Court of Appeals assert review hearings can result in implicit dependency findings. The Court of Appeals pointed to the same language from Chubb cited by petitioner above, but then abruptly concluded: "Chubb thus only holds that orders entered after dependency review hearings are not appealable." K.N.J. 151 Wn. App. at 315. The crux of its reasoning appears to be that courts are free to treat review orders as a substitute for a valid dependency order because Chubb does not explicitly exclude that possibility. However, such a narrow reading of Chubb not only ignores this Court's explanation of the differences between a dependency determination and its ongoing review, it also fails to give meaning to the express language of RCW 13.34.138(1).

Instead, the State and Court of Appeals have carefully plucked language from several cases in support of the assertion that review hearings result in implicit dependency findings. K.N.J., 151 Wn.2d at 313-14; Answer to Motion for Discretionary Review (AMDR) at 11-14. These cases are easily distinguishable, however, because the juvenile court's jurisdiction already had been established via valid dependency orders.⁴ None of the cases cited by the state contemplated a situation where the underlying dependency order was void (not voidable), and the juvenile court's jurisdiction over the matter had never been established prior to the review hearings.

Most importantly, neither the State nor the Court of Appeals addresses the loss of a parent's due process rights that would

⁴ See, In re Dependency of A.S., 101 Wn. App. 60, 65, 6 P.3d 11(2000) (showing a valid dependency order had been entered after fact-finding hearing); In re Welfare of H.S., 94 Wn. App. 511, 523, 973 P.2d 474 (1999) (showing original dependency order valid); In re Dependency of A.W., 53 Wn. App. 22, 26-27, 765 P.2d 307 (1989) (holding appellant had waived personal jurisdiction defense to the original dependency order; thus, it was valid); State v. Norlund, 31 Wn. App. 725, 644 P.2d 724 (1982) (holding appellant had waived any personal jurisdiction defense to the original dependency order); Matter of Welfare of Henderson, 29 Wn. App. 748, 750, 630 P.2d 944 (1981) (explaining a trial court had validly established dependency even though the order was based upon a statute that had been amended by the time of the termination trial).

result if juvenile courts were permitted to establish a dependency through the review process. First, if a dependency fact-finding were simply done on an ad hoc basis during a review hearing, parents would be denied proper notice that a dependency fact-finding is to take place (as the facts of this case aptly demonstrate).

Second, although review hearings must be meaningful, they are considerably more relaxed, and the rules of evidence do not apply. ER 1101(c)(3). Hence, parents whose child's dependency is established during a review hearing would not be afforded the same procedural protections as those parents who have benefitted from a full fact-finding under RCW 13.34.110.⁵

Third, parents have a right to appeal a dependency order, but not a review order. Thus, if a dependency is established implicitly via a review order, the parent would lose the opportunity to have a higher court review the juvenile court's dependency findings.⁶ See, Babcock, 116 Wn.2d at 615 (explaining the right to appeal an initial disposition order is a significant judicial safeguard not present during review hearings).

⁵ This raises a significant equal protection question.

⁶ This also raises a significant equal protection question.

In response to Jenkins' petition, the State claims juvenile courts would be precluded from making any major changes to a child's status during a review hearing if this Court finds that review hearings are simply a determination of whether to continue the status quo (as stated in Chubb, 112 Wn.2d at 724). AMDR at 10. This is not so. First, Chubb specifically contemplates the juvenile court may conclude during the review hearing that court supervision need not continue. 112 Wn.2d at 724. Second, the Legislature has provided a procedure for modifying orders based on substantial changes. See, RCW 13.34.150.

The State also claims that if parents are permitted to challenge void dependency orders on jurisdictional grounds, an unreasonable disruption of a child's permanency would result. AMDR at 10. While a child's permanency is an important aim in dependency proceedings, there is no need to carve out special exceptions to civil procedure rules in order to achieve this goal. The State had every opportunity to secure permanency by following ordinary civil procedural rules that apply equally to all parties. Parents are held to strict procedural standards, A.W. 53 Wn. App. at 24, and it is in a child's best interest to hold the State strictly to these standards as well. Indeed, K.N.J.'s permanency would not

have been jeopardized had the State undertaken the simple step of procuring a default dependency order from an elected judge rather than from a pro tem. judge without petitioner's consent.

Moreover, permanency is not the only interest to be considered in dependency proceedings. A child also has a strong interest in maintaining close ties with his biological family when possible. See, Moore v. Burdman, 84 Wn.2d 408, 411-12, 526 P.2d 893 (1974) (noting the psychological need of children to stay connected with biological parent); In re Dependency of A.C., 123 Wn. App. 244, 251, 98 P.3d 89 (2004) (noting the Legislature's increasing interest in providing children with continuing connection to their biological families, culture, traditions and history). Consequently, Washington courts recognize "in contested hearings where placement of the child is at issue, giving interested parties a meaningful opportunity to present evidence coincides with the best interest of the child." In re Dependency of R.L., 123 Wn. App. 215, 223, 98 P.3d 75 (2004). This interest would not be served if the State were permitted to bypass the dependency fact-finding process and the protections it affords.

As shown above, under the plain language of the dependency statutes and under this Court's interpretation of that

language in Chubb, review orders do not represent an implicit establishment of a dependency, and therefore, they can not make up for a void order. Accordingly, this Court should reverse the Court of Appeals and remand for proceedings under RCW 13.34.110(1).

II. THE REVIEW ORDERS FAIL TO ESTABLISH A SUFFICIENT FACTUAL BASIS TO SUPPORT THE JUVENILE COURT'S LEGAL CONCLUSION THAT K.N.J. REMAINS A DEPENDANT CHILD.

Even if this Court finds juvenile courts may, under certain circumstances, establish a dependency during the review process, this Court must still review the content of the review orders to determine whether they do in fact establish a dependency. They do not.

RCW 13.34.110(1) requires the juvenile court to establish – via written factual findings -- factual grounds for concluding a child is dependent. Findings of fact are reviewed to determine whether they are supported by substantial evidence and, if so, whether the court's findings support its conclusions of law. State v. Ruse, 138 Wn.2d 1, 5-6, 977 P.2d 570 (1999).

Here, the juvenile court's only factual finding regarding the establishment of K.N.J.'s dependent status was a reference to the

void dependency order. CP 82, 122, 157. Thus, the juvenile court relied solely on the validity of the default dependency order as the factual basis supporting its legal conclusion that K.N.J. remains a dependent child. CP 87, 124, 159. Given that the default order was void, however, that order does not constitute substantial evidence regarding K.N.J.'s dependent status.

Although the Court of Appeals also points to the trial court's findings regarding K.N.J.'s out-of-home placement as an implicit dependency finding, K.N.J., 151 Wn. App. at 312-13, the emphasis on this finding is misplaced and once again ignores important statutory requirements.

The juvenile court found:

2.9 [X] The child has been residing in foster care since February 17, 2006. A reason for removal of the child as set forth in RCW 13.34.130(2):

.... [X] still exists and the child should not be returned home.

CP 82-83, 122-23, 157-58. This finding expressly references as its legal basis RCW 13.34.130, a statute pertaining to placement decisions after a fact-finding hearing and after a child has been found dependent.⁷ Thus, the juvenile court's placement finding is

⁷ RCW 13.34.130 provides:

predicated upon the prior existence of a valid dependency order and does not implicitly establish a dependency.

Given the findings and conclusions in the review hearing orders, these orders did not provide a factual basis to establish K.N.J. is a dependant child – the orders merely assume this. Thus, the review orders do not constitute clear, cogent, and convincing evidence that K.N.J. was a dependent child as was required under RCW 13.34.180(1). As such, this Court should reverse the Court of Appeals, reverse the termination order, and remand for further proceedings.

III. THE STATE'S FAILURE TO OBTAIN A VALID DEPENDENCY ORDER WAS NOT HARMLESS.

The State suggests the jurisdictional error here was made harmless by the subsequent termination of petitioner's parental rights. AMDR 12-13. The State is incorrect.

If, after a fact-finding hearing pursuant to RCW 13.34.110, it has been proven by a preponderance of the evidence that the child is dependent within the meaning of RCW 13.34.030 after consideration of the social study prepared pursuant to RCW 13.34.110 and after a disposition hearing has been held pursuant to RCW 13.34.110, the court shall enter an order of disposition pursuant to this section.

Emphasis added.

The dependency order is void. The legal status of a void judgment has been aptly explained as follows:

“A judgment void upon its face and requiring only an inspection of the record to demonstrate its invalidity is a mere nullity, in legal effect no judgment at all, conferring no right and affording no justification. Nothing can be acquired or lost by it; it neither bestows nor extinguishes any right, and may be successfully assailed whenever it is offered as the foundation for the assertion of any claim or title. It neither binds nor bars any one. All acts performed under it and all claims flowing out of it are void. The parties attempting to enforce it may be responsible as trespassers. The purchaser at a sale by virtue of its authority finds himself without title and without redress. No action upon the part of the plaintiff, no inaction upon the part of the defendant, no resulting equity in the hands of third persons, no power residing in any legislative or other department of the government can invest it with any of the elements of power or of vitality. ...Such a judgment has been characterized as a dead limb upon the judicial tree, which may be chopped off at any time, capable of bearing no fruit to plaintiff but constituting a constant menace to defendant.

Fooks' Executors v. Ghingher, 172 Md. 612, 619, 192 A. 782 (1937) (citing 1 *Freeman On Judgments*, § 322). A void judgment may never be rendered harmless by subsequent proceedings relying on it, because the judgment is without recognized legal authority and all judicial acts flowing from it are void.

Here, the State's procurement of a void dependency order tainted the entire framework of the dependency and termination proceedings. Thus, the error is structural and resists harmless error review. State v. Levy, 156 Wash.2d 709, 725, 132 P.3d 1076 (2006), see also, State v. Applegate, 147 Wn. App. 166, 170 194 P.3d 1000 (2008) (harmless error doctrine cannot resurrect a void proceeding). Hence, the error is not harmless despite subsequent termination findings.

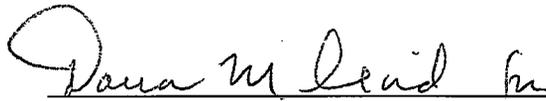
D. CONCLUSION

Due to the State's failure to prove RCW 13.34.180(1)(a)-(c), petitioner respectfully asks this Court to reverse the termination order. This Court should remand for proceedings under RCW 13.34.110(1) and for consideration of whether to stay any legal action pertaining to K.N.J's adoption until the ongoing dependency is settled.

DATED this 16th day of February, 2010.

Respectfully submitted,

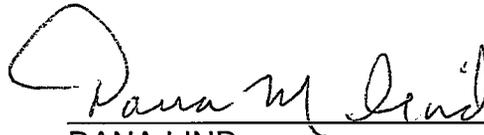
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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In Re the Dependency of K.N.J. and K.M.J.)	
)	
STATE OF WASHINGTON/DSHS,)	
)	
Respondent,)	
)	
v.)	NO. 83516-1
)	
MICHAEL JENKINS,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 16TH DAY OF FEBRUARY 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **SUPPLEMENTAL BRIEF OF APPELANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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DPC NO. 776900
AIRWAY HEIGHTS CORRECTION CENTER
P.O. BOX 2049
AIRWAY HEIGHTS, WA 99006

SIGNED IN SEATTLE WASHINGTON, THIS 16TH DAY OF FEBRUARY 2010.

x *Patrick Mayovsky*