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NO. 64711-3

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

In re the Dependency of J.M.R.

JOHN ROUSSEAU,

Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF SOCIAL AND HEALTH SERVICES,

Respondent.

BRIEF OF RESPONDENT

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COURT OF APPEALS DIVISION I
STATE OF WASHINGTON

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I. SUMMARY OF ARGUMENT

John Rousseau, the father of J.M.R. (d.o.b. 07/12/02), stipulated that his parental rights be terminated on April 14, 2009. While Rousseau has not parented J.M.R. since April, 2007, he now seeks to vacate the agreed order terminating his parental rights. At the time of trial on termination, April 13, 2009, J.M.R. was 6½ years old and had been removed from the care and custody of his parents for two years. The mother relinquished her parental rights the day prior to trial. J.M.R. was stable and in a prospective adoptive home, a situation supported by Rousseau, who agreed J.M.R. should remain permanently in that home. On the second day of trial, Rousseau decided to stipulate to termination and the order entered. Rousseau then sought direct appeal of that order. However, trial counsel failed to perfect the record for appeal and appeal was dismissed on December 9, 2009; the mandate issued January 29, 2010.

While the first appeal was pending, seven months after the proceedings to terminate Rousseau's parental rights concluded, he filed a motion to withdraw and vacate the agreed order terminating his parental rights. After a full hearing on Rousseau's motions on November 18, 2009, the court denied the motion to withdraw and vacate.

Rousseau now asks that the stipulation and agreed order of termination be vacated and the child's adoption be disrupted, claiming the court did not have authority to accept the stipulation and agreed order. His argument regarding the court's lack of authority to accept a stipulation and

agreed order is raised for the first time on appeal and is without merit. The trial court exercised sound discretion in denying Rousseau's motion to withdraw the stipulation and vacate the order terminating parental rights.

II. RESTATEMENT OF THE ISSUES

- A. **Did the court exercise sound discretion in denying Rousseau's motion to withdraw his stipulation and vacate the order terminating parental rights when Rousseau willingly entered into the stipulation mid trial after consultation with his attorney and extensive inquiry by the court?**
- B. **Does the court have authority to accept a stipulation and agreed order terminating parental rights pursuant to RCW 13.34.180?**
- C. **Do circumstances exist which justify granting appellant's request to "reinstate the original appeal" by recalling the mandate of the appeal of stipulation and order?**

III. STATEMENT OF THE CASE

J.M.R. is seven years old. He was born July 12, 2002. CP 276. On April 10, 2007, the Department of Social and Health Services (DSHS) filed a petition for dependency based, inter alia, upon the failure of Rousseau, the mother, and the legal guardian (grandmother) to provide a safe home for J.M.R. in that the child was abused or neglected and had no parent or guardian capable of caring for him. CP 277, 278.

J.M.R. was removed from Rousseau's home and placed in protective custody on April 5, 2007, and he has never been returned. Ex. 3. At the initial shelter care hearing on April 11, 2007, Peter Lawson was appointed as attorney for Rousseau. Ex. 3. He has remained as

Rousseau's counsel in superior court throughout the proceedings. CP 19-20, 276; Ex. 3. On September 6, 2007, the court held a dependency fact-finding hearing after which J.M.R. was declared a dependent child with regard to Rousseau. Ex. 11. A dispositional order entered and services were ordered for Rousseau. Id.

On April 16, 2008, DSHS filed a petition to terminate parental rights. CP 276. On May 15, 2008, Peter Lawson appeared in the termination proceeding on behalf of Rousseau. CP 269.

The termination trial was initially set for September 15, 2008, but was continued to October 22, 2008, and then to January 12, 2009. CP 232, 262, 273. Trial was continued yet again from January 12, 2009, to March 23, 2009, on Rousseau's motion. CP 224-225. Trial on termination of parental rights finally began April 13, 2009, a year after the petition had been filed. 1RP.¹

On March 23, 2009, Rousseau filed a Guardianship Petition asserting that five of the seven elements of the termination statute are true and correct but requested the prospective adoptive parent be appointed as a guardian for the child rather than allowing the child to be adopted. CP 173-176.

At the time of the termination trial, J.M.R. had been removed from his parents' care for two years. CP 277. The mother relinquished her parental rights immediately prior to trial commencing. CP 133. On the

¹ The verbatim report of proceeding is referenced as follows: 1RP – April 14, 2009; 2RP – November 18, 2009.

afternoon of the second day of trial, Rousseau entered into a stipulation of facts and agreed to termination of his parental rights. CP 136-139. Prior to accepting the stipulation and order, the court conducted a lengthy colloquy with Rousseau. 1RP 3-10. After extensive inquiry, the court found Rousseau entered into the stipulation of facts and order terminating his parental rights voluntarily and not under fraud or duress. CP 138; 1RP 8-9. On April 14, 2009, in open court, the court accepted and approved the stipulation, including stipulation to the factual and legal basis for termination of parental rights. 1RP 9. The stipulation and order was filed April 15, 2009. CP 136-139.

Rousseau timely filed notice of appeal on May 14, 2009. CP 91. Subsequent to filing the notice of appeal, counsel for Rousseau failed to comply with RAP 18.13A. On July 10, 2009, counsel for Rousseau appeared at the Court of Appeals and stated a motion to withdraw the stipulation and vacate the order terminating parental rights was set in superior court for August 21, 2009. Brief of Appellant (BOA) App. A at 5.² The Court of Appeals granted an extension for perfecting appeal. BOA App. A at 5. On September 11, 2009, and again on October 16, 2009, counsel appeared and stated the motion to vacate was set before the superior court. BOA App. A at 3, 4. The Court of Appeals again granted an extension for perfecting appeal to November 18, 2009. BOA App. A at 3. The motion to withdraw the stipulation and vacate the agreed order was

² Documents attached to Brief of Appellant in Appendix A are referenced as BOA App. A with page number of Appendix A added.

heard by the superior court on November 18, 2009. 2RP 1-16. On December 9, 2009, a letter decision was issued from the Court of Appeals dismissing the appeal. BOA App. A at 2. The mandate terminating review was issued on January 29, 2010. BOA App. A at 1. Review by the Supreme Court was not sought, nor was a motion to recall the mandate filed.

Meanwhile, in superior court, Rousseau's motion to withdraw his stipulation and vacate the order terminating his parental rights was filed October 8, 2009. CP 66-79. Rousseau argued the termination order should be vacated pursuant to CR 60(b)(1), (3), (4), and (11). 2RP 4-9, CP 66-79. After full hearing, the court again found Rousseau's stipulation entered April 14, 2009, was knowing, intelligent, and voluntary, and denied the motion to withdraw and vacate. 2RP 1-16; CP 19-20. This appeal followed.

IV. ARGUMENT

A. The court exercised sound discretion in denying Rousseau's motion to withdraw the stipulation and vacate order terminating parental rights.

1. The court did not abuse its discretion in denying Rousseau's CR 60(b) motion to withdraw his stipulation and vacate the order terminating his parental rights.

Rousseau's motion to withdraw and vacate was based on CR 60(b) (1), (3), (4), and (11). CP 66-79; 2RP 4-9. CR 60(b) authorizes a court to provide relief from judgment on the basis of:

- (1) Mistake, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order; ...
- (3) Newly discovered evidence...;
- (4) Fraud..., misrepresentation, or other misconduct of an adverse party; ...[or]
- (11) Any other reason justifying relief from the operation of judgment.

CR 60(b).

The standard of review of a trial court's decision to deny a motion under CR 60(b) is abuse of discretion. *In re Welfare of J.N.*, 123 Wn. App. 564, 570, 95 P.3d 414 (2004). A court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds. See *In re Marriage of Kovas*, 121 Wn.2d. 795, 801, 854 P.2d 629 (1993).

As a preliminary matter, Rousseau has failed to assign error to or present argument regarding the court's exercise of discretion in denying Rousseau's motion to withdraw stipulation and vacate order. Although Rousseau's statement of the case discusses concerns he raised to the trial court, Rousseau fails to set forth legal grounds or argument regarding the court's exercise of discretion. Rousseau does not assign error to the court's acceptance of the facts set forth in the stipulation, nor its finding that he entered into the stipulation and agreed order "voluntarily and not under fraud or duress." CP 138. Findings of Fact to which the appellant has not assigned error are considered verities on appeal. *Wash. Ass'n of Child Care Agencies v. Thompson*, 34 Wn. App. 235, 247, 660 P.2d 1129 (1983).

In addition, even if Rousseau had assigned error, he failed to present legal argument regarding the court's exercise of discretion. Assignments of error not supported by argument shall not be considered on appeal. An assignment of error that is not argued in an appellant's brief as required by RAP 10.3(a)(6) will not be considered and is deemed waived. *In re Dependency of C.M.*, 118 Wn. App. 643, 649, 78 P.3d 191 (2003) citing *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

Even if Rousseau waived this argument, it is clear from the record that the court did not abuse its discretion. In his motion to withdraw stipulation and vacate order, Rousseau argued mistake revealed by newly discovered evidence under CR 60(b)(1) and (3). CP 68-71; 2RP 4-9. Rousseau argued the facts that he had not died and his health had not deteriorated constituted new evidence and proof the decision to stipulate to termination had been based on a mistaken assumption. CP 68-71.

Regarding Rousseau's health, the court held that it was not new evidence, nor a mistake, that Rousseau's health had not further deteriorated. Rather, such facts were consistent with what was known at the time of trial about Rousseau's uncertain prognosis. 2RP 10. In fact, Rousseau's own counsel acknowledged it was known that he was not terminally ill and that his cancer was in remission when the stipulation was entered. 2RP 10. There is also no evidence at the time of the stipulation's entry that Rousseau's medical condition was central to the issue of termination of parental rights. 2RP 10-11.

In addition, Rousseau's counsel argued that in hindsight, he had given advice to his client that he later regretted. 2RP 4-6. The court found counsel had done nothing wrong stating, "It's clear that you feel bad in relation to what the result was in this case and you are partially blaming yourself which, frankly, I think that a blame on yourself is misguided. I don't think that you did anything inappropriate in this case." 2RP 9. In addition, even if counsel had given erroneous advice, that would not be grounds to vacate. "Erroneous advice of counsel, pursuant to which the consent judgment was entered is not ground for vacating it." *Haller v. Wallis*, 89 Wn.2d 539, 546, 573 P.2d 1302 (1978).

Under CR 60(b)(4), Rousseau alleged the parties had not followed through with the terms of the open adoption agreement. CP 75; 2RP 6, 7. Evidence presented at the motion to vacate was that Rousseau had been offered visitation in anticipation of the open adoption agreement going into effect when the adoption was finalized. CP 23. Instead of taking advantage of the offered visitation, Rousseau engaged in an angry outburst, and therefore, the visit had to be stopped. *Id.* The court found that disputes regarding the open adoption agreement were not properly before the court. CP 23; 2RP 11. The open adoption agreement has not been made part of this record so its terms are not before the court.

The court in *In re M.G.* faced a situation analogous to this case. *In re M.G.*, 148 Wn. App. 781, P.2d 354 (2009). *M.G.* involved an appeal of an order denying mother's motion to vacate an agreed order of dependency. *Id.* Mother initially agreed to an order of dependency

believing the child would be placed with her in inpatient treatment in the near future. *M.G.* at 793. She later moved to withdraw her consent and vacate the order of dependency pursuant to CR 60(b)(1), (4), and (11) on several grounds. *Id.* at 789, 791, 792, 793.

The court found that failure to accurately predict whether the child could be placed with her in inpatient treatment did not constitute a “mistake” and was not grounds for withdrawal of her agreement. *Id.* at 793. Likewise, here, as in *M.G.*, the fact that later circumstances varied from what Rousseau or his counsel expected does not constitute “mistake” under CR 60(b).

The *M.G.* court then addressed the issue of the court’s failure to conduct a colloquy on the record with mother prior to entry of the agreed order. The court in *M.G.* held that the court substantially complied with statutory requirements and showed no prejudice from the procedures followed by the court. *Id.* at 791. “We will not set aside the order without some showing of actual prejudice.” *Id.* at 791. Here, unlike in *M.G.*, the court engaged in an extensive colloquy with Rousseau before accepting the stipulation and entering the order. However, like *M.G.*, Rousseau has failed to make a showing of prejudice. Thus, the order denying vacate should be upheld. “Error without prejudice is not grounds for reversal.” *In re Ferguson*, 41 Wn. App. 1, 5, 701 P.2d 513 (1985).

Rousseau also argued that the stipulation and order should be set aside pursuant to CR 60(b)(11), but failed to set forth other grounds. CP 71. CR 60(b)(11) applies only to extraordinary circumstances not covered

by any other section of the rule. *M.G.* at 793. In his motion to vacate, Rousseau argued no other circumstances not covered by other sections of the rule.

2. Rousseau has failed to establish a valid defense to the action to terminate his rights, as required by RCW 4.72.050.

RCW 4.72.050 provides in pertinent part: “The judgment shall not be vacated on motion or petition until it is adjudged that there is a valid defense to the action in which the judgment is rendered.” RCW 4.72.050.

To vacate the termination order, not only would Rousseau need to establish adequate grounds to vacate under CR 60, he would additionally have to establish a valid defense to the action to terminate his rights. RCW 4.72.050 and .060. *Haller v. Wallis*, 89 Wn.2d 539, 546, 573 P.2d 1302 (1978). Rousseau failed to establish an adequate defense. The order denying vacate was properly upheld.

B. The court has authority to accept stipulations and agreed orders terminating parental rights pursuant to RCW 13.34.180.

1. The trial court has broad authority to accept stipulations.

The court’s authority to enter orders based on stipulation is well established. “It is well recognized that a judgment may be entered by consent or stipulation of the parties.” *Smyth Worldwide Movers, Inc., v. Whitney*, 6 Wn. App. 176, 179, 491 P.2d 1356 (1971) citing *Washington Asphalt Co. v. Harold Kaeser Co.*, 51 Wn.2d 89, 316 P.2d 126 (1957).

“Stipulations and agreements of counsel are viewed with favor unless some good, contrary reason is shown... The courts look upon stipulations with favor... Our statutory law, RCW 2.44.010, authorizes stipulations by attorneys binding upon their clients, providing agreements are made in open court or in writing. See also CR 2A.” *Smyth* at 178-179.

A stipulation is binding on the parties if it is arrived at in accordance with CR 2A and RCW 2.44.010. *Baird v. Baird*, 6 Wn. App. 587, 589, 494 P.2d 1387 (1972). CR 2A states:

No agreement of the parties or attorneys in respect to the proceedings in a cause, the purport of which is disputed, will be regarded by the court unless the same shall have been made and assented to in open court on the record, or entered in the minutes, or unless the evidence thereof shall be in writing and subscribed by the attorneys denying the same.

CR 2A.

RCW 2.44.010 grants an attorney authority to bind his client by his agreement duly made but states, in part, that the court shall disregard a stipulation unless it is made in open court or signed by the party against whom the same is alleged or his attorney. RCW 2.44.010.

Based upon the law as set forth above, it follows that parents involved in dependency and termination actions have the right and ability to enter into stipulations and agreed orders in litigation pursuant to chapter 13.34 RCW. The court’s adherence to procedures set forth in CR 2A and RCW 2.44.010 insures the rights of parents are protected when stipulations are entered in cases involving termination of parental rights.

In this case, the trial court followed all proper procedures in accepting Rousseau's stipulation and agreed order. The stipulation was entered in open court, on the record, and signed by both Rousseau and his attorney. CP 136-139; 1RP 13. The court fulfilled its function to ascertain that the parties and counsel understood the stipulation. *Baird* at 589, citing *Jones v. Jones*, 23 Wn.2d 657, 161 P.2d 890 (1945). The court made extensive inquiry of Rousseau to insure that Rousseau's stipulation was based on full knowledge of the consequences of his actions and was made knowingly, voluntarily, and intelligently. 1RP 3-10.

Further, at the motion to withdraw and vacate, the court heard counsels' arguments, reviewed documents submitted by DSHS and Rousseau, and reviewed the transcript of the hearing at which the stipulation was accepted. 2RP 9-12. Based on full review, the court denied the motion to vacate and again found Rousseau's stipulation had been knowing, voluntary, and intelligent. CP 19; 2RP 15-16. The court had authority to accept the stipulation and agreed order and exercised sound discretion in denying Rousseau's motion.

2. Accepted rules of statutory construction support the court's authority to accept stipulations and agreed orders terminating parental rights pursuant to RCW 13.34.180.

Public policy favors resolution of disputes by agreement. Stipulations and agreements of parties are viewed with favor. 50 Am. Jur. Stipulations Sec. 12 (1944). "... it is well settled that judgment may be entered by consent". *In re M.G.* at 793, citing *Smyth Worldwide Movers*,

Inc. v. Whitney, 6 Wn. App. 176, 178, 491 P.2d 1356 (1971), *see also* chapter 4.60 RCW.

The correct starting point for analysis of the court's authority is that courts have broad general authority to accept stipulations when procedures set forth in chapter 2.44 RCW and CR 2A are followed. chapter 4.60 RCW, *Smyth* at 179. Rousseau argues that a party to a lawsuit is unable to enter into a judicial settlement and the court is without authority to approve and enter an enforceable order unless there is a specific statutory grant of such authority. Rousseau cites no authority for such a sweeping limitation on parties' and superior courts' ability to settle disputes and it is well settled that this is not the law. Such a legal holding would render CR 2A, RCW 2.44.010, and chapter 4.60 RCW meaningless as specific provisions for settlement would need to be set forth in statutes directly applicable to the matter in dispute.

Rousseau argues that the superior courts of this state lack authority to accept a stipulated judgment on any claim absent specific legislative grant of such authority. In particular, Rousseau argues the court is precluded from accepting a stipulation to termination pursuant to RCW 13.34.180, because the legislature amended RCW 13.34.110 and .130 to add specific procedures within those statutes for accepting agreed orders regarding dependency. Rousseau's argument that rules of statutory construction demand a conclusion that the court lacked authority to accept a stipulation to termination pursuant RCW 13.34.180 is without merit.

Prior to the statutory amendments to chapter 13.34 RCW enacted in 2001, procedures and requirements in CR 2A and RCW 2.44.010 were proper and sufficient for accepting agreed orders of dependency, as well as stipulations to termination under RCW 13.34.180. In 2001, the Washington State Legislature enacted ESSB 5413 which set forth detailed procedures for accepting agreed orders of dependency and dispositions pursuant to RCW 13.34.110 and .130. Respondent's Appendix A. The legislature did not add specific requirements to procedures for accepting stipulations to orders establishing dependency guardianships, to orders terminating parental rights, or to other orders entered in dependency or termination cases. Respondent's Appendix A.

Well established rules of statutory construction compel the conclusion that the legislature did not intend to require additional procedures for accepting stipulations to orders terminating parental rights under RCW 13.34.180 when it amended RCW 13.34.110 and .130. ESSB 5413 added specific, detailed requirements exclusively to acceptance of agreed orders of dependency and dispositions. Respondent's Appendix A. It is an "elementary rule that where the legislature uses certain statutory language in one instance and different language in another, there is a difference in legislative intent." *United Parcel Service, Inc. v. State, Dept. of Revenue*, 102 Wn.2d 355, 362, 687 P.2d 186 (1984). The omission of a provision in a particular statute is deemed purposeful where the provision appears in a closely related statute. *State v. Hubbard*, 106 Wn. App. 149, 153-54, 22 P.3d 296 (2001). By not amending RCW 13.34.180, the

legislature indicated its intent not to change the standards governing acceptance of stipulations under that statute.

Rousseau also objects that a stipulation accepted under RCW 13.34.180 lacks the 48-hour waiting period provided by RCW 26.33 for voluntary relinquishment and adoption. But, it is also contrary to rules of statutory construction to read a requirement for a 48-hour waiting period to accept a stipulation to termination into RCW 13.34.180 when that is not in the statute. A statute which is clear on its face is not subject to judicial interpretation. *Kovacs v. Kovacs*, 121 Wn.2d 795, 804, 854 P.2d 629 (1993).

In addition, to require a waiting period would run counter to public policy and law favoring resolution of disputes through agreements of the parties and stipulations. The state would be forced in every termination proceeding to complete the trial if the parent did not stipulate more than 48 hours prior to trial, for to accept a stipulation with a 48-hour waiting period requirement on the day of trial or mid trial would be to put timely resolution and permanence for the child in jeopardy. If during trial, proceedings were halted to accept a stipulation, witnesses and further trial time would be cancelled. If within 48 hours the parent timely revoked their consent to termination, it could be weeks or months before trial could again be held. Facts on the ground could have changed necessitating further discovery and additional witnesses. A parent who chose to stipulate and then revoke consent, would in effect be automatically

granted a continuance of trial without having to argue for or establish adequate grounds for a continuance.

3. The considerations underlying adoption proceedings, chapter 26.33 RCW, are not applicable to termination proceedings pursuant to RCW 13.34.180.

Rousseau contends the court should graft into RCW 13.34.180 the 48-hour waiting period that RCW 26.33 requires following a parent's decision to relinquish a child for adoption. However, the legislative intent underlying the dependency and termination statutes in chapter 13.34 RCW is separate and distinct from the policies underlying the adoption statute, chapter 26.33 RCW.

The focus of requirements set forth in chapter 13.34 RCW is to protect children from abuse or neglect while providing services aimed at nurturing families and correcting parental deficiencies. RCW 13.34.020 and .025. While the child has a right to speedy resolution of the proceedings, the legislature also provides time frames throughout the statute for assessment and progress on correction of parental deficiencies. The court and parties are not required to implement a permanent plan until the child has been out of the parents' home for nine to twelve months. RCW 13.34.020 and .145. The elements to be proven in a termination of parental rights case serve to guarantee parents have been provided services for at least a six month period prior to trial to terminate their parental rights. RCW 13.34.180. It is the state's burden to establish that despite having been offered all available services capable of correcting parental

deficiencies, the parent is still unfit to parent and the child cannot be safely returned home in the near future. RCW 13.34.180. Therefore, even in the case of newborn infants removed from the parents' home at birth, absent aggravated circumstances, it is six months to a year before any trial for termination could go forward pursuant to RCW 13.34.180.

In light of the extensive safeguards for parental rights throughout the statute in the form of required services, court reviews, and timelines, it is reasonable the legislature did not believe an additional waiting period was necessary prior to allowing parents to stipulate or agree to orders entered in dependency guardianship and termination proceedings pursuant to chapter 13.34 RCW.

By contrast, the legislative intent underlying the adoption statute, chapter 26.33 RCW, is to provide stable homes for children while protecting the rights of all parties. RCW 26.33.010. The focus is not on protecting children from abuse or neglect, nor on providing remedial services to parents. It is not on nurturing the original family unit.

Throughout chapter 26.33 RCW the statute makes reference to the birth of the child. Chapter 26.33 RCW sets forth two separate procedures for terminating parental rights, termination through relinquishment pursuant to 26.33.080 and .090 and termination for cause pursuant to RCW 26.33.100-.120. Petitions to relinquish and petitions to terminate parental rights may both be filed before a child is even born. RCW 26.33.080(3) and .100(3). The hearing on petition to relinquish or terminate cannot be held until 48 hours after the child's birth or the

signing of the documents, whichever is later. RCW 26.33.110. The requirement of a 48-hour waiting period appears on its face to be necessary to protect the decision making of parents, particularly mothers, during and shortly after giving birth.

In the case at bar, Rousseau was served with the petition to terminate a year prior to trial. Rousseau even signed a competing petition for guardianship a month before trial asserting he had been offered all necessary services and still was not capable of parenting in the near future. Rousseau also requested the child remain with the prospective adoptive parent. CP 173-176. Rousseau had ample time to consider his options and made a knowing and voluntary decision to stipulate to termination of parental rights.

Rousseau's argument that the state refused to accept a relinquishment from Rousseau, but did from the mother, and therefore acted unfairly is also without merit. The state accepted a relinquishment from the mother prior to trial commencing. CP 133. Rousseau's attorney informed the court he and his client decided against relinquishing. 2RP 4. There is no evidence to support the proposition that the state would have refused to accept Rousseau's offer to relinquish had it been made prior to trial. It is the obligation of the department to place children in stable and permanent homes if they cannot be timely returned to their parents' care. RCW 13.34.145(1)(a) and (3)(b).

The trial court in this case properly followed procedures and requirements for accepting stipulations as set forth in CR 2A and RCW

2.44.010 when accepting the stipulation and agreed order from Mr. Rousseau. Such procedures are proper and sufficient for accepting stipulations to termination under RCW 13.34.180. Appellant's argument that the legislature intended to revoke the general authority of superior court to enter into stipulated settlements of disputed issues or in the alternative to require new procedures to termination actions through targeted amendments to RCW 13.34.110, which pertains to dependency and disposition only, is contrary to well established rules of statutory construction, public policy, and common sense. It is also contrary to the rules of statutory construction and public policy to graft a 48-hour waiting period for acceptance of stipulations into RCW 13.34.180. The superior court had full authority to accept a stipulation and agreed order terminating the parental rights of Mr. Rousseau.

C. No circumstances exist which justify granting Rousseau's request to reinstate the original appeal.

1. Rousseau's request to "reinstate" his prior appeal should not be considered by the court.

Rousseau asserts that his previous appeal, #63514-0, should be "reinstated" as part of his current appeal. As a preliminary matter, Rousseau has made no motion to recall the mandate, nor has he argued a basis for recall of the mandate. "An assignment of error that is not argued in an appellant's brief as required by RAP 10.3(a)(6) will not be considered and is deemed waived." *C.M.* at 649, citing *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

Rousseau's request to reinstate the prior appeal is not properly before the court and should be denied.

2. This court does not have jurisdiction to consider recall of the mandate at this time.

The general rule is the appellate court has no power to act after a mandate has issued. *Reeploeg v. Jensen*, 81 Wn.2d 541, 503 P.2d 99 (1973). After issuance of the mandate, the court of appeals may exercise jurisdiction solely to correct a judgment or order which was improvidently or erroneously given, or to correct a decision based on fraud. RAP 12.9. 84 A.L.R. 579.

RAP 12.9 provides for recall of a mandate:

- (a) **To require Compliance With Decision.** The appellate court may recall a mandate issued by it to determine if the trial court has complied with an earlier decision of the appellate court given in the same case. The question of compliance by the trial court may be raised by motion to recall the mandate, or by initiating a separate review of the lower court decision entered after issuance of the mandate.
- (b) **To Correct Mistake or Remedy Fraud.** The appellate court may recall a mandate issued by it to correct an inadvertent mistake or to modify a decision obtained by the fraud of a party or counsel in the appellate court.

RAP 12.9.

The motion to recall the mandate must be made within a reasonable time. RAP 12.9(c).

Rousseau has filed no motion for recall of the mandate dismissing his prior appeal. Even if the current request to "reinstate the appeal" were

to be characterized as a motion to recall under RAP 12.9, Rousseau has set forth no grounds to support recall of the mandate and no grounds exist.

RAP 12.9(a) allows for a motion to recall mandate to be filed to allow appellate review of a trial court order issued pursuant to a remand. There was no appellate court directive to the trial court issued with the dismissal of the first appeal. In fact, the trial court was in the process of a proceeding that would have been appropriate for the Court of Appeals to direct on remand. Relief from a stipulation may be had only in the trial court. *State ex rel. Carroll v. Gatter et ux.*, 43 Wn.2d 153, 155, 260 P.2d 360 (1953). *See also* H.D. Warrant, Annotation, Relief From Stipulations, 161 A.L.R. 1161 (1946). Rousseau's motion to withdraw stipulation and vacate order terminating parental rights had been scheduled and heard by the time of dismissal. CP 19-20, BOA App. A at 2. Therefore, RAP 12.9(a) does not apply.

RAP 12.9(b) states the Court of Appeals may recall a mandate to correct an inadvertent mistake or to modify a decision obtained by the fraud of a party or counsel in the appellate court. No such allegations are asserted as the basis of the request to "reinstate the appeal." Therefore, RAP 12.9(b) does not apply.

Public policy and judicial efficiency support rules supporting the finality of judgments. Once the judgment is entered, the appellate court thereafter loses jurisdiction to reconsider its decision, except in limited circumstances. *Reeploeg v. Jensen*, 81 Wn.2d 541, 503 P.2d 99 (1973). The court in *Reeploeg* quoted the general rule as stated in 84 A.L.R. 579:

‘Though the courts are not agreed as to the exact time when an appellate court loses jurisdiction of a case (see 2 R.C.L. p. 265), it may be laid down as a general rule, subject to exceptions subsequently noted, that, after a case has been fairly submitted to an appellate court, and the court has regularly determined the issues involved and caused its judgment in conformity with such determination to be entered, and its judgment has been properly entered, and the case remanded to the lower court for such action as may be necessary, the appellate court thereafter has no power to reconsider, alter, or modify its decision. To require courts to consider and reconsider cases at the will of litigants would deprive the courts of that stability which is necessary in the administration of justice.’

Reeploeg at 546.

The court in *Reeploeg* also held that this rule is not limited to cases which have been heard on the merits, but also applies where an appeal has been dismissed. *Id.* at 546. Recall of the mandate or reinstatement of the prior appeal in this case should be denied. The appeal was properly dismissed, mandate issued, and no motion to recall has been filed. The order of termination was properly challenged in the trial court pursuant to Rousseau’s motion to withdraw and vacate. Appeal from the order denying vacate is properly before this court.

3. A claim of ineffective assistance of counsel does not form a sufficient basis for recall of the mandate at this time.

In lieu of a motion to recall mandate, Rousseau improperly attempts to insert into this appeal a review of the trial court’s alleged failure to sign an order of indigency and a related claim of ineffective assistance of counsel, both of which took place in an appeal which has

been dismissed. Rousseau fails to provide an adequate record for review and fails to set forth any prejudice resulting from the alleged failure to enter an order of indigency or to perfect a direct appeal from the stipulation and order of termination.

The question of whether the trial court violated appellant's due process rights by failing to sign an order of indigency in COA #63514-0 is not properly before this court. The mandate issued, terminating review in that action, and entered on January 29, 2010. BOA App. A at 1. There has been no motion to reopen nor for reconsideration. No appeal of the dismissal of appeal has been filed and review of this issue is foreclosed. *Reeploeg* at 546.

Even if the issue were not foreclosed from review based upon issuance of the mandate as argued above, review of the issue must be denied for failure of appellant to provide an adequate record for review. There is no record for review of the allegation that the trial court improperly failed to approve an order of indigency for Mr. Rousseau. There is no record provided of any motion by appellant for an order of indigency in connection with the Notice of Appeal of the Stipulation and Order on Termination of Parental Rights filed May 14, 2009. Nor does the record contain a declaration containing facts to support a motion for order of indigency at that time. It is the responsibility of appellant to provide an adequate record for review. *State v. Mannhalt*, 33 Wn. App. 696, 658 P.2d 15, *review denied*, 100 Wn.2d 1024 (1983).

What the record does reflect is that counsel for Rousseau decided to pursue a motion to vacate the stipulation and order in the trial court and so informed the Court of Appeals on July 10, 2009. BOA App. A at 7.

The record before this court also does not support a claim of ineffective assistance of counsel. To prevail on a claim of ineffective assistance of counsel requires a showing that the lawyer's performance was deficient, and but for the deficient performance, the outcome at trial would have been different. *Dependency of S.M.H.*, 128 Wn. App. 45, 61, 115 P.3d 990 (2000), citing *State v. Turner*, 143 Wn.2d 715, 730, 23 P.3d 499 (2001). Further, there is a strong presumption that counsel has rendered adequate assistance and has made all significant decisions in the exercise of reasonable professional judgment. *State v. Benn*, 120 Wn.2d 631, 665, 845 P.2d 289 (1993). If an attorney's conduct constitutes legitimate trial strategy, it withstands a claim of ineffective assistance of counsel. *S.M.H.* 128 Wn. App. at 61.

Rousseau argues now that trial counsel's performance was deficient because he failed to perfect the record in the first appeal and the appeal was subsequently dismissed. But trial counsel's decision to pursue a motion to vacate rather than a direct appeal from a stipulation was proper and should not be found to have been deficient. Relief from a stipulation may be had only in the trial court. *State ex rel. Carroll v. Gatter et ux.*, 43 Wn.2d 153, 155, 260 P.2d 360 (1953). See also annotation, 161 A.L.R., 1161 *Relief from Stipulations*. This rule is necessary for it is only in the trial court that the proper record for review

can be established. The party seeking to vacate a stipulation must establish proper grounds for vacate under CR 60. *M.G.* at 792. In addition to establishing grounds to vacate pursuant to CR 60, a party seeking relief from judgment must establish a valid defense to the action. RCW 4.72.050 and .060. *Haller v. Wallis*, 89 Wn.2d 543, 546, 573 P.2d 1302 (1978).

The court in *Haller* further held “The rule that a party cannot in equity find relief from the consequence of his own negligence or of a mistake of the law is equally applicable where the mistake or neglect is that of his attorney employed in the management of the case.” *Id.* at 547. “... the law favors amicable settlement of disputes and is inclined to clothe them with finality”. *Id.* at 545.

Direct appeals from stipulations are also not authorized by the Rules of Appellate Procedure. RAP 2.2(a)(6) provides that an order terminating all of a person’s parental rights is the type of order subject to appellate review, but does not specify who may appeal. One must look to RAP 3.1 to determine who may appeal. RAP 3.1 reads: “Only an aggrieved party may seek review by the appellate court.”- The rule is clear: only a party aggrieved by the decision has a right to appeal. If Rousseau had filed a petition to terminate his own parental rights pursuant to RCW 13.34.180 and prevailed, he would not have a right to appeal. This situation is the same. Rousseau chose to stipulate – agree – to join in the state’s request to enter an order terminating his parental rights. Therefore, Rousseau cannot now claim to be aggrieved by his own

request. It was only after his motion to withdraw the stipulation and vacate the order was denied that Rousseau can properly appeal that order as an aggrieved party.

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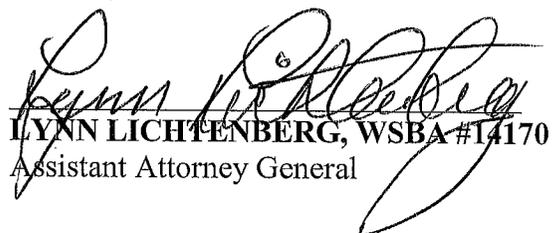
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V. CONCLUSION

This court has also recognized the turmoil and hardship likely to accompany the vacation of an adoption decree. *In re the Marriage of Farrow*, 115 Wn. App. 661, 675, 63 P.3d 821 (2003). The practical effect of vacating the stipulation and order is probably to vacate the child's adoption. If that happens, it would be for the sole purpose of providing Rousseau, who for years failed to successfully parent this child, the chance to try again. The child has suffered enough. The present successful adoptive placement should not be disrupted. Rousseau's appeal should be denied.

RESPECTFULLY SUBMITTED this 18 day of June, 2010.

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Appendix A

2001
SESSION LAWS
OF THE
STATE OF WASHINGTON

REGULAR SESSION
FIFTY-SEVENTH LEGISLATURE
Convened January 8, 2001. Adjourned April 22, 2001.

FIRST SPECIAL SESSION
FIFTY-SEVENTH LEGISLATURE
Convened April 25, 2001. Adjourned May 24, 2001.

SECOND SPECIAL SESSION
FIFTY-SEVENTH LEGISLATURE
Convened June 4, 2001. Adjourned June 21, 2001.

THIRD SPECIAL SESSION
FIFTY-SEVENTH LEGISLATURE
Convened July 16, 2001. Adjourned July 25, 2001.



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renewal, or verification of record and preparation of an affidavit of lost title other than at the time of the title application or transfer and (b) three dollars and fifty cents for registration renewal only, issuing a transit permit, or any other service under this section.

(6) If the fee is collected by the state patrol as agent for the director, the fee so collected shall be certified to the state treasurer and deposited to the credit of the state patrol highway account. If the fee is collected by the department of transportation as agent for the director, the fee shall be certified to the state treasurer and deposited to the credit of the motor vehicle fund. All such fees collected by the director or branches of his office shall be certified to the state treasurer and deposited to the credit of the highway safety fund.

(7) Any county revenues that exceed the cost of providing vehicle licensing and vessel registration and title activities in a county, calculated in accordance with the procedures in subsection (3)(d) of this section, shall be expended as determined by the county legislative authority during the process established by law for adoption of county budgets.

(8) The director may adopt rules to implement this section.

Passed the Senate April 18, 2001.

Passed the House April 5, 2001.

Approved by the Governor May 15, 2001.

Filed in Office of Secretary of State May 15, 2001.

CHAPTER 332

[Engrossed Substitute Senate Bill 5413]
CHILD DEPENDENCY PROCEEDINGS

AN ACT Relating to provisions to improve accountability in child dependency cases; amending RCW 13.34.062, 13.34.065, 13.34.180, 13.34.138, and 13.34.110; and adding new sections to chapter 13.34 RCW.

Be it enacted by the Legislature of the State of Washington:

NEW SECTION. Sec. 1. A new section is added to chapter 13.34 RCW to read as follows:

(1) Following shelter care and no later than twenty-five days prior to fact-finding, the department, upon the parent's request or counsel for the parent's request, shall facilitate a conference to develop and specify in a written service agreement the expectations of both the department and the parent regarding the care and placement of the child.

The department shall invite to the conference the parent, counsel for the parent, the foster parent or other out-of-home care provider, caseworker, guardian ad litem, counselor, or other relevant health care provider, and any other person connected to the development and well-being of the child.

The initial written service agreement expectations must correlate with the court's findings at the shelter care hearing. The written service agreement must set forth specific criteria that enables the court to measure the performance of both the

department and the parent, and must be updated throughout the dependency process to reflect changes in expectations. The service agreement must serve as the unifying document for all expectations established in the department's various case planning and case management documents and the findings and orders of the court during dependency proceedings.

The court shall review the written service agreement at each stage of the dependency proceedings and evaluate the performance of both the department and the parent for consistent, measurable progress in complying with the expectations identified in the agreement.

The case conference agreement must be agreed to and signed by the parties. The court shall not consider the content of the discussions at the case conference at the time of the fact-finding hearing for the purposes of establishing that the child is a dependent child, and the court shall not consider any documents or written materials presented at the case conference but not incorporated into the case conference agreement, unless the documents or written materials were prepared for purposes other than or as a result of the case conference and are otherwise admissible under the rules of evidence.

(2) At any other stage in a dependency proceeding, the department, upon the parent's request, shall facilitate a case conference.

Sec. 2. RCW 13.34.062 and 2000 c 122 s 5 are each amended to read as follows:

(1) The written notice of custody and rights required by RCW 13.34.060 shall be in substantially the following form:

"NOTICE

Your child has been placed in temporary custody under the supervision of Child Protective Services (or other person or agency). You have important legal rights and you must take steps to protect your interests.

1. A court hearing will be held before a judge within 72 hours of the time your child is taken into custody excluding Saturdays, Sundays, and holidays. You should call the court at (insert appropriate phone number here) for specific information about the date, time, and location of the court hearing.

2. You have the right to have a lawyer represent you at the hearing. Your right to representation continues after the shelter care hearing. You have the right to records the department intends to rely upon. A lawyer can look at the files in your case, talk to child protective services and other agencies, tell you about the law, help you understand your rights, and help you at hearings. If you cannot afford a lawyer, the court will appoint one to represent you. To get a court-appointed lawyer you must contact: (explain local procedure).

3. At the hearing, you have the right to speak on your own behalf, to introduce evidence, to examine witnesses, and to receive a decision based solely on the evidence presented to the judge.

4. If your hearing occurs before a court commissioner, you have the right to have the decision of the court commissioner reviewed by a superior court judge. To obtain that review, you must, within ten days after the entry of the decision of the court commissioner, file with the court a motion for revision of the decision, as provided in RCW 2.24.050.

You should be present at any shelter care hearing. If you do not come, the judge will not hear what you have to say.

You may call the Child Protective Services' caseworker for more information about your child. The caseworker's name and telephone number are: (insert name and telephone number).

5. You may request that the department facilitate a case conference to develop a written service agreement following the shelter care hearing. The service agreement may not conflict with the court's order of shelter care. You may request that a multidisciplinary team, family group conference, prognostic staffing, or case conference be convened for your child's case. You may participate in these processes with your counsel present."

Upon receipt of the written notice, the parent, guardian, or legal custodian shall acknowledge such notice by signing a receipt prepared by child protective services. If the parent, guardian, or legal custodian does not sign the receipt, the reason for lack of a signature shall be written on the receipt. The receipt shall be made a part of the court's file in the dependency action.

If after making reasonable efforts to provide notification, child protective services is unable to determine the whereabouts of the parents, guardian, or legal custodian, the notice shall be delivered or sent to the last known address of the parent, guardian, or legal custodian.

(2) If child protective services is not required to give notice under RCW 13.34.060(2) and subsection (1) of this section, the juvenile court counselor assigned to the matter shall make all reasonable efforts to advise the parents, guardian, or legal custodian of the time and place of any shelter care hearing, request that they be present, and inform them of their basic rights as provided in RCW 13.34.090.

(3) Reasonable efforts to advise and to give notice, as required in RCW 13.34.060(2) and subsections (1) and (2) of this section, shall include, at a minimum, investigation of the whereabouts of the parent, guardian, or legal custodian. If such reasonable efforts are not successful, or the parent, guardian, or legal custodian does not appear at the shelter care hearing, the petitioner shall testify at the hearing or state in a declaration:

(a) The efforts made to investigate the whereabouts of, and to advise, the parent, guardian, or legal custodian; and

(b) Whether actual advice of rights was made, to whom it was made, and how it was made, including the substance of any oral communication or copies of written materials used.

(4) The court shall hear evidence regarding notice given to, and efforts to notify, the parent, guardian, or legal custodian and shall examine the need for shelter care. The court shall hear evidence regarding the efforts made to place the child with a relative. The court shall make an express finding as to whether the notice required under RCW 13.34.060(2) and subsections (1) and (2) of this section was given to the parent, guardian, or legal custodian. All parties have the right to present testimony to the court regarding the need or lack of need for shelter care. Hearsay evidence before the court regarding the need or lack of need for shelter care must be supported by sworn testimony, affidavit, or declaration of the person offering such evidence.

(5) A shelter care order issued pursuant to RCW 13.34.065 may be amended at any time with notice and hearing thereon. The shelter care decision of placement shall be modified only upon a showing of change in circumstances. No child may be placed in shelter care for longer than thirty days without an order, signed by the judge, authorizing continued shelter care.

(6) Any parent, guardian, or legal custodian who for good cause is unable to attend the initial shelter care hearing may request that a subsequent shelter care hearing be scheduled. The request shall be made to the clerk of the court where the petition is filed prior to the initial shelter care hearing. Upon the request of the parent, the court shall schedule the hearing within seventy-two hours of the request, excluding Saturdays, Sundays, and holidays. The clerk shall notify all other parties of the hearing by any reasonable means.

Sec. 3. RCW 13.34.065 and 2000 c 122 s 7 are each amended to read as follows:

(1) The juvenile court probation counselor shall submit a recommendation to the court as to the further need for shelter care unless the petition has been filed by the department, in which case the recommendation shall be submitted by the department.

(2) The court shall release a child alleged to be dependent to the care, custody, and control of the child's parent, guardian, or legal custodian unless the court finds there is reasonable cause to believe that:

(a) After consideration of the specific services that have been provided, reasonable efforts have been made to prevent or eliminate the need for removal of the child from the child's home and to make it possible for the child to return home; and

(b)(i) The child has no parent, guardian, or legal custodian to provide supervision and care for such child; or

(ii) The release of such child would present a serious threat of substantial harm to such child; or

(iii) The parent, guardian, or custodian to whom the child could be released has been charged with violating RCW 9A.40.060 or 9A.40.070.

If the court does not release the child to his or her parent, guardian, or legal custodian, and the child was initially placed with a relative pursuant to RCW

13.34.060(1), the court shall order continued placement with a relative, unless there is reasonable cause to believe the health, safety, or welfare of the child would be jeopardized. If the child was not initially placed with a relative, and the court does not release the child to his or her parent, guardian, or legal custodian, the supervising agency shall make reasonable efforts to locate a relative pursuant to RCW 13.34.060(1). If a relative is not available, the court shall order continued shelter care or order placement with another suitable person, and the court shall set forth its reasons for the order. The court shall enter a finding as to whether RCW 13.34.060(2) and subsections (1) and (2) of this section have been complied with. If actual notice was not given to the parent, guardian, or legal custodian and the whereabouts of such person is known or can be ascertained, the court shall order the supervising agency or the department of social and health services to make reasonable efforts to advise the parent, guardian, or legal custodian of the status of the case, including the date and time of any subsequent hearings, and their rights under RCW 13.34.090.

(3) An order releasing the child on any conditions specified in this section may at any time be amended, with notice and hearing thereon, so as to return the child to shelter care for failure of the parties to conform to the conditions originally imposed.

The court shall consider whether nonconformance with any conditions resulted from circumstances beyond the control of the parent and give weight to that fact before ordering return of the child to shelter care.

(4) If a child is returned home from shelter care a second time in the case, or if the supervisor of the caseworker deems it necessary, the multidisciplinary team may be reconvened.

(5) If a child is returned home from shelter care a second time in the case a law enforcement officer must be present and file a report to the department.

Sec. 4. RCW 13.34.180 and 2000 c 122 s 25 are each amended to read as follows:

(1) A petition seeking termination of a parent and child relationship may be filed in juvenile court by any party to the dependency proceedings concerning that child. Such petition shall conform to the requirements of RCW 13.34.040, shall be served upon the parties as provided in RCW 13.34.070(8), and shall allege all of the following unless subsection (2) or (3) of this section applies:

- (a) That the child has been found to be a dependent child;
- (b) That the court has entered a dispositional order pursuant to RCW 13.34.130;
- (c) That the child has been removed or will, at the time of the hearing, have been removed from the custody of the parent for a period of at least six months pursuant to a finding of dependency;
- (d) That the services ordered under RCW 13.34.136 have been expressly and understandably offered or provided and all necessary services, reasonably

available, capable of correcting the parental deficiencies within the foreseeable future have been expressly and understandably offered or provided;

(e) That there is little likelihood that conditions will be remedied so that the child can be returned to the parent in the near future. A parent's failure to substantially improve parental deficiencies within twelve months following entry of the dispositional order shall give rise to a rebuttable presumption that there is little likelihood that conditions will be remedied so that the child can be returned to the parent in the near future. The presumption shall not arise unless the petitioner makes a showing that all necessary services reasonably capable of correcting the parental deficiencies within the foreseeable future have been clearly offered or provided. In determining whether the conditions will be remedied the court may consider, but is not limited to, the following factors:

(i) Use of intoxicating or controlled substances so as to render the parent incapable of providing proper care for the child for extended periods of time or for periods of time that present a risk of imminent harm to the child, and documented unwillingness of the parent to receive and complete treatment or documented multiple failed treatment attempts; or

(ii) Psychological incapacity or mental deficiency of the parent that is so severe and chronic as to render the parent incapable of providing proper care for the child for extended periods of time or for periods of time that present a risk of imminent harm to the child, and documented unwillingness of the parent to receive and complete treatment or documentation that there is no treatment that can render the parent capable of providing proper care for the child in the near future; and

(f) That continuation of the parent and child relationship clearly diminishes the child's prospects for early integration into a stable and permanent home.

(2) In lieu of the allegations in subsection (1) of this section, the petition may allege that the child was found under such circumstances that the whereabouts of the child's parent are unknown and no person has acknowledged paternity or maternity and requested custody of the child within two months after the child was found.

(3) In lieu of the allegations in subsection (1)(b) through (f) of this section, the petition may allege that the parent has been convicted of:

(a) Murder in the first degree, murder in the second degree, or homicide by abuse as defined in chapter 9A.32 RCW against another child of the parent;

(b) Manslaughter in the first degree or manslaughter in the second degree, as defined in chapter 9A.32 RCW against another child of the parent;

(c) Attempting, conspiring, or soliciting another to commit one or more of the crimes listed in (a) or (b) of this subsection; or

(d) Assault in the first or second degree, as defined in chapter 9A.36 RCW, against the surviving child or another child of the parent.

(4) Notice of rights shall be served upon the parent, guardian, or legal custodian with the petition and shall be in substantially the following form:

"NOTICE

A petition for termination of parental rights has been filed against you. You have important legal rights and you must take steps to protect your interests. This petition could result in permanent loss of your parental rights.

1. You have the right to a fact-finding hearing before a judge.
2. You have the right to have a lawyer represent you at the hearing. A lawyer can look at the files in your case, talk to the department of social and health services and other agencies, tell you about the law, help you understand your rights, and help you at hearings. If you cannot afford a lawyer, the court will appoint one to represent you. To get a court-appointed lawyer you must contact: (explain local procedure) .

3. At the hearing, you have the right to speak on your own behalf, to introduce evidence, to examine witnesses, and to receive a decision based solely on the evidence presented to the judge.

You should be present at this hearing.

You may call (insert agency) for more information about your child. The agency's name and telephone number are (insert name and telephone number) ."

Sec. 5. RCW 13.34.138 and 2000 c 122 s 19 are each amended to read as follows:

(1) Except for children whose cases are reviewed by a citizen review board under chapter 13.70 RCW, 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, at a hearing in which it shall be determined whether court supervision should continue. The initial review hearing shall be an in-court review and shall be set six months from the beginning date of the placement episode or no more than ninety days from the entry of the disposition order, whichever comes first. The initial review hearing may be a permanency planning hearing when necessary to meet the time frames set forth in RCW 13.34.145(3) or 13.34.134. The review shall include findings regarding the agency and parental completion of disposition plan requirements, and if necessary, revised permanency time limits. This review shall consider both the agency's and parent's efforts that demonstrate consistent measurable progress over time in meeting the disposition plan requirements. The requirements for the initial review hearing, including the in-court requirement, shall be accomplished within existing resources. The supervising agency shall provide a foster parent, preadoptive parent, or relative with notice of, and their right to an opportunity to be heard in, a review hearing pertaining to the child, but only if that person is currently providing care to that child at the time of the hearing. This section shall not be construed to grant party status to any person who has been provided an opportunity to be heard.

(a) A child shall not be returned home at the review hearing unless the court finds that a reason for removal as set forth in RCW 13.34.130 no longer exists. The parents, guardian, or legal custodian shall report to the court the efforts they have made to correct the conditions which led to removal. If a child is returned, casework supervision shall continue for a period of six months, at which time there shall be a hearing on the need for continued intervention.

(b) If the child is not returned home, the court shall establish in writing:

(i) Whether reasonable services have been provided to or offered to the parties to facilitate reunion, specifying the services provided or offered;

(ii) Whether the child has been placed in the least-restrictive setting appropriate to the child's needs, including whether consideration and preference has been given to placement with the child's relatives;

(iii) Whether there is a continuing need for placement and whether the placement is appropriate;

(iv) Whether there has been compliance with the case plan by the child, the child's parents, and the agency supervising the placement;

(v) Whether progress has been made toward correcting the problems that necessitated the child's placement in out-of-home care;

(vi) Whether the parents have visited the child and any reasons why visitation has not occurred or has been infrequent;

(vii) Whether additional services, including housing assistance, are needed to facilitate the return of the child to the child's parents; if so, the court shall order that reasonable services be offered specifying such services; and

(viii) The projected date by which the child will be returned home or other permanent plan of care will be implemented.

(c) The court at the review hearing may order that a petition seeking termination of the parent and child relationship be filed.

(2) The court's ability to order housing assistance under RCW 13.34.130 and this section is: (a) Limited to cases in which homelessness or the lack of adequate and safe housing is the primary reason for an out-of-home placement; and (b) subject to the availability of funds appropriated for this specific purpose.

NEW SECTION. Sec. 6. A new section is added to chapter 13.34 RCW to read as follows:

The department shall, within existing resources, provide to parents requesting a multidisciplinary team, family group conference, prognostic staffing, or case conference, information that describes these processes prior to the processes being undertaken.

Sec. 7. RCW 13.34.110 and 2000 c 122 s 11 are each amended to read as follows:

(1) 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 therefor. 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). The petitioner shall have the burden of establishing by a preponderance of the evidence that the child is dependent within the meaning of RCW 13.34.030.

(2)(a) The parent, guardian, or legal custodian of the child may waive his or her right to a fact-finding hearing by stipulating or agreeing to the entry of an order of dependency establishing that the child is dependent within the meaning of RCW 13.34.030. The parent, guardian, or legal custodian may also stipulate or agree to an order of disposition pursuant to RCW 13.34.130 at the same time. Any stipulated or agreed order of dependency or disposition must be signed by the parent, guardian, or legal custodian and his or her attorney, unless the parent, guardian, or legal custodian has waived his or her right to an attorney in open court, and by the petitioner and the attorney, guardian ad litem, or court-appointed special advocate for the child, if any. If the department of social and health services is not the petitioner and is required by the order to supervise the placement of the child or provide services to any party, the department must also agree to and sign the order.

(b) Entry of any stipulated or agreed order of dependency or disposition is subject to approval by the court. The court shall receive and review a social study before entering a stipulated or agreed order and shall consider whether the order is consistent with the allegations of the dependency petition and the problems that necessitated the child's placement in out-of-home care. No social file or social study may be considered by the court in connection with the fact-finding hearing or prior to factual determination, except as otherwise admissible under the rules of evidence.

(c) Prior to the entry of any stipulated or agreed order of dependency, the parent, guardian, or legal custodian of the child and his or her attorney must appear before the court and the court within available resources must inquire and establish on the record that:

(i) The parent, guardian, or legal custodian understands the terms of the order or orders he or she has signed, including his or her responsibility to participate in remedial services as provided in any disposition order;

(ii) The parent, guardian, or legal custodian understands that entry of the order starts a process that could result in the filing of a petition to terminate his or her relationship with the child within the time frames required by state and federal law if he or she fails to comply with the terms of the dependency or disposition orders or fails to substantially remedy the problems that necessitated the child's placement in out-of-home care;

(iii) The parent, guardian, or legal custodian understands that the entry of the stipulated or agreed order of dependency is an admission that the child is dependent within the meaning of RCW 13.34.030 and shall have the same legal effect as a finding by the court that the child is dependent by at least a preponderance of the evidence, and that the parent, guardian, or legal custodian shall not have the right in any subsequent proceeding for termination of parental

rights or dependency guardianship pursuant to this chapter or nonparental custody pursuant to chapter 26.10 RCW to challenge or dispute the fact that the child was found to be dependent; and

(iv) The parent, guardian, or legal custodian knowingly and willingly stipulated and agreed to and signed the order or orders, without duress, and without misrepresentation or fraud by any other party.

If a parent, guardian, or legal custodian fails to appear before the court after stipulating or agreeing to entry of an order of dependency, the court may enter the order upon a finding that the parent, guardian, or legal custodian had actual notice of the right to appear before the court and chose not to do so. The court may require other parties to the order, including the attorney for the parent, guardian, or legal custodian, to appear and advise the court of the parent's, guardian's, or legal custodian's notice of the right to appear and understanding of the factors specified in this subsection. A parent, guardian, or legal custodian may choose to waive his or her presence at the in-court hearing for entry of the stipulated or agreed order of dependency by submitting to the court through counsel a completed stipulated or agreed dependency fact-finding/disposition statement in a form determined by the Washington state supreme court pursuant to General Rule GR 9.

(3) Immediately after the entry of the findings of fact, the court shall hold a disposition hearing, unless there is good cause for continuing the matter for up to fourteen days. If good cause is shown, the case may be continued for longer than fourteen days. Notice of the time and place of the continued hearing may be given in open court. If notice in open court is not given to a party, that party shall be notified by certified mail of the time and place of any continued hearing. Unless there is reasonable cause to believe the health, safety, or welfare of the child would be jeopardized or efforts to reunite the parent and child would be hindered, the court shall direct the department to notify those adult persons who: ~~((1))~~ (a) Are grandparent, brother, sister, stepparent, stepbrother, stepsister, uncle, or aunt; ~~((2))~~ (b) are known to the department as having been in contact with the family or child within the past twelve months; and ~~((3))~~ (c) would be an appropriate placement for the child. Reasonable cause to dispense with notification to a parent under this section must be proved by clear, cogent, and convincing evidence.

The parties need not appear at the fact-finding or dispositional hearing if the parties, their attorneys, the guardian ad litem, and court-appointed special advocates, if any, are all in agreement. ~~((The court shall receive and review a social study before entering an order based on agreement. No social file or social study may be considered by the court in connection with the fact-finding hearing or prior to factual determination, except as otherwise admissible under the rules of evidence.))~~

NEW SECTION. Sec. 8. A new section is added to chapter 13.34 RCW to read as follows:

The department of social and health services shall promulgate rules that create good cause exceptions to the establishment and enforcement of child support from parents of children in out-of-home placement under chapter 13.34 or 13.32A RCW that do not violate federal funding requirements. The department shall present the rules and the department's plan for implementation of the rules to the appropriate committees of the legislature prior to the 2002 legislative session.

Passed the Senate April 19, 2001.

Passed the House April 18, 2001.

Approved by the Governor May 15, 2001.

Filed in Office of Secretary of State May 15, 2001.

CHAPTER 333

[Substitute Senate Bill 5533]

SCHOOL PESTICIDE USE—PARENTAL NOTIFICATION

AN ACT Relating to posting and notification of pesticide applications at schools; amending RCW 17.21.020 and 17.21.410; adding a new section to chapter 17.21 RCW; adding a new section to chapter 28A.320 RCW; adding a new section to chapter 74.15 RCW; creating a new section; and providing an effective date.

Be it enacted by the Legislature of the State of Washington:

Sec. 1. RCW 17.21.020 and 1994 c 283 s 1 are each amended to read as follows:

Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

(1) "Agricultural commodity" means any plant or part of a plant, or animal, or animal product, produced by a person (including farmers, ranchers, vineyardists, plant propagators, Christmas tree growers, aquaculturists, floriculturists, orchardists, foresters, or other comparable persons) primarily for sale, consumption, propagation, or other use by people or animals.

(2) "Agricultural land" means land on which an agricultural commodity is produced or land that is in a government-recognized conservation reserve program. This definition does not apply to private gardens where agricultural commodities are produced for personal consumption.

(3) "Antimicrobial pesticide" means a pesticide that is used for the control of microbial pests, including but not limited to viruses, bacteria, algae, and protozoa, and is intended for use as a disinfectant or sanitizer.

(4) "Apparatus" means any type of ground, water, or aerial equipment, device, or contrivance using motorized, mechanical, or pressurized power and used to apply any pesticide on land and anything that may be growing, habitating, or stored on or in such land, but shall not include any pressurized handsized household device used to apply any pesticide, or any equipment, device, or contrivance of which the person who is applying the pesticide is the source of power or energy in making such pesticide application, or any other small equipment, device, or

contrivance that is transported in a piece of equipment licensed under this chapter as an apparatus.

~~((4))~~ (5) "Arthropod" means any invertebrate animal that belongs to the phylum arthropoda, which in addition to insects, includes allied classes whose members are wingless and usually have more than six legs; for example, spiders, mites, ticks, centipedes, and isopod crustaceans.

~~((5))~~ (6) "Certified applicator" means any individual who is licensed as a commercial pesticide applicator, commercial pesticide operator, public operator, private-commercial applicator, demonstration and research applicator, or certified private applicator, or any other individual who is certified by the director to use or supervise the use of any pesticide which is classified by the EPA or the director as a restricted use pesticide.

~~((6))~~ (7) "Commercial pesticide applicator" means any person who engages in the business of applying pesticides to the land of another.

~~((7))~~ (8) "Commercial pesticide operator" means any employee of a commercial pesticide applicator who uses or supervises the use of any pesticide and who is required to be licensed under provisions of this chapter.

~~((8))~~ (9) "Defoliant" means any substance or mixture of substances intended to cause the leaves or foliage to drop from a plant with or without causing abscission.

~~((9))~~ (10) "Department" means the Washington state department of agriculture.

~~((10))~~ (11) "Desiccant" means any substance or mixture of substances intended to artificially accelerate the drying of plant tissues.

~~((11))~~ (12) "Device" means any instrument or contrivance intended to trap, destroy, control, repel, or mitigate pests, but not including equipment used for the application of pesticides when sold separately from the pesticides.

~~((12))~~ (13) "Direct supervision" by certified private applicators shall mean that the designated restricted use pesticide shall be applied for purposes of producing any agricultural commodity on land owned or rented by the applicator or the applicator's employer, by a competent person acting under the instructions and control of a certified private applicator who is available if and when needed, even though such certified private applicator is not physically present at the time and place the pesticide is applied. The certified private applicator shall have direct management responsibility and familiarity of the pesticide, manner of application, pest, and land to which the pesticide is being applied. Direct supervision by all other certified applicators means direct on-the-job supervision and shall require that the certified applicator be physically present at the application site and that the person making the application be in voice and visual contact with the certified applicator at all times during the application. Direct supervision of an aerial apparatus means the pilot of the aircraft must be appropriately certified.

~~((13))~~ (14) "Director" means the director of the department or a duly authorized representative.

NO. 64711-3

**COURT OF APPEALS FOR DIVISION I
STATE OF WASHINGTON**

In re Dependency of: J.M.R.,

STATE OF WASHINGTON,
DEPARTMENT OF SOCIAL AND
HEALTH SERVICES,

Respondent,

v.

JOHN ROUSSEAU,

Appellant.

DECLARATION OF
SERVICE OF BRIEF
OF RESPONDENT

I, Ronda Larivee, certify that on **June 23, 2010**, I sent via Legal Messenger the original or a copy of the Brief of Respondent to the following parties:

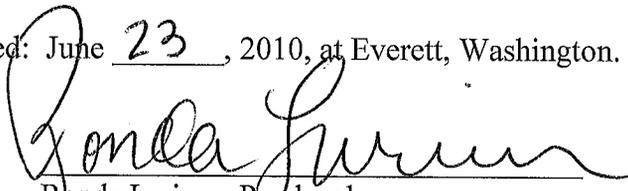
Court of Appeals, Division I
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Seattle, WA 98101

Guardian ad Litem Office
2801 10th Street, 2nd Floor
Everett, WA 98201

Casey Grannis
Nielsen, Broman & Koch
Attorney at Law
1908 E Madison St.
Seattle, WA 98122

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

Dated: June 23, 2010, at Everett, Washington.

By: 
Ronda Larivee, Paralegal

FILED
COURT OF APPEALS DIVISION I
STATE OF WASHINGTON
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