

SUPREME COURT NO. 86124-2  
NO. 65565-5-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re Dependency of K.D.S., a Minor  
STATE OF WASHINGTON, DSHS,  
Respondent,

v.

DEREK GLADIN,  
Petitioner,

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR WHATCOM COUNTY

The Honorable Steven J. Mura, Judge

MOTION FOR DISCRETIONARY REVIEW AND SUPPORTING  
BRIEF

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A. IDENTITY OF PETITIONER

Petitioner, Derek Gladin, the appellant below, asks this Court to review the decision referred to in Section B.

B. COURT OF APPEALS DECISION

Gladin requests review of the Commissioner's Ruling in In re Dependency of K.D.S. (No. 65565-5-I), entered on March 9, 2011, and the Court of Appeals (Division I) order denying appellant's motion to modify that ruling, entered on May 11, 2011.<sup>1</sup>

C. ISSUE PRESENTED FOR REVIEW

Does a finding that continuation of the parent-child relationship diminishes a child's prospects for early integration into a stable and permanent home under RCW 13.34.180(1)(f) necessarily follow from a finding that there is little likelihood that conditions will be remedied so the child can be returned to the parent in the near future under RCW 13.34.180(1)(e)? In other words, is the State's burden under RCW 13.34.180(1)(f) automatically met if it has met its burden under RCW 13.34.180(1)(e)?

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<sup>1</sup> These rulings are attached as Appendices A and B.



13.34.180(1) in In re Welfare of A.B., 168 Wn.2d 908, 232 P.3d 1104 (2010), also suggests J.C.'s holding is no longer good law.

The existing confusion over whether J.C. is still applicable is apparent in this record. On the one hand, the trial court refused to apply J.C.'s holding, concluding its reasoning did not apply to future cases. On the other hand, Division I applied J.C. in this case, and in other cases that are published,<sup>3</sup> as controlling precedent. Appendix A at 9.

Gladen's petition offers this Court the opportunity to clarify J.C. either by offering a reasoned legal analysis supporting J.C.'s conclusion or expressly recognizing that its conclusion has been abandoned. As this case shows, only an express ruling from this Court can ensure that all Washington courts uniformly hold the State to its burden under RCW 13.34.180(1)(f). Hence, this case raises a matter of substantial public interest and review should be granted. RAP 13.4(b)(4).

Review also should be granted because, as shown below, Division I's decision conflicts with this Court's decision in K.S.C. and A.B. RAP 13.4(b)(1).

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<sup>3</sup>See, e.g., In re P.P.T. 155 Wn. App. 257, 268, 229 P.3d 818 (2010) (citing J.C. with but offered no legal analysis.)

E. RELEVANT FACTS

K.D.S. was born on July 28, 1995. RP 17. Appellant Derek Gladin is K.D.S.'s father and Elizabeth Sleasman is her mother. RP 17. K.D.S. was taken into custody on November 23, 2002, after Sleasman engaged in a high speed chase with K.D.S. in the car. RP 17, 75. At that time, Gladin was living in Alabama. RP 19-20. A dependency was established as to Sleasman on January 6, 2003, based on a finding of neglect. CP 5. On August 29, 2003, a dependency was established as to Gladin because he did not appear able to meet K.D.S.'s significant special needs. CP 5; RP 74.

K.D.S. suffers severe developmental delays and mental health issues which manifest in extreme behavior problems.<sup>4</sup> K.D.S. has been diagnosed with fetal alcohol exposure, attention deficit hyperactivity disorder, post traumatic stress disorder, communication disorder, mild mental retardation, opposition defiance disorder, and a mood disorder. RP 103, 292. Although K.D.S. was 14 years old at the time of the termination hearing, her cognitive function was akin to that of a preschooler. RP 250, 262.

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<sup>4</sup> The trial court found Gladin was not responsible for causing these circumstances. RP 541.

As a result, K.D.S. acts out aggressively (physically and verbally) when she does not get her way or is frustrated, engages in highly sexualized and inappropriate behavior, self injures, and verbally threatens to kill others. RP 104, 295. She has been hospitalized several times for psychiatric treatment -- sometimes needing to stay up to 180 days. RP 91, 102, 290, 300.

K.D.S.'s behavior is so extreme she has to live in an institutional home without roommates. RP 266, 297. Throughout the dependency, K.D.S. changed residency fourteen times. RP 143. In August 2008, K.D.S. was transferred to SL Start Children's Home in Spokane, even though the Department was aware the transfer would present visitation challenges because Gladin lived in western Washington. RP 115, 290. K.D.S. requires multiple caregivers and is staffed at all times. RP 105, 302. The staff has had to develop an elaborate safety plan for protecting K.D.S. and themselves when she is out of control. RP 298-300. This includes attempting to restrain K.D.S., and if that does not work, leaving the house and observing her through the windows. RP 299. As a last resort, the staff is directed to call 911 for help. RP 300. The police have been called a few times, and K.D.S. has had to be handcuffed. RP 301.

The social worker testified K.D.S.'s behavioral issues are extreme compared to other children she has worked with, and that she does not see K.D.S. ever being able to live independently. RP 106. K.D.S.'s needs have proven too much to handle for her relatives and the one foster home she was placed in. RP 274, 408. Although Gladin was provided with remedial services, the trial court found he too was not in a position to meet his daughter's significant daily needs as a single parent, and no amount of services could change that. RP 77-81; 540-41.

Despite the ongoing dependency, K.D.S. was cleared for adoption in April 2008. RP 409. K.D.S. was listed with the Northwest Adoption Exchange Network and specifically presented twice. RP 106. Although one family was interested, they decided to adopt a disabled child with far less challenges. RP 106, 336-39. The social worker testified K.D.S. was more likely to be adopted if Gladin's parental rights were terminated because, in general, people are more likely to adopt if a child is already legally available. RP 107. When the trial court asked the social worker to render a specific opinion as to how likely it is for a 14-year-old girl with

K.D.S.'s needs to be adopted, she admitted she had no idea.<sup>5</sup> RP 410.

During argument, the State cited J.C. and argued -- despite K.D.S.'s bleak prospects for ever being placed outside an institution -- the trial court should find it met its burden under RCW 13.34.180(1)(f) based on the fact the State met its burden under RCW 13.34.180(1)(e). In response, defense counsel argued J.C.'s holding is not well-reasoned and should not be followed. RP 529-31. The State pointed out J.C. had never been reversed. RP 537.

Despite this, the trial court declined to follow J.C., explaining:

I wish the courts were clearer for me in order to address [RCW 13.34.180(1)(f)]. Sometimes the courts can intentionally, or unintentionally, seek an outcome and then back reason in order to justify the outcome that the court wants to see. And when you have that back reasoning, it just doesn't work trying to apply the law in future cases. But that prong means something besides the first five. If after the first five were found the sixth was ipso facto, as the Department argues here, then we wouldn't even have that. We would only find the first five and say terminate.

RP 541.

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<sup>5</sup> Given her nearly non-existent prospects for foster care placement or adoption, an SL Start representative testified that institution was committed to providing for K.D.S.'s care permanently. RP 108, 118-19, 329.

The trial court concluded there was no chance K.D.S. would be adopted and it was absolutely certain she would remain in a home such as RL Start for the rest of her life. RP 542, 543. It found there was only a small (5%) chance K.D.S. would ever find a permanent, non-institutional home even if termination occurred. RP 543-44; CP 8. It concluded “[K.D.S.] is in as in as stable and permanent home now as she’ll ever be in.” RP 544. The trial court believed the ideal situation would be to continue of the dependency and K.D.S.’s placement at RL Start with occasional supervised parental visits, but did not believe it had the power to order this. RP 543-44.

Despite these findings and the trial court’s rejection of J.C., it concluded the State had met its burden under RCW 13.34.180(1)(f) because there was a “small” chance K.D.S. might be more adoptable if Gladin’s rights were terminated. CP 8. Division I affirmed the trial court’s ruling under RCW 13.34.180(1)(f), but analyzed the issue quite differently. It found J.C. was binding precedent. Appendix A at 9. Appellant petitions this Court to review that decision.

F. ARGUMENT IN SUPPORT OF REVIEW

J.C. IS NO LONGER GOOD LAW AND SHOULD BE EXPRESSLY OVERRULED TO ENSURE THE STATE IS NOT RELIEVED OF ITS BURDEN TO PROVE ALL THE STATUTORY PREREQUISITES TO TERMINATION IN ALL CASES.

As stated above, in J.C., this Court suggested that RCW 13.34.180(1)(f) is automatically met once the State has met its burden under RCW 13.34.180(1)(f). J.C., 130 Wn.2d at 427.

Just a few years later, however, this Court appeared to abandon J.C.'s holding. In K.S.C., this Court was asked to review a case in which the mother challenged the sufficiency of the evidence under former RCW 13.34.180(6), but did not properly raise a challenge under former RCW 13.34.180(5). In re Dependency of K.S.C., 137 Wn.2d 918, 926, n. 3, 976 P.2d 113 (1999). The Supreme Court refused to review any argument regarding former RCW 13.34.180(5), letting stand the finding that the State had met its burden regarding that element. Id. Under J.C., any further review of the case would have been unnecessary. Instead, however, this Court reviewed the merits of the case to determine whether the State had affirmatively met its burden under former RCW 13.34.180(6). Id. at 926-27. In so doing, this Court appears to have abandoned its conclusion in J.C. that proof of RCW

13.34.180(5) automatically leads to a finding that RCW 13.34.180(6) also has been proved.<sup>6</sup>

This Court's sub silentio rejection of J.C. so soon after that case was decided was reasonable given J.C.'s lack of legal reasoning. It is well established that unreasoned precedence should not be adhered to under the policy of stare decisis. Payne v. Tennessee, 501 U.S. 808, 827, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991). The precedential force of an opinion turns, in part, on the quality of its reasoning and diminishes substantially if the opinion provides no reasoning. Id. When a decision treats an issue in a conclusory manner, and is "virtually devoid of reasoning," its authoritative status is undermined and stare decisis should not be invoked. City of Berkeley v. Superior Court, 26 Cal.3d 515, 533, 162 Cal.Rptr. 327, 606 P.2d 362 (1980). This is especially so when the fundamental constitutional rights of parents and children hang

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<sup>6</sup> In Gladin's case, Division I tried to distinguish K.S.C. on the ground that case only involved the question of whether a dependency guardianship was an alternative to termination. Appendix A at 9. While that issue was raised, the Court of Appeals ignores the fact this Court was also asked to review whether there was sufficient evidence to support the trial court's finding under RCW 13.34.180(1). It was the Court's analysis of this question which is relevant to the issue raised by petitioner. Thus, the Division I's attempt to distinguish K.S.C. based on the legal question presented is without merit.

in the balance. See, e.g., State v. Savidge, 144 Wn. 302, 310, 258 P. 1 (1927) (explaining stare decisis does not apply when a prior opinion affecting constitutional rights was erroneous).

Moreover, the Supreme Court's sub silentio abandonment of J.C. is consistent with the longstanding rule of statutory construction that all language within a statute must be given effect so that no portion is rendered meaningless or superfluous. Davis v. Dep't of Licensing, 137 Wn.2d 957, 963, 977 P.2d 1231 (1999). Appellate courts are duty bound to give meaning to every word the legislature includes in a statute and must avoid rendering any language superfluous. City of Seattle v. Williams, 128 Wn.2d 341, 349, 908 P.2d 359 (1995). The legislature is presumed not to engage in unnecessary or meaningless acts. Bailey v. Allstate Ins. Co., 73 Wn. App. 442, 446, 869 P.2d 1110 (1994). As the trial court recognized in this case, under J.C.'s holding, RCW 13.34.180(1)(f) is rendered meaningless.

In contrast to J.C., this Court's recent decision in A.B. provides a recent interpretation of RCW 13.34.180(1) that gives meaning to all the language in that statute. In A.B., this Court explicitly stated "**each** [element under RCW 13.34.180(1)] must be proved clearly, cogently, and convincingly." 168 Wn.2d\_911.

Under J.C., the State is only required to prove the first five elements and, then, it necessarily follows that the sixth element is met. By stating in A.B. that each of the six factors must be supported by clear and convincing evidence, this Court again appears to have rejected J.C.'s interpretation of RCW 13.34.180(1)(f), which holds the State to no independent evidentiary burden under RCW 13.34.180(1)(f).

Despite this Court's apparent rejection of J.C. in K.S.C. and A.B., this issue remains murky – as this record shows. It is imperative that this Court undertake a meaningful statutory analysis and either expressly affirm or reject J.C.'s holding. This will bring clarity to this murky issue of law. As it stands now, however, the State is being required to affirmatively meet a distinct burden under RCW 13.34.180(1)(f) in some termination proceedings, but not in others. Such a lack of uniformity should not be permitted to continue in cases where the constitutional rights of parents and children hang in the balance.

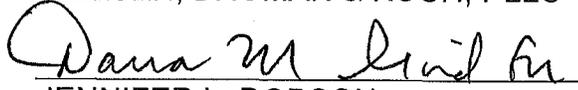
G. CONCLUSION

For the reasons stated above, appellant respectfully asks this Court grant review. RAP 13.4(b)(1), 13.4(b)(3), 13.4(b)(4) and 13.5A(3).

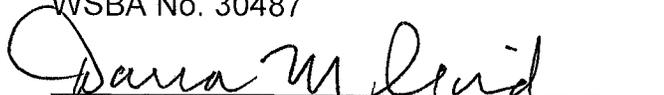
DATED this 3<sup>rd</sup> day June, 2011.

Respectfully submitted,

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**APPENDIX A**

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

In the Matter of the Dependency of: )  
)  
K.D.S., )  
B.D. 7-28-95, )  
)  
  a minor child. )  
)  
STATE OF WASHINGTON, )  
DEPARTMENT OF SOCIAL AND )  
HEALTH SERVICES, )  
)  
  Respondent, )  
)  
  v. )  
)  
DEREK GLADIN, )  
)  
  Appellant. )

No. 65565-5-1

COMMISSIONER'S RULING  
ON ACCELERATED REVIEW  
AFFIRMING TERMINATION  
OF PARENT-CHILD  
RELATIONSHIP

Derek Gladin appeals the trial court order terminating his parental relationship with his daughter ("K"), contending that the Department of Social and Health Services (the Department) failed to establish that continuing a relationship with him would diminish her prospects for early integration into a stable and permanent home. K is a 15-year-old who suffers from fetal alcohol exposure, attachment disorder, attention deficit hyperactivity disorder (ADHD), post traumatic stress disorder (PTSD), mild mental retardation and a mood disorder. She functions at the level of a five or six year old and performs at the educational level of a special education preschool/kindergarten student. She lives in a specialized children's group home where she requires constant one-on-one line of sight supervision. Gladin had some successful visits at the group home, but he does not fully appreciate the extent of K's limitations. When safety

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concerns arose, his visitation was suspended and he did not attend meetings to address those concerns. He had not seen K for two years prior to the termination trial.

Gladin argues that K's prospects for adoption are so limited, that maintaining his relationship with her has no practical impact on her prospects for integration into a more stable or permanent placement. But the testimony of the Department social worker and the Guardian ad litem confirm that without a termination, K is unlikely to be considered for adoption at all. The trial court recognized that although slight, K's chances of adoption are impaired by continuing a parental relationship with Gladin. Substantial evidence supports the trial court's determination that continuing a relationship with Gladin would clearly diminish K's prospects for early integration into a stable and permanent home.

Gladin challenges the absence of an express finding of current parental unfitness, but such a finding is clearly implied by the trial court.

Gladin also contends that termination is not in the best interest of the child, but the testimony of the social worker and the Guardian ad Litem supports the trial court finding that termination is in K's best interests.

Gladin's arguments that the trial court failed to recognize its equitable authority to craft less restrictive alternatives is not convincing.

Contrary to Gladin's arguments, RCW 13.34.190 is not unconstitutional for lack of adequate standards.

This matter is appropriate for accelerated review under RAP 18.13 and the decision of the trial court is affirmed.

**FACTS**

K was born in 1995. Gladin cared for K for a short period of time in 2001, when he violated the parenting plan by moving K to Seattle. K was removed from her mother's care in 2002 due to her mother's substance abuse and failure to keep K safe. At that time Gladin was considered for placement, but was not able to address K's special needs. K has been out her parent's care since 2002.

Dependency was established as to Gladin in 2003. Some questions were raised regarding allegations of sexual abuse as well as Gladin's level of insight as to K's needs, his resistance to case management and services, and an unstable life style. In 2003, Gladin participated in a psychological evaluation by Dr. Friedman. Dr. Friedman concluded that Gladin's intellectual functioning was in the low average range and that he would have difficulty retaining information necessary to deal with K's special needs. He lacks awareness of the impact of his behavior on others. His diminished ability to interact effectively with the professionals impacts his ability to meet K's special needs. Dr. Friedman diagnosed Gladin with a personality disorder Not Otherwise Specified with paranoid, antisocial and borderline personality traits. Dr. Friedman also noted that Gladin's cognitive deficits and personality disorder are not likely to change, and that K does not relate to Gladin as a parental figure. Dr. Friedman concluded that a return of K to Gladin's care would put her at a moderate to high risk. He recommended that Gladin complete a sexual history interview and polygraph, anger management and basic and specialized parenting instruction.

Among other requirements, the 2003 dispositional order directed Gladin to complete a sexual history interview with polygraph, and one-on-one parenting education. Between 2003 and 2005, Gladin participated in parenting classes including individualized parent coaching offered by Amy Glasser. Glasser concluded that Gladin's major weakness is his inability to understand the severity of K's special needs. He did work on setting routines and making sure that K followed them, but after 14 or 15 sessions, Glasser was concerned that Gladin would not continue to use these techniques if she was not present. Gladin also completed an anger management evaluation and no treatment was recommended.

After 2005, Gladin did not participate in further services. He has not undertaken a sexual history interview or polygraph. He did not maintain regular contact with the Department or with K's service providers.

Some visits went well, with Gladin interacting positively with K who was happy during visits. Other visits were troublesome. K would not talk with Gladin and her behavior would escalate. After visits K would bite, scratch, pull hair, sweat, remove her clothing and engage in inappropriate sexual behavior. After such a visit in December 2008, the court suspended visitation until Gladin and the providers could meet to develop an approach to minimize the negative reactions. Gladin missed a first meeting and then was late for the second meeting. He did not attempt to reschedule the meeting. He has not seen K since December 2008. He made a phone call request for a visit. The social worker directed Gladin to obtain an attorney and make his request to the court. Gladin did not pursue visitation.

K is placed with a specialized children's group home where she receives constant one-on-one line of sight supervision. The Department social worker testified that the Department has sought an adoptive home for K. One family expressed interest but then decided to look at another developmentally disabled child. The social worker acknowledges that an adoption would not be easy, but that the Department is more likely to find an adoptive home for K, if her parental rights have been terminated. The social worker testified that having parental rights in place reduces K's chances of having a successful permanent plan. The caseworker concludes that K is not bonded to Gladin and termination is in her best interests.

A behavior support coordinator employed at the group home has worked with K. She is aware of another child adopted with a similar level of needs and a similar age as K.

The Guardian ad Litem (GAL) has seen K several times and observed four or five visits with Gladin. She is concerned that Gladin believes the professionals are exaggerating K's needs and he has not demonstrated an ability to work with professionals and participate in necessary meetings regarding K. The appropriate alternative plans for K are either long term foster care or adoption. If K is not adopted, the GAL anticipates that at age 18 a Title 11 GAL would be appointed to arrange for a legal guardian to be appointed. "I'm concerned that if Mr. Gladin's rights are in place when it comes time for [K] to have a legal guardian appointed to follow her throughout her adult life he will contest and attempt to take custody of her."

The trial court found that Mr. Gladin has completed some services but there has been little improvement in parental functioning during the 7-year dependency. Gladin

struggles with understanding K's disability. He has never participated in the sexual history interview with polygraph exam ordered by the court. His personality disorder and below average IQ are not likely to change over his lifetime. Although he states he is willing to do anything to parent the child, his statement "is not borne out by his actions." Finding of Fact 2.13. The court expressly found that "[i]t is highly unlikely that Mr. Gladin will be able to parent his child with any period of services or treatment, let alone in the near future." Finding of Fact 2.13.

In its oral ruling, the trial court observed that the seven year dependency was very unusual. The court noted that "if I had the authority in this case I would just order that [K] remain dependent on the state, which she will be for the rest of her life, and that the father be entitled on occasion to visit her." The court later observed "[t]he other thing I would like to have the authority to do and I don't,...is to tell the State to keep looking and do the best to find a permanent foster home, find [an] adoptive home, and the instant you do that I'd sign off on an order terminating parental rights." The court stated that Gladin was not a danger to K "during the supervised visits" and that Gladin loves his daughter. But the court also observed that Gladin had not complied with required services including the sexual history interview with polygraph, and that although he says he will do anything required to parent K he statement "has not been proven out by actions." The court was "absolutely convinced that you have no clue what it would be like to parent [K] because you're not going to be capable of [parenting even] with the best of intentions."

In the written findings of fact, the court expressed its concern with the limited prospects of K for adoption, but found that the continuation of the parent child

relationship with Gladin would clearly diminish her prospects for integration into a stable and permanent home:

Terminating Mr. Gladin's parental rights would increase [K's] chances for finding a permanent home, and would allow the Department to have more adoptive options available. More families are willing to adopt when a child is legally free. Although the chances of finding a stable and permanent home for [K] are small, continuation of the parent-child relationship clearly diminishes the child's prospects for early integration into a stable and permanent home.

Finding of Fact 2.14.

The trial court also concluded that termination is in the best interests of K

### DECISION

An order of permanent termination of the parent-child relationship may be entered when the statutory elements set forth in RCW 13.34.180(1) through (6) are established by clear, cogent, and convincing evidence and the court finds that termination is in the best interests of the child.<sup>1</sup> The trial court is assigned the

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<sup>1</sup> RCW 13.34.190. RCW 13.34.180(1) provides in part:

"A petition seeking termination of a parent and child relationship . . . shall allege . . . :

"(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

challenging task of viewing the witnesses and resolving the factual disputes presented. "Deference paid to the trial judge's advantage in having the witnesses before him is particularly important in deprivation proceedings[.]"<sup>2</sup> If there is substantial evidence that the lower court could reasonably have found to be clear, cogent, and convincing, an appellate court will not disturb the trial court's findings.<sup>3</sup>

Likelihood of Early Integration Into Permanent Home. Gladin argues that the record does not support the finding that continuing his relationship with K will interfere with any tangible chance that K's circumstances will change as a result of the termination. Gladin argues that evidence of some remote and slight improvement in the chances for adoption does not meet the standard of clear cogent and convincing evidence that a child's prospects are **clearly** diminished by continuing the parent child relationship.

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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."

<sup>2</sup> In re Welfare of Aschauer, 93 Wn.2d 689, 695, 611 P.2d 1245 (1980).

<sup>3</sup> In re Dependency of H.J.P., 114 Wn.2d 522, 532, 789 P.2d 96 (1990); Aschauer, 93 Wn.2d at 695.

But this element does not turn on the practical chances of an adoption. “[T]his factor is mainly concerned with the continued effect of the *legal* relationship between parent and child, as an obstacle to adoption...” of the child.<sup>4</sup>

Additionally, a finding that continuation of the parent-child relationship diminishes a child’s prospects for early integration into a stable and permanent home necessarily follows from a showing that there is little likelihood that conditions will be remedied so the child can be returned to that parent in the near future.<sup>5</sup> Gladin argues that such a construction renders the “integration” element superfluous and the legislature must have intended the “integration” element to require something other than just satisfying the “little likelihood” requirement. Gladin argues that the holding in In re Dependency of K.S.C.,<sup>6</sup> *sub silentio* abandoned the “necessarily follows” portion of Dependency of J.C.<sup>7</sup>. But K.S.C. involved the question whether a dependency guardianship was an alternative to termination. Washington caselaw continues to recognize the “necessarily follows” link between the two requirements for termination.<sup>8</sup> It also appears that the extension of Gladin’s argument would require the phrase “stable and permanent” home to mean only an “adoptive home,” a proposition squarely rejected in In re Dependency of J.E.<sup>9</sup>

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<sup>4</sup> In re Dependency of A.C., 123 Wn. App. 244, 250, 98 P.3d 89 (2004).

<sup>5</sup> In re Dependency of J.C., 130 Wn.2d 418, 924 P.2d 21 (1996).

<sup>6</sup> 137 Wn.2d 918, 927–29, 976 P.2d 113 (1999).

<sup>7</sup> 130 Wn.2d 418, 427, 924 P.2d 21 (1996).

<sup>8</sup> In re P.P.T., 155 Wn. App. 257, 268, 229 P.3d 818 (2010).

<sup>9</sup> 99 Wn.2d 210, 214, 660 P.2d 758 (1983).

Gladin's continued legal relationship poses an obstacle to adoption planning. Because it is undisputed that there is little likelihood K could be reunited with Gladin in the near future, it necessarily follows that continuation of his relationship diminishes prospects for integration into a stable and permanent home.

Gladin's arguments do not alter the established standard that if the existence of the "legal relationship" does directly impact the ability of the child to be integrated into a permanent and stable home, then the "integration" element is satisfied. The record here supports the determination by the trial court that continuing a legal relationship with Gladin is a legal barrier to K's chance of adoption and thus diminishes the likelihood of her integration into a stable and permanent home.

Explicit Finding of Current Parental Unfitness. Gladin argues that there is no express or implied finding that he is currently unfit to parent K as required by In re Welfare of A.B.<sup>10</sup> The June 10, 2010 decision in Welfare of A.B., was issued after the termination trial in this matter. The Supreme Court held that the trial court must enter an express finding that the parent is currently unfit and "when an appellate court is faced with a record that omits an explicit finding of current parental unfitness, the appellate court can imply or infer the omitted finding if—but only if—all the facts and circumstances in the record (including but not limited to any boiler plate findings that parrot RCW 13.34.180) clearly demonstrate that the omitted finding was actually

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<sup>10</sup> 168 Wn.2d 908, 232 P.3d 1104 (2010).

intended, and thus made, by the trial court.”<sup>11</sup> In A.B. the trial court made several conflicting findings including praise for the father’s almost heroic efforts.

Gladin argues that the trial court’s observations that Gladin loves his daughter, he did not cause her to require extensive supervision, he poses no danger during supervised visits, and his daughter enjoyed visits are all inconsistent with being currently unfit to parent “in some capacity”. But the findings of fact unequivocally set forth Gladin’s lack of any significant improvement during the seven year dependency. He has not completed the required sexual history interview with polygraph. He struggles with understanding his daughter’s profound disability and despite his statements that he will do anything to parent his daughter, his statement is “not borne out by his actions.” The trial court found it is highly unlikely that Gladin will be able to parent K in the near future or at any time in the future. He has no clue how to deal with her extreme needs. There is no question that the trial court was convinced that Gladin is not currently fit to parent K. He has not been denied due process for lack of an explicit finding that he is “currently unfit” to parent his daughter.

Best Interests. The trial court is afforded broad discretion in making a best interests determination, and its decision will receive great deference on review.<sup>12</sup> Here, the social worker and the GAL testified to Gladin’s parental deficiencies and his inability to meet his daughter’s needs. The social worker acknowledges the difficulty of achieving an adoption but that an adoption is less likely without a termination. The GAL

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<sup>11</sup> 168 Wn.2d at 921.

<sup>12</sup> In re Welfare of Young, 24 Wn. App. 392, 395, 600 P.2d 1312 (1979).

testified that alternatives of adoption or a permanent guardianship when she turns 18 are the best plans for K. The GAL was concerned that without a termination, Gladin might delay and disrupt those efforts.

Gladin challenges the trial court's factual findings that termination is in K's best interests because termination will allow resolution of who will be K's permanent caretaker and allow adoption planning to begin. He is correct that adoption planning and some efforts have already begun, but the social worker and the GAL testimony reflects that such efforts are impaired so long as the parental relationship remains in existence. He argues that K is already in as permanent a placement as she will likely ever know, but the GAL testimony reflects her concerns that without a termination, Gladin might frustrate selection of a permanent guardian.

Under all the circumstances, it was within the broad discretion of the trial court to make a determination that termination is in the best interests of K.

Failure to Recognize Equitable Power to Order Less Restrictive Alternatives.

Gladin argues that the court had equitable powers to structure less restrictive alternatives. He focuses upon the trial court's observations in its oral ruling that it wished it had the authority to simply allow Gladin some limited visits in perpetuity or that it could keep the matter on hold indefinitely and if an adoptive home became available, then instantly enter the order terminating the parental relationship. He argues there is a gap in the termination statute, and when the court finds all the elements are present, the court still has the equitable powers to shape remedies such as those identified by the trial court. Or at the very least the trial court should have recognized that a dependency guardianship would have allowed Gladin to continue with occasional visits,

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arguing that the Spokane group home could have taken on the role of dependency guardian. He acknowledges that no guardianship petition was before the court, but argues that the absence of a petition does not preclude the court from exploring that option in its discretion.

The trial court clearly had the authority to find all the elements satisfied except best interests and to continue the termination trial for a period of time to allow the Department to further explore efforts at adoption. But it does not appear that the trial court was confused about such an option. Rather the court wished it had authority to find all the elements required for termination and indefinitely delay actually signing the termination order until and unless the Department was able to arrange for an adoption and then instantly order termination. Gladin offers no compelling authority that the court held such authority as part of its inherent equitable powers.

Gladin's argument that the trial court had the authority to propose and implement a dependency guardianship in the absence of such a petition does not support a reversal. No one asked the trial court to grant such a remedy. And even if asked, there is no showing that the group home could qualify and function as a dependency guardian.

Best Interests Statute (RCW 13.34.190) Not Void for Vagueness. Finally, Gladin argues that RCW 13.34.190 is void for vagueness for lack of any standards. The trial court does not reach the question of best interest unless the other elements have been

satisfied.<sup>13</sup> The best interests of a child depends on the circumstances of each case and the trial court is accorded broad discretion in determining the best interests.<sup>14</sup>

Statutes are presumed to be constitutional.<sup>15</sup> The challenging party has the burden to prove otherwise beyond a reasonable doubt.<sup>16</sup> A statute is unconstitutionally vague under the Fourteenth Amendment if it is "framed in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application."<sup>17</sup> For a statute to be unconstitutional, its terms must be " 'so loose and obscure that they cannot be clearly applied in any context.' "<sup>18</sup> In reviewing a vagueness challenge to a provision of RCW 13.34, the statute is the provisions of the statute are considered as a whole.<sup>19</sup>

There is no statutory definition of "best interests" or a list of specific factors or guidelines. But Washington courts have repeatedly recognized the critical role of determining the best interests of a child as part of a termination:

This court has repeatedly said that the goal of a dependency hearing is to determine the welfare of the child and his best interests... While the criteria for establishing the best interests of the child are not capable of specification, each case being largely dependent upon its own facts and circumstances (see *In re Becker, supra*), the proof necessary in order to

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<sup>13</sup> Dependency of I.J.S., 128 Wn. App. 108, 118, 114 P.3d 1215 (2005).

<sup>14</sup> In re Schulz, 17 Wn. App. 134, 139-40, 561 P.2d 1122 (1977); In re Tarango, 23 Wn. App. 126, 595 P.2d 552 (1979); In re Aschauer, 93 Wn.2d 689, 695, 611 P.2d 1245 (1980).

<sup>15</sup> In re K.R., 128 Wn.2d 129, 142, 904 P.2d 1132 (1995).

<sup>16</sup> In re Dependency of C.B., 79 Wn. App. 686, 689, 904 P.2d 1171 (1995).

<sup>17</sup> State v. White, 97 Wn.2d 92, 98-99, 640 P.2d 1061 (1982).

<sup>18</sup> City of Spokane v. Douglass, 115 Wn.2d 171, 182 n.7, 795 P.2d 693 (1990) (quoting Basiardanes v. Galveston, 682 F.2d 1203, 1210 (5th Cir.1982)).

<sup>19</sup> Aschauer, 93 Wn.2d at 697.

deprive a person of his or her parental rights must be clear, cogent and convincing.<sup>[20]</sup>

Our courts have recognized that using a restrictive definition or specific factors approach would result in a lack of flexibility important to the best interests of children:

In *In re Becker*, 87 Wn.2d 470, 553 P.2d 1339 (1976), we said that criteria for establishing the best interests for the welfare of the child are necessarily absent, since each case presents its own peculiar facts and circumstances, and the complexity of these, as well as the need for individualized treatment, militates against the mandatory consideration of certain specified factors in every case. For the same reason the legislature has not chosen to define the terms objected to here. With developing knowledge and understanding of the needs of children, the criteria for determining what is "proper" or in their best interests also change. For example, it was formerly thought that blood ties between parent and child were extremely important. Now it is learned that kinship is not as important as stability of environment and care and attention to the child's needs. See J. Goldstein, A. Freud, A. Solnit, *Beyond the Best Interests of the Child* (1973). These convictions may also change as further study and experience produces new insights. Were the legislature to define the terms in question more precisely than it has already done, the result might well be an inflexibility that deterred rather than promoted the pursuit of the child's best interests.<sup>[21]</sup>

When the termination statute is read as a whole, the question of best interests arises only after the other elements for termination have been satisfied and these other elements provide a context for evaluation of the best interests. The standard of best interests is not so loose and obscure that it cannot be applied in any context. Gladin does not establish beyond a reasonable doubt that the statute is void for vagueness.

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<sup>20</sup> Aschauer, 93 Wn.2d at 695 (citations omitted).

<sup>21</sup> Aschauer, 93 Wn.2d at 697-98 n.5.

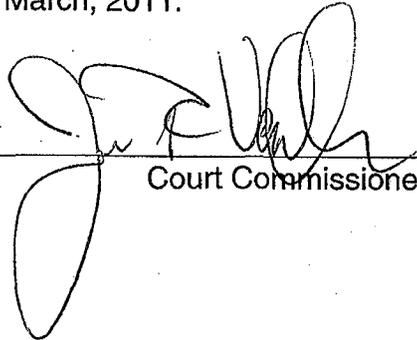
No. 65565-5-I/16

This matter is appropriate for accelerated review under RAP 18.13.

Now, therefore, it is hereby

ORDERED that decision of the trial court is affirmed and review is terminated.

Done this 9<sup>th</sup> day of March, 2011.

  
\_\_\_\_\_  
Court Commissioner

**FILED**  
COURT OF APPEALS  
DIVISION ONE  
MAR -9 2011

**APPENDIX B**

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

In the Matter of the Dependency of: )  
K.D.S., dob 07/28/95, a minor child. )  
)  
STATE OF WASHINGTON, )  
DEPARTMENT OF SOCIAL AND )  
HEALTH SERVICES, )  
)  
Respondent, )  
)  
v. )  
)  
DEREK GLADIN, )  
)  
Appellant. )  
\_\_\_\_\_ )

No. 65565-5-1

ORDER DENYING MOTION  
TO MODIFY COMMISSIONER'S  
RULING

Appellant Derek Gladin has filed a motion to modify the commissioner's March 9, 2011 ruling accelerating review and affirming the trial court order terminating his parental rights to K.D.S. Respondent Department of Social and Health Services has filed a response. We have considered the motion to modify under RAP 17.7 and have determined that it should be denied.

Now, therefore, it is hereby

ORDERED that appellant's motion to modify is denied.

Done this 11<sup>th</sup> day of may, 2011.

**FILED**  
COURT OF APPEALS  
DIVISION ONE  
MAY 11 2011

Spencer, J.

Becker, J.  
[Signature]

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re the Dependency of K.D.S. )  
STATE OF WASHINGTON, )  
Respondent, )  
v. )  
DEREK GLADIN, )  
Petitioner. )

SUPREME COURT NO. \_\_\_\_\_  
COA NO. 65565-5-1

**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 3<sup>RD</sup> DAY OF JUNE, 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **MOTION FOR DISCRETIONARY REVIEW AND SUPPORTING BRIEF** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] ROBYN MARTIN  
ATTORNEY GENERAL'S OFFICE  
103 E. HOLY STREET, SUITE 310  
BELLINGHAM, WA 98225
  
- [X] DEREK GLADIN  
8362 PORTAL WAY  
BLAINE, WA 98230

2011 JUN 23 4:16:24  
FILED  
APPEALS DIV #1  
COURT OF APPEALS  
STATE OF WASHINGTON

**SIGNED** IN SEATTLE WASHINGTON, THIS 3<sup>RD</sup> DAY OF JUNE, 2011.

x Patrick Mayovsky