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**SUPREME COURT OF THE STATE OF WASHINGTON**

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IN RE THE DEPENDENCY OF K.D.S.

DEREK GLADIN,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND  
HEALTH SERVICES

Respondent.

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**RESPONDENT'S SUPPLEMENTAL BRIEF**

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## I. INTRODUCTION

RCW 13.34.180(1) sets forth six elements which must be established before parental rights can be terminated. Derek Gladin, the father, contends that the trial court and Court of Appeals improperly held that if the fifth statutory element has been met, there is no need for a finding on the sixth, RCW 13.34.180(1)(e)-(f). The father also claims that the trial court and Court of Appeals improperly relied on this Court's decision in *In re Dependency of J.C.*, 130 Wn.2d 418, 427, 924 P.2d 21 (1996). He contends that *In re J.C.* collapses the six elements, and that *In re J.C.* has been impliedly overruled.<sup>1</sup>

The father is mistaken on both counts. First, as the trial court order reflects, separate findings and conclusions were made with respect to each of the six required elements, including the elements contained in RCW 13.34.180(1)(e) and (f). The trial court did not eliminate the sixth element after concluding that the fifth element was present. Second, this Court has never held that only five of the six statutory requirements need be met. In *In re J.C.*, the Court noted that when there is evidence supporting a conclusion under the fifth element, the same evidence may also support a conclusion on the sixth element. *In re J.C.*, 130 Wn.2d at 427. At no point

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<sup>1</sup> The father challenged several other aspects of the termination order at the Court of Appeals. Because these arguments were not raised in his Motion for Discretionary Review, they are not before this Court. RAP 13.7(b).

did the Court state that the trial court is excused from the statutory requirement of concluding that each element has been established prior to termination. No subsequent decision has overruled *In re J.C.*

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## II. ISSUE

The Motion for Discretionary Review presents the following issue: Does a finding that continuation of the parent-child relationship diminish 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)?

## III. STATEMENT OF THE CASE

K.D.S. is a sixteen-year-old girl with extreme mental and emotional disabilities, who functions at the level of a five or six-year-old. RP 215, 250. She was born with the effects of fetal alcohol exposure and demonstrates pervasive developmental delays. RP 262, 417.

K.D.S. suffers from mild mental retardation, attachment disorder, attention deficit hyperactivity disorder, post-traumatic stress disorder, and a mood disorder. RP 292. Psychotropic medications are required to address K.D.S.'s psychiatric issues, including delusions and

hallucinations, which at times required psychiatric hospitalization.<sup>2</sup> RP 200, 291, 300.

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K.D.S. also demonstrates behavioral problems. She is sexually and physically aggressive, and occasionally harms herself. RP 251, 256, 295. Direct adult supervision is required at all times to keep K.D.S. safe. RP 298-300. When upset, K.D.S. throws objects, and attempts to bite, kick, slap, scratch and hit others. RP 252-254; RP 264. She grabs women's breasts and men's groins, and makes inappropriate comments such as asking adults to remove their pants or her own pants. RP 264. She also demonstrates positive behavior at times, and enjoys coloring and talking about animals and babies. RP 295.

K.D.S.'s school created a special "time out" room for her. RP 252-254. The room is entirely carpeted, has a window for observation, and is void of any objects that K.D.S. could use to harm herself. *Id.* When K.D.S. is violent, and less-restrictive interventions have failed, she is escorted to the room to safely calm down while being monitored at all times by a staff member through the observation window. RP 253-254. The school utilizes protective gear and padding to assist with physical restraint when necessary. RP 259.

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<sup>2</sup> K.D.S. was hospitalized many times during the dependency, including pediatric psychiatric units at Children's Hospital, Spokane Mental Health and Fairfax Hospital, and short-term stays in a local hospital in Spokane. RP 91, 102, 119-121.

K.D.S.'s current home is also designed to keep her safe. She resides at a foster care facility in Spokane, SL Start. K.D.S. is the only child living in her staffed residence. RP 266, 297. The house design allows K.D.S. and the staff to walk in a circle, which often calms K.D.S. RP 298. When K.D.S. attacks staff members, they use exercise balls as a barrier between themselves and K.D.S. RP 299. If redirection and interventions are unsuccessful, the staff can leave when they are in danger, and watch over K.D.S. through the windows. RP 299. All staff are required to carry a cell phone, to allow them to call for additional staff, or police or medical intervention. RP 299.

**A. Dependency Action**

A dependency action was filed in November 2002. Prior to the dependency action, K.D.S.'s parents separated, and her mother had primary custody. Dep. FF 1-3.<sup>3</sup> K.D.S.'s mother struggled with methamphetamine addiction.<sup>4</sup> K.D.S.'s father was minimally involved in her daily care. Dep. FF 3; RP 17, 65. In August 2002, K.D.S.'s mother accused the father of sexually abusing K.D.S., resulting in an inconclusive administrative finding by the State. RP 97.

Dependency was established as to the father on August 23, 2003

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<sup>3</sup> The Dependency Findings of Fact (Termination Trial Ex.14,) and the Termination Findings of Fact, CP 4-10, are referenced as Dep. FF and Term FF.

<sup>4</sup> After unsuccessful attempts to treat her addiction, the mother's parental rights were terminated when she failed to appear for the termination trial. RP 14-15.

following a multi-day trial.<sup>5</sup> The trial court made findings regarding K.D.S.'s significant special needs, noting that she would require "permanent care." The court also found that K.D.S. had been hospitalized for her behaviors, had a "paramount need for stability and predictability," and that she required a "more than adequate parent."<sup>6</sup> Dep. FF 4, 6.

Prior to the dependency trial, the father completed a psychological and parenting evaluation with Dr. Evan Freedman, to determine his level of emotional and intellectual functioning and his ability to parent. RP 206-207, CP 232.<sup>7</sup> Dr. Freedman assessed the father as having a personality disorder; antisocial, paranoid and borderline traits; and, a low-average intelligence. He described the father as having a slight presentation of a developmental disability. RP 211. Dr. Freedman's analysis determined that the father has trouble recognizing his shortcomings, and has difficulties with being aware of the impacts and consequences of his behavior. The father minimizes the effects of his behaviors and actions upon others. His hostility and suspicion of others, and poor control of his anger, limit his ability to work with others. RP

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<sup>5</sup> The mother agreed to a dependency finding on January 6, 2003.

<sup>6</sup> The dependency determination was upheld on a revision motion before the superior court, and again at the Court of Appeals. The Court of Appeals affirmed the dependency determination but remanded for further findings to support the decision to restrict the father's visitation. *See* COA Cause No. 54052-1-I.

<sup>7</sup> Dr. Freedman is a licensed psychologist who performs evaluations at the request of school districts and other institutions, and has a clinical practice treating children with developmental disabilities. RP 204-205.

210-211.

The dependency trial court found that the father was “unwilling to provide [K.D.S.] with her prescribed medications” based upon beliefs that she “was overmedicated and experimented on,” and that the father was “unaware of the extent of [K.D.S.]’s disabilities.” Dep. FF 7. The father’s living arrangements changed frequently, he had been evicted three times in the preceding ten years, had difficulty recalling his addresses and was only temporarily residing with a friend. Dep. FF 8.

The father had additionally demonstrated he was unwilling to work with providers to meet K.D.S.’s needs. In 2001, he violated the parenting plan by removing K.D.S. from her school and services in Bellingham, taking her to Seattle and failing to enroll her in school or services. Dep. FF 11. The father was defensive and hostile to the psychological evaluator, drug and alcohol evaluator, social workers, a detective from the Whatcom County Sheriff’s Office and the Court. Dep. FF 13.

The court found that the father’s unstable lifestyle and unwillingness to work with professionals meant that he could not provide for K.D.S. and her extraordinary needs. Dep. FF 14, 17. The court determined K.D.S. would be at “moderate to high risk” of harm if she returned to the father’s care at that time, but that if the father engaged in services without opposition, worked closely with service providers and

gained stability in his own life, he could "possibly" parent K.D.S. in the future. Dep. FF 14, 17.

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Dependency review hearings were held every six months after the finding of dependency. K.D.S. initially resided with her maternal grandmother and community foster care placements, but individual families were unable to meet her needs. RP 91, 274. K.D.S. was moved to a behavioral rehabilitation group care home in 2005, and eventually to her current residence, SL Start, in September 2008. RP 91, 472.

K.D.S. made significant progress towards stability during the school year leading up to the termination trial (September 2009-April 2010). RP 257. Her teacher testified that in September 2009, K.D.S.'s behavior was escalating five to six times per hour, progressing from verbal lashing out to physical responses. RP 257. However, this decreased to a few escalations per day, and as of March 8, 2010, there were no further physical escalations at school. RP 257. Her teacher attributed the progress to K.D.S.'s structured school environment, home environment and learning self "de-escalation" methods. RP 257. She testified that the close communication and cooperation with K.D.S.'s care providers was "extremely important" to her success at school. RP 265.

Although all necessary services were offered or provided, the father demonstrated little improvement in parental functioning during the

eight years of dependency. Dep. FF 2.12, 2.13. The father initially engaged in some of the court-ordered services, although he was hostile to the providers, and reluctant or unable to incorporate advice he received. Dep. FF 13. He never completed the sexual history interview required by the dependency order. RP 29.

The father completed individual parenting instruction with Amy Glasser, but did not make significant improvement and ultimately, she did not believe the father could care for K.D.S. safely. RP 178, 185. Ms. Glasser observed the father's continued inability to grasp the severity of K.D.S.'s cognitive and emotional delays. RP 187. Ms. Glasser was concerned that he does not understand K.D.S.'s severe needs and is unable to respond appropriately to her behavioral issues. RP 184-185, 188.

Visitation between K.D.S. and her father was a source of contention throughout much of the case. Visits became increasingly disruptive to K.D.S.'s daily routines, to the point where K.D.S.'s safety was at risk. For example, following a visit in early 2008, K.D.S. attempted to jump out of a second story window and required psychiatric hospitalization. RP 119. By the fall of 2008, staff at SL Start noted that during visitations, K.D.S. did not interact much with her father. RP 303. During one visit, her behavior escalated for an extended period of time, and the father had to leave the room for thirty minutes while staff calmed

K.D.S. RP 305. Following visits with her father at SL Start, K.D.S. displayed increased aggression, including biting, scratching and pulling hair. RP 325. K.D.S. would also remove her clothes, ask people to touch her sexually and grab people in the crotch. RP 325.

When K.D.S. moved to SL Start in September 2008, the father stopped maintaining contact with the social worker and did not regularly attend team staffings. RP 393, 396; Term. FF 2.12. The dependency court suspended visits in March 2009, and required that the father meet with K.D.S.'s team of professionals to develop an approach to keep K.D.S. stable during and after visits. The father missed the first meeting and was so late to the second meeting that the child's therapist and case manager had already left. The father never requested another meeting. RP 101.

From March 2009 until the time of the termination trial in April 2010, the father only contacted the social worker twice by phone. RP 89. The father focused on his perception of past injustices and demonstrated difficulty addressing his daughter's disabilities and special needs. RP 89.

**B. Termination Trial**

In October 2009, the State filed a Petition for Termination of Parental Rights. CP 112-162. Her parents were not visiting her or involved with her care, but K.D.S. was finally demonstrating stability in her schooling and day-to-day life. RP 258-259. Following a four-day trial,

the termination petition was granted. RP 538-547.

While K.D.S.'s adoption prospects were small, they were greater than any chance she had at returning to her parents' care. The experts testifying at trial, including the parenting instructor, assigned social worker, and staff from her residential placement believed that adoption was an option for K.D.S. RP 106-107, 190-192, 330-331, 498-499. Ms. Robins, case manager at SL Start, specifically discussed a recent example of another special-needs child that was transitioned out of SL Start and into a family home for adoption. RP 330. The State made efforts to identify an adoptive home prior to the termination trial. RP 106. Although it was not expected to be easy, adoption was not impossible. RP 106-107. It is more likely for a child to be adopted once a child is "legally free," meaning parental rights are terminated and there is no chance the biological parents will come forward and disrupt the placement or adoption. RP 107; Term. FF 2.14.

The trial court made specific, individual written findings of fact on each of the termination elements. Term. FF 2.1-14. The judge spent a lengthy amount of time in his oral ruling discussing the sixth element required for termination under the statute, rejecting any interpretation of *In re J.C.* that would eliminate the need to establish the sixth element individually and apart from the other elements. RP 500-501, 539.

While the trial court commented in his oral ruling that, "[t]he uncontested testimony is yes, while it may be difficult to find an adoptive home for [K.D.S.], she's deserving of such adoptive home and the Department's plan is to find her such an adoptive home," RP 499. The judge found that "[p]ermanency will actually be impeded for K.D.S if her father's parental right are not terminated" based upon the testimony presented at trial. RP 499. The judge also stated that continuing the parent-child relationship would interfere with K.D.S.'s continued placement in foster care, even if that continued to adulthood. RP 542-543.

The termination decision was upheld by Commissioner's decision on March 11, 2011. The Court of Appeals declined to modify the ruling and discretionary review to this Court was timely sought.

#### IV. ARGUMENT

The Court of Appeals appropriately determined that sufficient evidence supported the trial court's conclusion under RCW 13.34.180(1)(f). Whether a termination order satisfies statutory requirements is a question of law. Questions of law are reviewed de novo. *In re Dependency of K.N.J.*, 171 Wn.2d 568, 574, 257 P.3d 522 (2011).

A petitioner for termination of parental rights must establish six statutory elements:

- (a) the child has been found dependent;

(b) a dispositional order has been entered;

(c) the child has been in foster care for at least six months;

(d) all necessary services, reasonably available, capable of correcting the parental deficiencies within the foreseeable future have been expressly and understandably offered or provided;

(e) there is little likelihood that conditions will be remedied so that the child can be returned to the parent in the near future (parent's failure to substantially improve parental deficiencies within 12 months of entry of the dispositional order gives rise to a presumption that there is little likelihood conditions will be remedied so that the child can be returned to the parent in the near future); and

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

RCW 13.34.180(1)(a)-(f).

The court weighs the interests of the child against the interests of the parent only if these six elements have been proven.

RCW 13.34.190(1)(a)(i). After the six elements have been proven, parental rights are terminated if the trial court finds that termination is in the child's best interest. RCW 13.34.190(1)(b).

The Department need not prove that the child is adoptable prior to termination of parental rights. This Court has held that "long-term foster care by the State for a developmentally disabled child constitutes a 'stable and permanent' home for the purposes of RCW 13.34.180(6), such that the

father's rights may be terminated to facilitate such care."<sup>8</sup> *Matter of Dependency of Esgate*, 99 Wn.2d 210, 211, 660 P.2d 758 (1983).

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In an appeal from a termination order, the findings of the trial court should be affirmed if they are supported by substantial evidence. *In re the Dependency of K.S.C.*, 137 Wn.2d 918, 925, 976 P.2d 113 (1999); *In re Welfare of Hall*, 99 Wn.2d 842, 849, 664 P.2d 1245 (1983). "When the rights of parents and the welfare of their children are in conflict, the welfare of the minor children must prevail." *In re Sego*, 82 Wn.2d 736, 738, 513 P.2d 831 (1973). The trial court's determination that termination is in the child's best interest is given "very strong reliance." *In re Dependency of K.R.*, 128 Wn.2d 129, 146, 904 P.2d 1132 (1995) (citations omitted). In a termination case, evidence is substantial (or equivalently, sufficient to support a trial court finding) if, taking the evidence in the light most favorable to the party who prevailed below, a rational and reasonable trier of fact could find each element of the case in accordance with the applicable burden of persuasion. *In re Welfare of A.B.*, 168 Wn.2d 908, 925 n.30, 232 P.3d 1104 (2010).

Here, the trial court found that the State proved *each* of the six termination elements by clear, cogent and convincing evidence. It then found that termination of parental rights was in K.D.S.'s best interests and

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<sup>8</sup> RCW 13.34.180(1)(f) was formerly codified as RCW 13.34.180(6). Laws of 2000, ch. 122, § 25.

properly terminated the father's rights. The Court of Appeals correctly affirmed the findings of the trial court.

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**A. The Trial Court Found That Each Element Of RCW 13.34.180(1) Is Separately Supported By Substantial Evidence**

The trial court made independent findings regarding each element of RCW 13.34.180(1). The father did not challenge Termination Findings of Fact 2.1 through 2.12, establishing the basis for RCW 13.34.180(1)(a)-(d). He does not contest that sufficient evidence exists to support the finding that little likelihood exists that he will be able to remedy his parental deficiencies in the near future, except to the extent that the finding provides additional indication that he is incapable of parenting K.D.S. in any capacity. COA Br. of App. at 18, n.13. Because he does not brief or argue issues beyond the interrelation of RCW 13.34.180(1)(e) and (f), the trial courts' findings are verities on appeal. *In re Mahaney*, 146 Wn.2d 878, 895, 51 P.3d 776 (2002).

While the father concedes the essential finding of "little likelihood," due to the interrelated nature of RCW 13.34.180(1)(e) and (f), analysis of the facts supporting both prongs is helpful. To the extent the father challenged the trial court's finding under RCW 13.34.180(1)(e), it is supported by substantial evidence.

The father's evidence primarily consisted of his own testimony

that he could independently parent K.D.S. if given sufficient support. The trial court found otherwise. The father failed to recognize the severity of K.D.S.'s special needs and overestimated his parenting abilities. Two separate courts made these findings after multi-day trials, once in 2003 and again in 2010 after seven years of services were offered. *See* Dep. FF 7-13; Term. FF 2.13. As stated in the trial court's oral ruling, the father had "no clue what it would be like to parent [K.D.S.]" because he was not going to be capable of doing it, even with the best intentions. RP 540.

Pursuant to RCW 13.34.180(1)(f), the trial court separately determined that continuation of the parent-child relationship clearly diminished K.D.S.'s prospects for early integration into a stable, permanent home. Term. FF 2.13-2.14. The trial court noted this Court's prior ruling that when there is a finding of little likelihood that conditions will be remedied to allow a child to be returned to the parent in the near future, it "necessarily follows" that continuation of the parent-child relationship diminishes the child's prospects for early integration into a permanent home. RP 541, *citing In re J.C.*, 130 Wn.2d at 427.

However, the trial court stated that RCW 13.34.180(1)(f) "means something besides the first five [elements]." RP 541. The trial court separately determined that termination was necessary for K.D.S.'s early integration into a stable and permanent home. While finding an adoptive

home for K.D.S. would be a challenge, terminating her father's parental rights provided K.D.S. with the best opportunity of having a permanent home, whether it be with an adoptive family or fully integrating into her group home placement until transitioning to adult care. RP 542-543; Term. FF 2.14. In affirming the trial court, the Court of Appeals noted that the father's continued legal relationship posed an obstacle to adoption, given the little likelihood that he would ever be able to parent K.D.S. COA Decision at 10.

As both underlying courts found that each of the six elements stated in RCW 13.34.180(1) were separately supported by substantial evidence, this case does not present a vehicle for consideration of whether a finding that RCW 13.34.180(1)(f) has been met *necessarily* flows from a finding that RCW 13.34.180(1)(e) has been met.

**B. Facts Supporting A Conclusion Under RCW 13.34.180(1)(e) May Also Support a Conclusion Under RCW 13.34.180(1)(f).**

The trial courts' findings under RCW 13.34.180(1)(f) are bolstered by its findings under RCW 13.34.180(1)(e). The Court of Appeals decision is consistent with this Court's holding that once RCW 13.34.180(1)(e) is proven, a finding under RCW 13.34.180(1)(f) "necessarily follows." *In re J.C.*, 130 Wn.2d at 427. Logically, facts showing obstacles to early integration into a permanent home may overlap

with evidence supporting a finding of little likelihood that parental deficiencies will be remedied in the near future. But the Department does not claim that *In re J.C.* relieves the State of its obligation to prove that termination is necessary to integrate the child into a stable and permanent home. Even when the facts establishing RCW 13.34.180(1)(e) provide support for a finding under RCW 13.34.180(1)(f), a separate legal conclusion must be reached on each element.

RCW 13.34.180(1)(f) focuses on the legal relationship between the parent and child, and whether continuation of the relationship impairs the child's prospects for early integration into a stable and permanent home. *In re Esgate*, 99 Wn.2d at 214; *In re K.S.C.*, 137 Wn.2d at 928 (focus on prospects of early integration, not certainty of placement); *see also In re Dependency of A.C.*, 123 Wn. App. 244, 98 P.3d 89 (2004), and *In re P.P.T.*, 155 Wn. App. 257, 229 P.3d 818 (2010) (focus on the legal relationship between the parent and child). The need to establish RCW 13.34.180(1)(f) was not eliminated by *In re J.C.* As the trial court properly recognized, the RCW 13.34.180(1)(e) and (f) elements are separate statutory elements which the court must consider. The clear delineation between the elements by the trial court here demonstrates that trial courts are able to understand that *In re J.C.* did not rewrite the statute.

The trial court and Court of Appeals appropriately compared

K.D.S.'s permanency prospects against the undisputed fact that K.D.S. had no chance of being returned to her father, as demonstrated in seven years of remedial services being offered to the father with little progress toward safe reunification. Separate findings under RCW 13.34.180(1)(e) and (f) support the trial court's conclusion there was no chance of permanency for K.D.S. while the father's rights remained intact. The independent findings and conclusions regarding RCW 13.34.180(1)(e) and (f) are supported by substantial evidence and should be affirmed.

**C. *In Re J.C. Has Not Been Overruled And Is Consistent With Prior And Subsequent Case Law***

Contrary to the father's arguments, *In re J.C.* is consistent with both prior case law on the interrelated nature of RCW 13.34.180(1)(e) and (f) and subsequent case law affirming the statutory requirement to prove each element RCW 13.34.180(1). Mtn. for Rev. at 2.

Cases decided by the Court prior to *In re J.C.* are consistent with the "necessarily follows" interrelation of the two elements. A year prior to *In re J.C.*, the Court stated, "absent the completion of the proffered services, allegation [(f)] is satisfied because prospects for integration into the family home are dim." *In re K.R.*, 128 Wn.2d at 145. As in *In re J.C.*, the Court recognized that facts supporting the RCW 13.34.180(1)(e) may also support RCW 13.34.180(1)(f). *Id.* In 1983, the Court commented on

the interrelated nature of the fifth and sixth elements by stating that once RCW 13.34.180(1)(e) has been shown, "consideration of the child's alternatives is not only permissible but highly desirable." *In re Hall*, 99 Wn.2d at 849.

Nor do cases decided after *In re J.C.* overrule the Court's "necessarily follows" interrelation of the two elements. The father first argues that *In re J.C.* was overruled by *In re K.S.C.*, 137 Wn.2d 918. Mtn. for Rev. at 9. *In re K.S.C.* does not address the issue presented in this case. Because the parent appealed only the finding under RCW 13.34.180(1)(f), the Court had no reason to address RCW 13.34.180(1)(e). *Id.* at 927, n.3. Although the relationship between (1)(e) and (f) was not addressed, the discussion of (f) is consistent with the decision in this case. The Court stated that "the main focus of the sixth [element] in RCW 13.34.180 is the parent-child relationship and whether it impedes the child's prospects for integration, not what constitutes a stable and permanent home." *Id.* at 927.

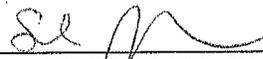
The father also argues that *In re J.C.* was overruled by *In re A.B.* In that case, the Court held that absent a finding of current parental unfitness, parental rights could not be terminated. *In re A.B.*, 168 Wn.2d at 927. Without a trial court finding of unfitness, the Court had no cause to consider whether the same facts may support a finding under RCW 13.34.180(1)(e) and (f).

V. CONCLUSION

The State respectfully requests that the Court affirm the underlying  
decisions affirming termination of parental rights.

RESPECTFULLY SUBMITTED this 27<sup>th</sup> day of January, 2012.

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**PROOF OF SERVICE**

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I certify that I served a copy of this document on all parties or their counsel of record on the date below as follows:

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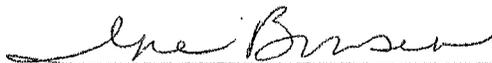
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Seattle, WA 98122-2842

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

DATED this 27<sup>th</sup> day of January, 2012, at Bellingham, Washington.



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Ina Bensen  
Legal Assistant