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SUPREME COURT NO. 91757-4

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re Welfare of K.M.M., a Minor,
STATE OF WASHINGTON, DSHS,
K.M.M.,

Respondent,

v.

J.M.

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KITSAP COUNTY, JUVENILE
DIVISION

The Honorable Jeanette Dalton, Judge

K.M.M.'S ANSWER IN REPLY TO NEW ISSUES RAISED IN
AMICUS BRIEFS

JENNIFER L. DOBSON
DANA M. NELSON
Attorneys for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

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A. ANSWER IN REPLY TO NEW ISSUES RAISED IN AMICUS BRIEFS

I. The Trial Court's Consideration of Whether J.M. was Fit to Meet K.M.M.'s Basic Needs was not the Equivalent of a Best Interests Analysis under RCW 13.34.190.

Citing this Court's decision in In re Welfare of A.B., 168 Wn.2d 908, 232 P.3d 1104 (2010), King County Department of Public Defense (KCDPD) claims the trial court improperly conflated a parental fitness analysis with a best interest analysis. Brief of KCDPD at 4. KCDPD suggests that A.B. supports its claim that "the parental fitness inquiry must focus on the parent and not the child." Brief of KCDPD at 4. However, KCDPD's position reflects both a misreading of A.B. and of the record.

A.B. holds that a best-interest analysis under RCW 13.34.190 is not part of a parental fitness determination. This point is not in contention. However, a best-interest analysis under RCW 13.34.190 is not synonymous with a court's consideration as to whether a parent is fit to meet a child's basic needs.¹ A.B. does not hold – in letter or in spirit – that trial courts may not consider any interests, rights, or needs of the child when determining parental unfitness. Yet, this is what KCDPD suggests. KCDPD's misreading of A.B. places that decision in conflict with RCW 13.34.020 and with other decisions by this Court.

¹ A "child's basic needs" include "basic nurture, health, or safety." In re Welfare of A.B. (A.B. II), 181 Wn. App. 45, 323 P.3d 1062 (2014)

In RCW 13.34.020, the Washington Legislature sets forth that a child's right of nurture, physical and mental health, and safety is a legitimate and paramount judicial focus at all stages of dependency and termination cases. Considering this directive, the amicus brief submitted by the Center for Children & Youth Justice (CCYJ), et al., provides a thorough legal analysis of Washington laws and common law as they pertain to the proper balancing of parental rights and a child's rights to basic nurture, mental health, and safety. Brief of CCYJ at 3-7. As CCYJ points out, the basic rights and needs of children have taken on greater importance and are now recognized by law as an important aspect at every level of dependency and termination proceedings. Id. A.B.'s holding does not diminish this important development.

This Court's decisions also reflected a growing recognition that children's basic rights have a central place in parental fitness determinations. For decades, this Court has acknowledged that a child's basic needs must be a compelling consideration when deciding whether to terminate parental rights:

Courts are always reluctant to deprive parents of rights with respect to their children, and it is particularly sad when the parent cares for the child and desires to be a good parent, as appears to be the case here. However, it is the court's duty to see that those rights yield, when to accord them dominance would be to ignore the needs of the child.

In re Aschauer's Welfare, 93 Wn.2d 689, 695, 611 P.2d 1245 (1980).

Building upon this, this Court recognized that a child has recognizable liberty interests at stake in parental rights cases that may be different than the parent but are “as least as great as” those of the parents. In re Dependency of MSR, 174 Wn.2d 1, 17, 271 P.3d 234, 243 (2012). One of the interests noted by this Court is the child’s interest in having caregivers that can provide for their basic needs. Id. at 15.

More recently, this Court explicitly stated that “a parent is unfit if he or she cannot meet a child's basic needs.” In re Custody of B.M.H., 179 Wn.2d 244, 236, 315 P.3d 470 (2013). This directly contradicts KCDPD’s pedantic reading of A.B.’s holding and its claim that the fitness inquiry focuses solely on the parent and forbids any consideration of the child’s interests in basic nurture, health, and safety.

Most importantly, if KCDPD’s narrow fitness inquiry were to be adopted, there would be an important subset of dependency cases unresolvable. Sadly, there exist cases, such as this, where a parent may be generally fit to parent other children but is unable meet the basic needs of a particular child due to that child’s special needs or because of a unique condition in that particular parent-child relationship. In such cases, the narrow inquiry advocated by KCDPD would mean that parent could never

be found unfit and that child would be left in a permanent state of dependency. Certainly, this cannot be the result intended in A.B.

As this Court recognized in B.H.M. – three years after A.B. – that parental fitness is determined by looking at both a parent’s individual parenting deficiencies and whether there is a condition in the parent-child relationship that prevents that parent from meeting the basic need of a particular child. If a parent who is generally fit to parent other children is unable to meet a particular child’s basic need for nurture, mental health, and safety – he is unfit to parent that particular child.

Turning to this case, contrary to KCDPD’s assertion, the trial court did not conflate its unfitness analysis with a best interest analysis under RW 13.34.190. The trial court’s overarching considerations were (1) whether J.M. was currently able to meet K.M.M.’s particular needs for nurture, mental health, and safety, and (2) whether J.M.’s inability to meet these needs could be remedied in the near future through the provision of services. CP 107-112 (FoFs X-XV, XVIII).

The trial court’s findings demonstrate a careful respect for the two-step termination process as interpreted in A.B. while at the same time following the Legislative directives set forth in RCW 13.34.020. The trial court never considered what was needed to give K.M.M. the best life possible. Id. It never considered whether the foster parent could better

provide for K.M.M. Id. While the trial Court's findings indeed reflect a recognition of K.M.M.' strong desires as voiced by K.M.M. herself and what she believed was in her own best interest (CP 110),² at the end of the day, the trial court's unfitness determination did not rest on this.

In sum, KCDPD's claim that the trial court improperly conflated its unfitness determination with a best interest analysis is not supported in law or fact.

II. The Trial Court Did Not Weigh the Benefits Provided by the Birth Family against those Provided by the Foster Family.

KCDPD devotes considerable space in its amicus brief to the proposition that trial courts cannot weigh the benefits provided by the birth family against those provided by the foster family. Brief of KCDPD at 5-10. K.M.M. does not disagree with this point. However, such a comparison never occurred here.

This record shows that the trial court did not compare the benefits or quality of care K.M.M. received from her foster family when determining J.M. was unfit. Indeed, this case should alleviate those concerns because the findings appear to show just the opposite.

The trial court took great care to stay focused on K.M.M.'s needs not the benefits of her foster home. It did not expressly or implicitly

²CCJY provides a compelling discussion as to the need for children, especially children of K.M.M.'s age, to have a voice in the process. Brief of CCJY at 10-13.

consider that the foster parents were “better,” “smarter,” “richer,” or “more loving or affectionate.”³ The trial court’s findings only once mentioned K.M.M.’s current foster parents: “[K.M.M.] forming attachments to her foster parents was evidence of the healing K.M.M. was undergoing, that she was developing the ability to attach with others, according to her therapist.” CP 107. This statement was made in the context of the trial court’s discussion of State’s efforts to provide K.M.M. with individual services to help her heal and become healthy. As such, it cannot be reasonably read as a comparison between the foster parents and J.M. Hence, KCDPD’s general concerns regarding unfair comparisons simply are not materialized in this record.

III. Attachment Experts Agree that the Child’s Basic Needs Ultimately Must be the Primary Concern in Child Welfare Cases.

Amici Spieker and Harris discuss in detail important research and trends regarding attachment theory, advocate for trial courts to prevent the dependency process from unnecessarily creating attachment issues, and espouse that termination decisions should not turn on the mere presence of an “insecure attachment.” Brief of Spieker and Harris at 1-14, 20. This information elucidates important policy considerations as to how generally the Department, the parties, and trial courts might best approach

³ Concerns cited in the Brief of KCDPD at 9.

attachment issues in future cases; unfortunately, however, it does nothing to change the unique circumstances that existed in this case at the time of the termination hearing.

Amici Spieker and Harris suggest that in general there are available remedial services and case management practices that should be provided at the beginning of and throughout a dependency to help maintain a parent-child attachment. Id. at 17-19. While this may be so, it does not answer whether, at the time of termination in this case, there were remedial attachment services available that could repair the parent-child attachment disruption without harm to K.M.M.

The unrebutted expert testimony at trial established that at the time of the termination trial, there was no parent-child relationship or attachment between K.M.M. and her father, and there were no available services to correct this without causing K.M.M. great harm. CP 108-10. Had the father called his own experts to rebut this, there undoubtedly would have been a far more robust record regarding general attachment theories and practices and how these might have applied to K.M.M.'s specific situation. But J.M. did not call an expert, so one can only speculate whether amici's input would have changed the outcome in this case.

It appears, however, that even amici Spieker and Harris would acknowledge that once an attachment is shown to be seriously disrupted (as it was here), the child's basic interests in need for nurturing and mental health must be a central consideration in judicial proceedings. They state:

[W]hen there is a disruption of the attachment relationship it is important for children to be placed in an environment where they can have healthy emotional development; this type of development can only occur when children have a caregiver who responds to their needs in a nurturing and caring manner.

Brief of Spieker and Harris at 19-20. For K.M.M., that nurturing environment was not with J.M.

Spieker and Harris ultimately conclude: "It is critical that child-well-being be the first priority in all child welfare cases." *Id.* at 20. On this point, they appear to agree with CCJY that a child's right to basic nurture, physical and mental health, and safety must serve as a paramount consideration in any parental fitness determination. Brief of CCJY at 3-7, 18-20.

In sum, the best practices and remedial services advocated by Spieker and Harris as a means to protect and nurture parent-child attachment and bonding should be a serious consideration in future dependency cases. As this case sadly shows, parent-child attachment can be very fragile. As amici suggest, this circumstances of this case highlight

a very important point: decision makers in the dependency process must fiercely protect any existing part-child attachment, and all family members must be provided services (with competent providers) to repair any damage to these bonds unless such services threaten the child's health, safety, or welfare.

But this case must be decided based the on the particular circumstances that existed at the time termination. As the record shows, K.M.M. got to the point where contact with J.M. caused a traumatic response and any attempt to remedy this would cause great harm to her mental health and development. Even amici Spieker and Harris agree that K.M.M. needed to be in an environment where she can have healthy emotional development. Unfortunately, J.M. could not provide that to K.M.M. due to the rupture of their parent-child bond.

IV. Decisions about the Quality of Parent-Child Relationships Should Be Shaped by Robust Litigation in the Trial Court.

KCDPD asserts “[d]ecisions about the quality of the parent-child relationship are likely to turn on the testimony of DSHS-contracted evaluators or visitation supervisors and transports” and that these providers “are not capable of rendering high-quality, culturally informed opinions about the parent-child relationship in a reliable and consistent way.” Brief of KCPDP at 11. While this is certainly a pressing concern,

the remedy for this is not to exclude any consideration of the parent-child relationship from a parental fitness determination. Instead, the remedy is for counsel for the parent and for the children⁴ to vigorously attack the qualifications, assessments, and opinions of these providers throughout dependency and termination trials.

In this case, J.M. was on notice that Staton and Sherry would be rendering opinions about the quality of the parent-child relationship. CP 1-3, 32-44, 45-55, 63-73. If J.M.'s trial counsel believed that the State's experts were not capable of rendering reliable opinions, she should have proved that point at trial by calling her own expert to expose this. She did not. Thus, this Court must presume that Staton and Sherry were qualified and competent. Indeed, the trial court expressly found that Staton and Sherry were "experienced therapists" and were "credible." CP 110. These findings are entitled to deference. See, Dependency of K.S.C., 137 Wn.2d 918, 925, 976 P.2d 113 (1999) (establishing that deference to the trial courts findings is particularly important in termination proceedings especially on issues of witness credibility and the persuasiveness of the evidence).

⁴ In its amicus brief, CCYJ discusses the importance of appointing counsel for the child in every case at a child's entry into foster care. Brief of CCYJ at 13-18.

V. A Child Should Not Be Forced to Visit Parents When to Do so Causes Emotional Harm.

KCDPD claims emotional harm to a child should never be the basis for denying visitation because it is difficult to assess the cause of emotional harm to children in the foster care system. On its face, this proposition conflicts with RCW 13.34.020.

Ignoring the directives RCW 13.34.020, however, KCDPD instead cites to a New York City Administration of Child Services policy manual, which explains that a child's negative behavior may be a way of expressing his desire to spend more time with his parent and instructs case planners to carefully explore the cause of a child's reactions before suspending visits. Brief of KCPDP at 17. However, this policy cannot be read, even in its broadest sense, as supporting the proposition that emotional harm to a child through visits is not a valid basis for denying visitation.

Turning to the facts of this case, KCDPD claims that, "DSHS inappropriately denied visitation ... based on assumptions that [K.M.M.] would suffer emotional harms." Brief of KCDPD at 15. This is not accurate. The record shows there was much more than mere "assumptions" that K.M.M. would experience emotional harms. The record clearly establishes this child was traumatized by visits.

Visitation was initially disrupted when K.M.M. asserted her own need to stop visits. Because of her unique history and personality – K.M.M. began to psychologically detach from her parents. RP 81; CP 61 (stipulated fact no. 43). She experienced stress and anxiety when contemplating contact with her biological family and started to withdraw from visits. RP 155, 194-95, 226-27, 237. She had bad memories when she merely thought about her biological parents. RP 285.

In an attempt to rekindle K.M.M.'s interest in visits and bolster her psychological ability to handle contact with her parents, the parties enlisted the help of a second experienced therapist Tom Sherry. RP 241, CP 338-39. He opined it would be detrimental to K.M.M.'s emotional development to force her to visit her parents. RP 272. He developed a “natural contacts” plan where the parents would have “incidental, passive contact” with K.M.M. RP 238-39.

In December 2012, J.M. was scheduled to have his first “natural contact” with K.M.M. RP 326, 364. The social worker prepared him, reviewing the plan. RP 366.

Staton prepared K.M.M. as best she could for the prospect of seeing her father. RP 328. Despite this, however, K.M.M. grew afraid and hid in the back of the van upon arriving at the visitation location. RP 328. Instead of sticking with the plan for passive contact, J.M. opened the

back of the van and put his hands on K.M.M.'s shoulders. RP 328-29. This was very upsetting to K.M.M., who later testified this incident made her "very scared." RP 289, 329. The visit was stopped and visitation was suspended thereafter, with the dependency court finding visits were a threat to K.M.M.'s health, safety, and welfare. RP 389; Ex. 14, 15, 16; CP 348.

These facts show visitation was not withheld merely because the Department "assumed" K.M.M. would experience some intangible emotional harm. Visitation was stopped because K.M.M. in fact did suffer emotional harm as a result of the last attempted visit. Future visitation was denied because court concluded that future visits posed a palpable threat to her mental health, emotional safety, and general welfare.

In this case, K.M.M.'s right to basic health, safety, and welfare trumped any right J.M. had to visitation, as is required by RCW 13.34.020. KCDPD fails to explain how the Department would have had the power to physically force K.M.M. to participate in visits.⁵ It also fails to explain how the dependency court could ignore the emotional harm when deciding whether to deny visits.

⁵ A social worker testified that the Department is not permitted to physically force a child to attend visits. RP 448.

B. MOTION TO STRIKE PORTIONS OF AMICUS BRIEFS DUE TO NON-COMPLIANCE WITH RAP 9.11 and 10.3(e).⁶

RAP 9.11(a) restricts appellate consideration of additional evidence on review. RAP 10.3(e) provides that amicus briefs should be limited to “the issues of concern to amicus” and “must avoid repetition of matters in other briefs.” Portions of the Spieker and Harris Brief and the KCDPD brief do not comply with these rules. Consequently, these portions of the briefs should be struck. See, Yousoufian v. Office of Ron Sims, 168 Wn.2d 444, 469, 229 P.3d 735, 748 (2010) (striking portions of an amicus brief because amici failed to comply with RAP 9.11 and 10.3).

I. Spieker and Harris Brief

In the Spieker and Harris brief under the section titled “Erroneous Points Regarding Attachment in ...KMM,” amici make the following statement:

In KMM there is no evidence that the issue between the father and daughter is attachment. This may be a situation where there are other psychological and/or developmental issues for this child that is causing her not to want to see her father.

Spieker Brief at 16. This statement amounts to additional evidence in the form of an expert opinion as to the whether there is an attachment issue

⁶ This type of motion to strike should be made in the brief rather than by separate motion. Admasu v. Port of Seattle, 185 Wn. App. 23, 41, 340 P.3d 873, 882 (2014).

between K.M.M. and J.M. As such, it should be struck because it does not meet the requirements under RAP 9.11.

RAP 9.11 allows supplementation of the trial court record only in extraordinary cases. RAP 9.11(a); E. Fork Hills Rural Ass'n v. Clark Cty., 92 Wn. App. 838, 845, 965 P.2d 650, 653 (1998). For this reason, additional evidence is seldom taken on appeal and only if the strict criteria of RAP 9.11 are met. Id.; State v. Madsen, 153 Wn. App. 471, 485, 228 P.3d 24, 31 (2009), overruled on other grounds by In re Flint, 174 Wn.2d 539, 277 P.3d 657 (2012).

Before this Court may take additional evidence, it must be shown that (1) the additional proof of facts is needed to fairly resolve the issues on review, (2) the additional evidence would probably change the decision being reviewed, and (3) that it would be inequitable to decide the case solely on the evidence already taken in the trial court. RAP 9.11(a). None of these requirements are met here.

First, proof of amici's opinion is not "needed" to fairly resolve the issue on review. The legal issue on review is whether the evidence before the trial court was sufficient to support the trial court's finding that J.M. was unfit due to an absence of an attachment bond and that there were not any remedial services available. The opinion from amici does not help

resolve this issue, because their opinion was not part of the evidence before the trial court.

Second, the additional evidence would probably not change the decision being reviewed. Amici offers an expert opinion. However, the trial court heard the expert opinions of Cory Staton and Tom Sherry that there was no attachment bond between K.M.M. and J.M. and no services available to remedy this condition. It determined this testimony was credible and persuasive.

The amici opinion would merely create a conflict among experts. As such, this Court cannot know how the trial court would resolve this conflict. Hence, it cannot be shown that the additional evidence would “probably” change the decision being reviewed.

Third, there is no inequity in deciding this case based solely on the existing trial record. Defense counsel received ample notice that attachment and bonding issues were a crucial point of contention in the termination proceeding, and J.M. had every opportunity to fully litigate this matter below. CP 1-3, 32-44, 45-55, 63-73. He could have submitted this type of expert evidence below. Thus, it would be utterly unfair to permit this evidence to come in without an opportunity to test the reliability of amici’s opinion through the adversarial process.

It would be equally unfair to reopen the trial phase after all this time to simply to admit expert testimony that should have been admitted below in the trial phase. This case has been on appeal for two and a half years. K.M.M. has been out of J.M.'s care for half her life. Equity demands that this case be resolved now based on the trial record that already exists so that a final resolution can be reached and the parties can move forward accordingly.

For the above stated reasons, this Court should strike that portion of the Spieker and Harris brief cited above.

II. KCDPD Brief

The portion of the KCDPD's brief discussing whether visitation is a "service" should be struck because it fails to comply with RAP 10.3. Amicus briefs "must avoid repetition of matters in other briefs." RAP 10.3(e) (emphasis added). In the Court of Appeals, J.M. argued that visitation is a service, fully briefing the matter. BOA at 18-21. The Court of Appeals expressly rejected this argument. In re Welfare of K.M.M., 187 Wn. App. 545, 572-74, 349 P.3d 929 (2015). J.M. chose not to include this issue when he petitioned this Court for review. As such, KCDPD's argument claiming visitation is a remedial services⁷ is beyond

⁷ Brief of KCDPD at 12-13, 18

the scope of the issues raised in this case and is repetitious of matters already briefed. Hence, the arguments should be struck. RAP 10.3(e).

To the extent this Court does not strike KCDDP's argument regarding visitation as a service, K.M.M. incorporates by reference the arguments she made below. K.M.M.'s Brief of Respondent at 21-23

C. CONCLUSION

The amicus briefing in this case presents this Court with an opportunity to underscore the fact that a child's right to basic nurture, physical and mental health, and safety remain a paramount consideration in termination proceedings.

Amicus briefing also provides this Court the opportunity to clarify A.B.'s holding and establish that consideration of a child's basic needs is not tantamount to a best-interest analysis under RCW 13.34.190. As such, consideration of a parent's ability to meet these basics needs may be included in a parental unfitness determination.

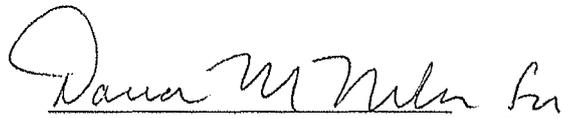
Finally, amicus briefing provides this Court the opportunity to make clear that a child's basic needs include attachment and bonding. And – where it is safe to do – this attachment and bonding must be fiercely protected with maximization of visits and necessary services (with competent providers) to repair any damage. As CCJY points out, however, in cases where the child's rights to basic nurture, physical and

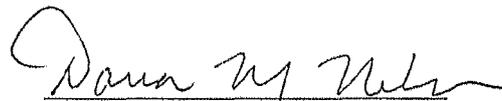
mental health, and safety is jeopardized by visits and attachment services,
these efforts must yield to the child's basic rights.

DATED this ^{28th April} ~~28~~ day of ~~May~~, 2016.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC


JENNIFER L. DOBSON,
WSBA 30487


DANA M. NELSON,
WSBA 28239
Office ID No. 91051
Attorneys for Appellant

OFFICE RECEPTIONIST, CLERK

To: Jamila Baker
Cc: talner@aclu-wa.org; sharonblackford@waelawyer.com; jrehberger@cascadialaw.com; e.smccann@mockingbirdsociety.org; lindalillevik@careylillevik.com; lindalillevik@careylillevik.com; knowlesd@seattleu.edu; D'Adre.Cunningham@kingcounty.gov; hannah.roman@kingcounty.gov; tara.urs@kingcounty.gov; kathleen.mcclellan@kingcounty.gov; anita.khandelwal@aya.yale.edu; alena.ciecko@kingcounty.gov; irina.nikolayev@kingcounty.gov; kelli.johnson@kingcounty.gov; sainsworth@legalvoice.org; lillian@defensenet.org; backlundmistry@gmail.com; peterk@atg.wa.gov; jayg@atg.wa.gov; SHSTacAppeals@ATG.WA.GOV
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To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: talner@aclu-wa.org <'talner@aclu-wa.org'>; sharonblackford@waelawyer.com <'sharonblackford@waelawyer.com'>; jrehberger@cascadialaw.com <'jrehberger@cascadialaw.com'>; e.smccann@mockingbirdsociety.org <'e.smccann@mockingbirdsociety.org'>; lindalillevik@careylillevik.com <'lindalillevik@careylillevik.com'>; lindalillevik@careylillevik.com <'lindalillevik@careylillevik.com'>; knowlesd@seattleu.edu <'knowlesd@seattleu.edu'>; D'Adre.Cunningham@kingcounty.gov <'D'Adre.Cunningham@kingcounty.gov'>; hannah.roman@kingcounty.gov <'hannah.roman@kingcounty.gov'>; tara.urs@kingcounty.gov <'tara.urs@kingcounty.gov'>; kathleen.mcclellan@kingcounty.gov <'kathleen.mcclellan@kingcounty.gov'>; anita.khandelwal@aya.yale.edu <'anita.khandelwal@aya.yale.edu'>; alena.ciecko@kingcounty.gov <'alena.ciecko@kingcounty.gov'>; irina.nikolayev@kingcounty.gov <'irina.nikolayev@kingcounty.gov'>; kelli.johnson@kingcounty.gov <'kelli.johnson@kingcounty.gov'>; sainsworth@legalvoice.org <'sainsworth@legalvoice.org'>; lillian@defensenet.org <'lillian@defensenet.org'>; backlundmistry@gmail.com <'backlundmistry@gmail.com'>; peterk@atg.wa.gov <'peterk@atg.wa.gov'>; jayg@atg.wa.gov <'jayg@atg.wa.gov'>; SHSTacAppeals@ATG.WA.GOV <'SHSTacAppeals@ATG.WA.GOV'>
Subject: In re the Welfare of: K.M.M., No. 91757-4 / K.M.M.'s Answer In reply To New Issues raised In Amicus Briefs

Attached for filing today is "K.M.M.'s Answer In Reply To New Issues raised In Amicus Briefs" for the case referenced below.

In re the Welfare of: K.M.M.

No. 91757-4

Filed By:
Dana Nelson

206.623.2373
WSBA No. 28239
nelsond@nwattorney.net

Jamila Baker
Legal Assistant
Nielsen, Broman & Koch PLLC
1908 East Madison St.
Seattle, WA 98122
206-623-2373
fax 206-623-2488