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SUPREME COURT NO. 91757-4

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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

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. SUPPLEMENTAL ISSUES

1. Did the trial court find appellant currently unfit to parent his child? Yes.

2. Did the State meet its burden under RCW 13.34.180(1)(d)?
Yes.

B. SUPPLEMENTAL STATEMENT OF THE CASE

K.M.M. was six years old when removed from her biological parents' care due to their drug abuse and neglect. RP 64. She entered the foster care system with psychological issues. RP 64. She was parentified, had no attachment to her parents, and did not know how to trust or rely on adult caregivers. RP 64, 66. Tragically, the issues were compounded when K.M.M. suffered abuse at the hands of her first foster parents. RP 159. Luckily, she was placed with her current foster parents and provided individual therapy to address her attachment issues. RP 18-19.

K.M.M.'s therapist Cory Staton believed it was critical for K.M.M.'s psychological and emotional development that she learn to establish the ability to securely attach with her current adult caregivers. CP 65-66. The caregivers available at the time were K.M.M.'s foster parents, not her biological parents.¹ RP 67-70. As such, the foster parents

¹ It was the therapist's policy not to involve biological parents in a child's attachment therapy unless reunification was under way. CP 68. J.M. never called an expert to establish this was somehow professionally unreasonable.

were provided attachment instruction to assist K.M.M. in her therapy. CP 71.

Staton explained the natural progression of attachment therapy aims at facilitating reunification, because once a child learns to securely attach to one adult caregiver that child is usually able to transfer that attachment back to a biological parent when that parent resumes the role of primary caretaker. CP 139-40; 267-68. Through 2011, it appeared that K.M.M. was progressing as expected in therapy. RP 79. Thus, at that time, it was reasonably expected that once K.M.M. achieved secure attachment with her foster parents, this attachment could be transferred to J.M. if he became a primary caregiver to K.M.M. RP 139.

It was not until the spring of 2012 that the parties were first alerted to the fact that – because of her unique history and personality – K.M.M. was detaching completely from her parents. RP 81; CP 61 (stipulated fact no. 43). She began experiencing stress and anxiety when contemplating contact with her biological family and started to withdraw from visits. RP 155, 194-95, 226-27, 237. K.M.M. testified she has bad memories when she thinks about her biological parents, and cannot picture living with them. RP 285, 287.

In April 2012, K.M.M. refused to participate in visits or have any contact with her biological parents, maintaining she wanted to be adopted

by her foster parents. CP 61 (stipulated fact no. 43); RP 41, 81. Unfortunately, before experts grasped the depth of K.M.M.'s detachment and before J.M. was in a position to reunify, K.M.M. extinguished her bond with her biological parents. Ex. 13; RP 30-31, 83.

In an attempt to rekindle some form of a relationship and bolster K.M.M.'s psychological ability to handle contact with her parents, the parties enlisted the help of family 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. Given her psychological state, Sherry did not believe family therapy for reunification purposes could occur. RP 243. Instead, he developed a "natural contacts" plan where the parents would have "incidental, passive contact" with K.M.M. when she was visiting with her sisters (who were transitioning back to the mother's home and having visits with J.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.² RP 389; Ex. 14, 15, 16; CP 348.

Ultimately, the case proceeded to termination and the trial court granted the State’s petition. CP 105-112. The trial court found that although J.M. had corrected his individual parental deficiencies and is fit to parent his other daughter, conditions exist in his relationship with K.M.M. such that reunification is not possible. FoF X. It found that there was an absence of a parent-child relationship that “cannot be now corrected without great harm being cause to [K.M.M.]” FoF X. The trial court also determined that, despite J.M.’s best efforts, K.M.M. had psychologically extinguished her bond with him and noted that mental health experts agreed there were no services reasonably available to correct this condition without harming her. FoF XII, XV. Finally, the trial court concluded that “[J.M.] is unable to parent [K.M.M.]” CP 112.

The Court of Appeals upheld the termination order holding that the trial court properly made an express finding of unfitness, and the State sufficiently proved that it offered or provided all reasonably available

² This order was never appealed or modified.

services. In re Welfare of K.M.M., 187 Wn. App. 545, 564-577, 349 P.3d 929 (2015).

C. ARGUMENT

I. THE TRIAL COURT'S FINDING THAT J.M. IS "CURRENTLY UNABLE" TO PARENT K.M.M. IS TANTAMOUNT TO AN EXPRESS FINDING OF PARENTAL UNFITNESS.

Parental rights are a fundamental liberty interest protected by the constitution. Santosky v. Kramer, 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982). However, children also possess fundamental liberty interests at stake in termination proceedings – interests that are just as great as those of the parents. In re Dependency of MSR, 174 Wn.2d 1, 17-18, 271 P.3d 234 (2012). These interests include the right to be free from unreasonable risk of harm (physical and psychological). Id. at 20.

The juvenile court may properly terminate parental rights when the State establishes by clear, cogent, and convincing evidence all the elements under 13.34.180(1) and demonstrates current parental unfitness. In re Welfare of A.B., 168 Wn.2d 908, 925, 232 P.3d 1104 (2010). The State must also prove by a preponderance of the evidence that termination of parental rights is in the child's best interests. RCW 13.34.190(1)(b).

Reviewing courts will not disturb the juvenile court's findings of fact if they are supported by substantial evidence. In re Sego, 82 Wn.2d

736, 739, 513 P.2d 831 (1973). Substantial evidence is evidence sufficient to persuade a rational person of the truth of the declared premise. Bering v. SHARE, 106 Wn.2d 212, 220, 721 P.2d 918 (1986). The trial court is “afforded broad discretion and its decision is entitled to great deference on review.” In re A.W., 53 Wn. App. 22, 31, 765 P.2d 307 (1988).

The key question here is whether the trial court found J.M. unfit to parent K.M.M. J.M. is correct when he states that without such a finding the termination order cannot stand. Motion for Discretionary Review (M.D.R.) at 10 (citing A.B.-I, 168 Wn.2d at 918). However, he misreads the record when suggesting no such finding exists. Id. at 10-13.

The trial court may expressly find parental unfitness, or it may implicitly do so. A.B.-I, 168 Wn.2d at 920. Satisfaction of the six statutory elements under RCW 13.34.180(1) constitutes an implicit finding of unfitness if the facts and circumstances in the record demonstrate that the omitted finding was intended. Id. at 927; In re Dependency of K.N.J., 171 Wn.2d 568, 577, 257 P.3d 522 (2011). In this case, the trial court not only found the State had proven all six statutory elements – it expressly found J.M. was unfit.

The trial court’s written findings state: “Because the attachment bond no longer exists between [K.M.M.] and her father, [J.M.] is unable to

parent [K.M.M.]....” CP 112. While this finding does not specifically contain the word “unfit,” that is in fact what it means.

First, looking just at the plain language of this finding, the trial court explicitly States J.M. is unfit. This is because, in its ordinary usage, the term “unable” is a recognized synonym for the term “unfit.”³

Second, within accepted legal parlance, a finding that a parent is “unable” to parent a particular child falls squarely within the definition of unfitness. Black’s Law Dictionary defines “unfit” as “unsuitable; incompetent; not adapted or qualified for a particular use or service.” BLACK’S LAW DICTIONARY 803 (6th ed. 1991) at 1530. More specifically, Black’s Law Dictionary defines what “unfit” means in the context of a parental-child relationship:

As applied to the relation of rational parents to their child, the word “unfit” usually, though not necessarily, imports something of moral delinquency, but, unsuitability for any reason, apart for moral defects, may render a parent unfit for custody.

Id. (Emphasis added).

Applying this same definition to parental right deprivation hearings, one court has explained:

... if returning custody to the natural parent would be seriously detrimental to the welfare of the child, then the

³See, "Unfit." Merriam-Webster.com. Merriam-Webster, n.d. Web. 23 June 2014. <<http://www.merriam-webster.com/dictionary/unfit>>.

parents could be considered unfit ('unsuitable, ... not adapted for a particular use or service,'...).

Petition of the Department of Public Health, 383 Mass. 573, 590, 421 N.E.2d 28 (1981) (citations omitted).

Under the definition of unfitness stated above, a parent might not have any individual parental deficiencies generally speaking; however, he still may be "unsuitable" to parent his child if that would be detrimental to the child's health. Here, the trial court found – based on substantial evidence – that J.M. is "unable" to parent K.M.M. because there is no attachment bond between the two and any further reunification efforts will harm her. Given the definition of "unfit" cited above, this is the same as saying J.M. is unfit to parent K.M.M.

Finally, case law defines parental unfitness in such a way as to render the trial court's finding that J.M. is "currently unable" to parent an explicit statement of parental unfitness. This Court recently stated: "A parent is unfit if he or she cannot meet a child's basic needs." In In re Custody of B.M.H., 179 Wn.2d 224, 236, 315 P.3d 470 (2013). The Court of Appeals has further clarified that 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); see also, In re Welfare of B.P., 188 Wn. App. 113, 131, 353 P.3d 224, (2015). Under this case law, if a trial court finds a

parent unable to parent his child because he cannot meet the child's basic need for attachment, this is the same as saying the parent is unfit.

In sum, no matter whether looking at the ordinary meaning of the term "unfit, the term's legal definition, or the manner in which Washington case law has defined unfitness, the trial court's finding that J.M. is "currently unable" to parent K.M.M. is tantamount to an express finding that J.M. is currently unfit to parent his daughter. Consequently, this Court should affirm the Court of Appeals.

Even if this Court disagrees that there is an "express" unfitness finding, the facts and circumstances in the record clearly demonstrate that this finding was made. This Court has stated: "An appellate court may imply the existence of such a finding if – but only if – the facts and circumstances clearly demonstrate that the finding was actually made by the trial court." A.B., 168 Wn.2d at 927. This case meets this standard.

The overarching conditions supporting the trial court's termination were the total absence of any parent-child bond between J.M. and K.M.M, and the fact she cannot psychologically tolerate contact with J.M without being developmentally harmed. CP107-10 (FoFs X, XII, XIV, XV, XVIII, CoL IV). The record amply supports this.

K.M.M. needed the permanency of a secure attachment with her caregivers, but her biological parents were not available to provide this

secure base. RP 79, 93. Consequently, K.M.M.'s psyche was damaged such that she experienced stress and anxiety even when merely contemplating contact – which caused her to psychologically shut down and extinguish her bond with J.M. RP 155, 194-95, 226-27, 237, 248.

Staton explained that from a psychological standpoint, K.M.M has fully identified herself with her foster family, and that family is her place of safety and security. RP 95. Staton described K.M.M as an anxious child who particularly fears losing her identified family (her foster family). RP 92-93. K.M.M does not feel safe with her parents. RP 91. K.M.M.'s last contact with J.M. amplified her anxiety, prompting the trial court to stop visits because they threatened her welfare. RP 132-34.

Ultimately, Staton opined that it would be very damaging to break K.M.M.'s attachment to her current caregivers and that a forced reunification would cause K.M.M. extreme distress and developmental delays. RP 140-41. Child therapist Tom Sherry reached a similar conclusion. RP 223-26; 247; 272. J.M. offered no expert testimony to refute these experts' assessments of K.M.M. and the lack of reunification prospects.

The trial court heard the evidence, gave careful consideration to the fact that J.M. has remedied his individual parental deficiencies and is generally fit to parent other children, and came to the unambiguous

conclusion that J.M. was currently unable to parent K.M.M.⁴ This demonstrates an implicit determination that no matter how suitable J.M. might be in other regards, if a child is unable to psychologically tolerate contact with him due to past neglect, J.M. is unsuitable to parent that child. As such, the facts and circumstances of this case demonstrate the trial court made a finding that J.M. is unfit to parent K.M.M.

J.M. paradoxically claims the trial court actually found J.M. fit to parent K.M.M. M.D.R. at 10. However, J.M. misreads the record, creating an alleged ambiguity where none exists.

Although the trial court found J.M. fit to parent a child, this does not necessary imply it found him fit to parent K.M.M. Legally, parent-child relationships are unique entities that exist between each child and each parent. See, In re Dependency of M.J.L., 124 Wn. App. 36, 41-42, 96 P.3d 996 (2004) (explaining that in child deprivation hearings courts must look at the “relationship between a parent and each child as an individual”).

⁴ J.M. points to the fact that the trial court expressed hope that K.M.M. might re-form her relationship with J.M. when she is older, suggesting that perhaps the trial court was “ambivalent” as to J.M.’s fitness. MDR at 10, n. 9. However, there is no question that current fitness is the required constitutional standard. A.B.-I, 168 Wn.2d at 920. Hence, any speculative hope on the part of the trial court that K.M.M. might be able to tolerate contact with her father in the future does not mitigate its finding that J.M. is currently unable to parent K.M.M. without causing her harm. CP 112. Furthermore, it is also well-established that a party cannot take an oral decision by the trial court and argue that it is inconsistent with the court’s written findings in an attempt to impeach those findings. E.g. In re Marriage of Raskob, 183 Wn. App. 503, 519-20, 334 P.3d 30 (2014).

Consequently, when evaluating parental fitness in the context of child placement proceedings, a parent's demonstrated fitness regarding one child does not necessarily establish his fitness regarding another child. Id.; B.P., 183 Wn. App. at 131. There is therefore no ambiguity in the fact that the trial court found J.M. a generally fit parent, but also found him unfit to parent K.M.M. due to a unique condition in that parent-child relationship.

This case shows how conditions may exist where a parent is perfectly fit to parent one child, while unfit to do so for another child. K.M.M.'s sister is able to have contact with her father without consequent psychological harm, so he is still able to nurture that daughter and is fit to parent her. This is not so with K.M.M. Hence, the trial court's finding that J.M. is a fit parent in the abstract cannot override its specific finding that he is unable to parent K.M.M. due to specific conditions in their relationship.

J.M. also suggests that courts may only consider individual parental deficiencies when determining parental fitness and must turn a blind eye to the harmful conditions that exist within an individual parent-child relationship. MDR at 12. Essentially, J.M. is asking this Court to ignore the salient fact of this case – that K.M.M. can no longer psychologically tolerate contact with her parents such that any reunification efforts will developmentally and emotionally harm her.

However, this fact is far too central to be swept aside – for it goes to the heart of the fitness issue.

Next, J.M. claims the Court of Appeals decision affirming termination is in conflict with A.B.-I because the cases are factually similar but reach different results. M.D.R. at 11-12. He points out that in A.B.-I, there were “profound and intractable” attachment issues that were not the fault of A.B.’s father. M.D.R. at 11. Whether – at first blush – this looks similar to J.M.’s situation, there is a significant factual difference between the cases that explains the different results.

At the time of termination, A.B.’s father was still able to have contact with his daughter and was engaging in visits, which presumably were not harmful to the child. A.B.-I, 168 Wn.2d at 916. Hence, there was at least a theoretical possibility that reunification could occur without damaging A.B.’s psychological development. By contrast, visits between J.M and K.M.M. were stopped because the dependency court determined contact was harmful to K.M.M. The basis for the order was amply proved at trial by the mental health experts who worked with K.M.M. and opined there were no services to fix this problem and any efforts to force reunification would harm K.M.M.

Given the difference between the facts here and those in A.B.-I, J.M. misses the mark when he suggests that the holding in this case

conflicts with that in A.B.-I. While the outcomes are different, this difference merely underscores that when the same legal standard is applied to different individual facts, different results may be reached.

J.M. also suggests that a parent cannot be found unfit unless the State establishes he is at fault for causing the condition in the parent-child relationship, which prevents safe reunification. MDR at 11-12. However, this Court's definition of parental unfitness in B.M.H. focuses on the basic needs of the child, not the "fault" of the parent. This approach is entirely appropriate. For as this case shows, even if J.M. is arguably not at fault for creating the situation that renders him unable to meet his child's basic needs, the fact remains he is unable to meet those needs.

From both a constitutional and statutory perspective, the focus of parental-rights deprivation proceedings ultimately must be on whether certain legal actions are necessary to prevent harm to the child. RCW 13.34.020; In re Custody of Smith, 137 Wn.2d 1, 27, 969 P.2d 21 (1998); aff'd sub nom. Troxel v. Granville, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000). Where the record establishes further reunification efforts will harm a child, parental rights must yield to the child's basic needs. Id. Fault is irrelevant. The tragic fact of this case is that K.M.M. cannot psychologically tolerate contact with J.M., and any reunification

efforts will harm her development. Sadly, there is no remedy for this regardless of whether J.M. is at fault.

In sum, the record shows the trial court found J.M. currently unfit to parent K.M.M. – either expressly or by implication. As such, this Court should affirm the Court of Appeals decision and uphold the termination order.

II. RCW 13.34.180(1)(D) DOES NOT REQUIRE THE DEPARTMENT TO FORCE A CHILD TO PARTICIPATE IN REUNIFICATION SERVICES WHEN IT WOULD BE DETRIMENTAL TO THE CHILD'S HEALTH, SAFETY AND WELFARE.

The record establishes the state proved by clear, cogent, and convincing evidence that all necessary services, reasonably available, capable of correcting the parental deficiencies within the foreseeable future have been expressly and understandably offered or provided.

Arguing to the contrary, J.M. claims he was not offered or provided court-ordered family therapy. MDR at 14. However, the record shows he was offered the type of service that was intended by the dependency court when it ordered “family therapy.” CP 334.

The appellant cites to the dependency review order issued on December 26, 2012, which states: “The father will participate in family therapy with Thomas Sherry... to address issues with visitation.” MDR at 14 (citing CP 334). Standing alone, this statement appears to call for

traditional family therapy where K.M.M. and her parents would work together in a therapeutic setting. Yet, the same order also says that contact between K.M.M. and her parents was suspended. CP 335. J.M. does explain how one can participate in traditional family therapy when contact between family members is prohibited.

Fortunately, the seeming disconnect between the trial court's call for family therapy and its suspension of contact between K.M.M. and her parents is clarified in the record. The social work testified that traditional family therapy was never ordered. She explained:

The intent was...never specifically for the parties to engage in family therapy. It was for Mr. Sherry to meet with them and see if – you know, what recommendation he would come up with based on assessing each individual, between [J.M. and D.C.] and [K.M.M.], and then come up with a [reunification] plan.

RP 369; see also CP 324. This establishes that the “family therapy” ordered by the court was actually Sherry's individual assessment of family members and development of a plan to re-establish contact if possible.

The record shows J.M. was provided the family therapy service that was ordered. All the parties met with Sherry individually. CP 225. Sherry assessed the situation and devised a plan aimed at warming K.M.M. to having contact with her parents, and worked with the Department in attempting to implement the plan. CP 226-27, 238-41. The

service ended, however, after it became evident that K.M.M. could no longer tolerate any contact with her biological family. RP 312, 392, 401, 450. As Sherry explained, K.M.M. cannot be forced into visits without causing harm to her. RP 247. Again, J.M. offered no expert to rebut this.

The record shows traditional family therapy was – and remains – unavailable. Ultimately, Sherry’s reunification service confirmed that visitation and further reunification efforts were not an option. Indeed, the next court order expressly found visitation was a “threat to K.M.M.’s health, safety, and welfare.” CP 347. Importantly, J.M. still offers no explanation as to how family therapy between K.M.M. and J.M. could have been a “reasonably available service” given the Department’s un rebutted expert opinion stating that forcing K.M.M. to participate will harm her (RP 247), and given that there is a dependency court order suspending visits because contact is detrimental to K.M.M.’s health, safety and welfare. (CP 335)

J.M. also claims the State was required to provide family therapy in 2011, before K.M.M. detached. Specifically, he claims the trial court “explicitly found that the deterioration of the father’s relationship with his daughter resulted from the department’s failure to provide family therapy ‘at a critical juncture.’” M.D.R. at 14. However, the court actually stated:

In 2011, the relationship between [K.M.M.] and her father

was at a critical juncture and the provision of reunification therapy at that time may have prevented her from extinguishing her attachment to the father.

CP 108 (FoF XII) (emphasis added). This is not an “explicit” finding the State failed to provide a reasonably available service at a critical juncture.

While the trial court’s finding suggests the possibility that reunification services between K.M.M. and her biological parents might have prevented K.M.M.’s detachment, it does not contradict the trial court’s other finding that all necessary and reasonably available services capable of correcting J.M.’s parental deficiencies were provided. This is because: (1) at the time of this so-called “critical juncture” the parties did not know that family therapy between J.M. and K.M.M. might be a necessary service; and (2) J.M. was not in a position to meaningfully participate in K.M.M.’s individual therapy in 2011 because he was not transitioning to be her primary caregiver.

Next, J.M. argues the State was obligated to provide him with the same attachment instruction that was given the foster family. MDR at 17. J.M. relies on In re Welfare of C.S., 168 Wn.2d 51, 225 P.3d 953 (2010). Id. However, this case is significantly different than C.S. in one key respect – the service at issue in C.S. remained reasonably available at the time of termination. That is not the case here.

In C.S., the child had been diagnosed with ADHD, oppositional-defiant disorder, obsessive-compulsive disorder, and sensory integration disorder. His foster parent had difficulties addressing C.S.'s conditions until the State provided her training services showing her how to effectively deal with them and C.S. was put on medication. This combination of training and medication was successful. However, the State never offered C.S.'s mother this same training. Id. at 55-56.

Despite the State's failure to offer C.S.'s mother the same special needs training, the trial court terminated the mother's parental rights based on the condition that she was unable to meet her child's special needs. This Court reversed, concluding that since this training was deemed necessary to address C.S.'s special needs, and it was not offered to the mother, termination of her parental rights was not warranted. Id. at 56.

Unlike here, the record in C.S. does not establish that the service at issue was unavailable to the parent because it would harm the child. There is no indication that C.S. psychologically detached from his mother or that offering the service at issue would be detrimental to the child's well-being. In other words, unlike here, there was no proof in C.S. that the remedial service at issue would harm the child. Hence, C.S. is distinguishable.

In sum, the trial court properly found the State offered all services that were court-ordered or necessary and reasonable available. The State sufficiently proved that the type of "family therapy" that was ordered had been provided. It also proved that traditionally family therapy was not a reasonably available service. Finally, the record shows the State was not obligated to provide J.M. with the same attachment training as the foster parents because doing so would harm K.M.M. As a consequence, this Court should affirm the Court of Appeals decision and uphold the termination order.

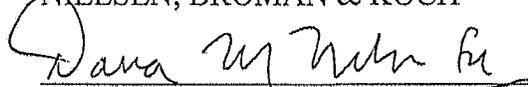
D. CONCLUSION

For the reasons stated above and those set forth in the State's brief, K.M.M. respectfully asks this Court to affirm the termination order.

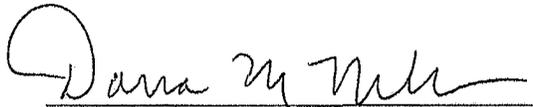
Dated this 19th day of February, 2016.

Respectfully submitted

NIELSEN, BROMAN & KOCH



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Attached for filing today is a supplemental brief of respondent for the case referenced below.

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

No. 91757-4

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