



Rob McKenna

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April 29, 2011

The Honorable Charles W. Johnson, Chair  
Supreme Court Rules Committee  
P.O. Box 40929  
Olympia, WA 98504-0929

**Re: Comment on Proposed Amendment to RAP 18.13A**

Dear Justice Johnson and Members of the Rules Committee:

Thank you for the opportunity to comment on the amendment to RAP 18.13A proposed by the Office of Public Defense. The amendment concerns the stay of termination orders on appeal, when adoption proceedings are commenced. The Attorney General's Office and the Department of Social and Health Services oppose the proposed amendment for three reasons, and based upon these reasons, we request that the amendment not be adopted.

First, we respectfully submit that the amendment is unnecessary. Parents who appeal from an order terminating parental rights long have had the right to move for a stay of the termination order. An appeal from a termination order is a civil action. RCW 13.04.033(1), the juvenile court statute, provides in pertinent part:

Any person aggrieved by a final order of the court may appeal the order as provided by this section. All appeals in matters other than those related to commission of a juvenile offense shall be taken in the same manner as in other civil cases . . . . *The order of the juvenile court shall stand pending the disposition of the appeal; PROVIDED, That the court or the appellate court may upon application stay the order.*

(Emphasis added.)

The process for seeking a stay and the standards for ordering a stay on appeal are well-established and well-understood. See RAP 8.1 (a) and (a) (3). It is not uncommon for a parent who determines to appeal from a termination order to seek a stay, and if a parent wishes to ensure that adoption proceedings do not move forward pending appeal, a stay of the termination order under RAP 8.1(a) and (a)(3) will achieve that end. In light of these existing avenues for a

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stay, it is difficult to identify a good reason to introduce into the RAP the additional complexity and uncertainty that accompanies the proposed amendment.<sup>1</sup>

In its purpose statement to the Court, the Office of Public Defense suggests that the amendment is needed to address a "jurisdictional conflict between [a termination appeal and an adoption proceeding] that is causing great uncertainty in the judicial system." OPD has not, however, demonstrated a jurisdictional conflict or uncertainty. Despite hundreds of appeals of termination orders in Washington in the past several years, this office is aware of just two cases where reversal has affected the adoption. Those are the two cases identified in OPD's filing. In neither case was there jurisdictional conflict or confusion. The termination order prevailed pending appeal, and the adoptions were successfully challenged by the parents' attorneys based upon reversal of the termination orders. This is consistent with the above-quoted statute and RAP 8.1 that "[a] trial court decision may be enforced pending appeal or review unless stayed pursuant to the provisions of this rule."

Second, the proposed amendment appears to proceed from a premise that discounts the Legislature's stated preference in RCW 13.34 in favor of permanency for children. The termination statute establishes that "[p]ermanency planning goals should be achieved at the earliest possible date," and "it shall be a goal to complete the adoption within six months following entry of the termination order." RCW 13.34.136(3).

In this respect, OPD's submission to the Court suggests that it is not in the child's best interests to be adopted if it is possible the adoption may later be vacated based upon reversal of a termination order. OPD should make this argument to the Legislature. In fact, hundreds of children have been adopted during the appeal of termination orders, and successfully and permanently so. These children should not be deprived of the opportunity to have a permanent new home, and the law recognizes this. Even in the rare instances where an adoption must be vacated, it is not the loss of that legal status that is disruptive to the child. It is the disruption of the home and family that the child has been a part of, sometimes for many years. Consistent with the Legislature's stated policy of achieving permanency at the earliest possible date, absent a stay of the termination order, permanency for the child is what the law contemplates.

Third, the proposed amendment misapprehends the role of DSHS in adoption proceedings, and as a consequence, would place upon DSHS responsibilities that it is not well-situated to fulfill. The amendment would require the Department to file and serve notice of the initiation of adoption proceedings on all parties to the termination appeal. DSHS does not initiate adoption proceedings. The prospective adoptive parent does. RCW 26.33.150(1). Where prerequisites to adoption have been established, through a home study and other evaluations, DSHS provides its

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<sup>1</sup> As an example of the proposal's uncertainty, it is not clear to us whether the amendment contemplates any hearing when it provides that "the appellate court shall upon its own motion . . . determine to whether to stay enforcement of the termination order to the extent that it authorizes the custodian to consent to entry of a final adoption order."

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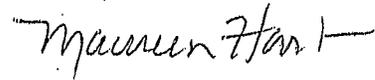
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consent to adoption. This occurs in advance of initiation of adoption proceedings, and DSHS itself is not in a position to know when an adoption petition is filed.

While not a substantive matter, we also note that the proposed amendment is being considered on an expedited basis. Even where there is good reason to expedite the rulemaking process, an expedited approach can come at the expense of valuable information and perspectives. The Court's usual rulemaking process would help ensure that all interested parties have a meaningful opportunity to participate. We note, that the last time this rule was amended, the amendment resulted from the recommendation of a workgroup involving all participants in the child welfare system.

Thank you for your consideration.

Sincerely,

A handwritten signature in cursive script that reads "Maureen Hart".

Maureen Hart  
Solicitor General  
(360) 753-2536