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NO. 62576-4-I

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

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STATE OF WASHINGTON
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IN RE THE DEPENDENCY OF
D.M.J.,
A Minor Child

ON APPEAL FROM THE SUPERIOR COURT OF WASHINGTON
COUNTY OF KING JUVENILE COURT

BRIEF OF APPELLANT FATHER

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I. SUMMARY OF THE ARGUMENT

Reginald Carey, appellant father, appeals the court's finding of dependency and respectfully requests this Court to reverse the unfounded determination.

At the time the mother of D.M.J., Ms. Jackson entered into an agreed upon order at a 72-hour shelter care hearing, the father, Mr. Carey, was unaware of why his newborn daughter was being taken away by the State. After the social workers finally made contact with Mr. Carey and informed him of the proceedings, Mr. Carey appeared before the court, and sought for the State to release his daughter to his care. Like almost every father, Mr. Carey was scared about raising D.M.J., but it was something that he desperately wanted to do, and as the child's father, it was also his right.

During the hearing, the State presented irrelevant and inadmissible evidence as part of its case for establishing dependency. Although the State presented enough evidence to raise a "concern" about several of Mr. Carey's issues, it failed to prove by a preponderance of the evidence he is unable to adequately care for his daughter. The State presented insufficient

evidence for the court's finding of dependency and the decision must be reversed.

II. ASSIGNMENTS OF ERROR

1. The court erred in finding D.M.J. a dependent child.
2. The court abused its discretion by considering irrelevant evidence.
3. The court abused its discretion by considering hearsay evidence.
4. The court erred in entering Finding of Fact 2 in the absence of substantial admissible evidence.¹
5. The court erred in entering Finding of Fact 3 in the absence of substantial admissible evidence.
6. The court erred in entering Finding of Fact 4 in the absence of substantial admissible evidence.
7. The court erred in entering Finding of Fact 5 in the absence of substantial admissible evidence.
8. The court erred in entering Finding of Fact 6 in the absence of substantial admissible evidence.
9. The court erred in entering Finding of Fact 7 in the absence of substantial admissible evidence.

¹ The trial court's Order of Dependency is attached as Appendix A.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The court must find by a preponderance of the evidence that a child meets one of the statutory definitions of dependency. Did the trial court commit error when it made a finding of dependency when the State failed to connect Mr. Carey's criminal history, substance abuse, and mental health issues to his ability to parent his daughter?

2. Due process rights apply during dependency cases. Did the trial court err when it found that Mr. Carey's dismissed and pending domestic violence charge created concern about his availability to care for D.M.J.?

3. The rules of evidence apply during dependency hearings. Did the trial court improperly admit evidence of Mr. Carey's criminal history, substance abuse, and mental health, pursuant to ER 402?

4. Hearsay testimony is not admissible in a dependency proceeding unless an exception applies. Did the trial court improperly admit hearsay testimony from the social worker concerning statements made by D.M.J.'s mother about Mr. Carey's substance abuse, contrary to ER 801(d)(2)?

IV. STATEMENT OF THE CASE

D.M.J. was born on March 29, 2008. 9/9/08RP 45. During the birth, the hospital contacted the Department of Social and Health Services (DSHS) after some difficulties with the mother. 9/9/08RP 135. Subsequently, a 72-Hour Shelter Care Hearing occurred on April 2, 2008. At that time, the court granted Ms. Jackson's request to waive the shelter care hearing, and accepted the agreements of the parties, but only with respect to the mother. 4/2/08RP 9. At the time of this hearing, the social worker, Cynthia Martin, was unable to notify Mr. Carey about the proceedings. 4/2/08RP 12. The state then filed a dependency petition.

Even at the time that D.M.J. was taken from Mr. Carey, he only understood that it was a result of his homeless status. 9/9/08RP 48. At the time of the hearing, Mr. Carey was living in transition. 9/9/08RP 46. He moved "from one shelter or one family member or friend or another." 9/9/08RP 46. Although, Mr. Carey had no current home, he still had plans for a place to stay with his daughter.

Mr. Carey planned to bring D.M.J. to his aunt and live with her for a while. 9/9/08RP 47. He had talked to her several times about the possibility and knew she had the many baby items at her

house from when she had previously run a successful day care.
9/9/08RP 47-48. Mr. Carey did admit that he was ill prepared for the baby, but knew that it would not be impossible and he could take care of everything if he “put a rush on it.” 9/9/08RP 48. During his testimony, Mr. Carey stated:

We lack a lot of things from the so-called traditional or well-prepared parent – family has. But I think we have what it takes to take care of the child – to take care of my child.

9/9/08RP 53.

Mr. Carey was able to make several visits to see D.M.J. 9/9/08RP 68. When asked about his visits with his daughter, Mr. Carey replied, “I sing to her, I talk to her, I say a prayer over her head every time I come there, every time I visit her. I hold her and take pictures.” 9/9/08RP 81. The State even made comments on behalf of the Court Appointed Special Advocate (CASA) for the child, Brian Reed, about Mr. Carey’s visits with D.M.J. 9/9/08RP 193-96. Mr. Reed found that “[Mr. Carey] was very nurturing, caring, concerning for the child, sung to the child and really interacted with the child.” 9/9/08RP 195.

The State ultimately argued that D.M.J. should be found dependent because there is no parent available to adequately care

for the child. 9/9/08RP 200. First, the State found Mr. Carey's criminal history "of particular concern." 9/9/08RP 202 (emphasis added). They found the substance and the length of his criminal history, as well as a pending matter concerning an allegation of domestic violence, raises questions about Mr. Carey's availability to parent. 9/9/08RP 202. Second, the State found that Mr. Carey's mental health history was "of significant concern." 9/9/08RP 202 (emphasis added). Although they failed to admit supporting testimony during the hearing, the State argued that Mr. Carey's "stressors . . . are barriers at this point form him to have the kind of relationship with [D.M.J.] and to be able to provide for his child the way that would be necessary to ensure that she was adequately cared for." 9/9/08RP 203. Third, the State relied on "unresolved" issues of substance abuse. 9/9/08RP 203.

In response, Mr. Carey contended that he was an affectionate and caring father and was always appropriate with D.M.J. during his visits with her. 9/9/08RP 206. Mr. Carey never exhibited any signs of substance abuse with any of his visits with D.M.J. or any of his meetings with the social workers. 9/9/08RP 206-07. There was also no testimony of any positive UAs over the course of the pending case. 9/9/08RP 207. Mr. Carey also disputed

that his criminal history was relevant as many of the convictions were several years old, and his charge of domestic violence was dismissed; nothing beyond a probable cause was ever established. 9/9/08RP 208. Additionally, Mr. Carey was involved in a dual diagnosis program at Sound Mental Health. 9/9/08RP 208. He has been on supervision and submitting UAs as part of his conditions with the Department of Corrections. 9/9/08RP 208. Ultimately, Mr. Carey would soon be available to care for D.M.J. after his pending incarceration was over. 9/9/08RP 208-09. He asked the court to not make a finding of dependency, and have DSHS work with him on a voluntary service contract instead. 9/9/08RP 209.

The court found D.M.J. dependent based on several factors. First, the court found Mr. Carey's criminal history was relevant because of the number of convictions, if he gets another, he would be in prison for a long time, which would prevent him from being able to care for D.M.J. 9/9/08RP 210. Second, although neither of the domestic violence charges were proven, the court nonetheless found it created a concern about the relationship between Mr. Carey and Ms. Jackson, which relates to his ability to provide a safe home. 9/9/08RP 210. Third, the court was also concerned with Mr. Carey's substance abuse issues because they do not "have

any indication that . . . the substance abuse issues are necessarily behind him. They may be, but we don't know at this point."

9/9/08RP 210. Finally, the court found Mr. Carey's mental health was a concern because the court did not "have any real details on the nature of [Mr. Carey's] mental health treatment." 9/9/08RP 211. Ultimately, all those issues taken together indicated to the court that Mr. Carey is not capable of adequately caring for D.M.J. 9/9/08RP 211.

V. ARGUMENT

THE STATE PRESENTED INSUFFICIENT EVIDENCE TO SUPPORT THE TRIAL COURT'S FINDING THAT D.M.J. IS A DEPENDENT CHILD.

1. A parent has a fundamental right to the care and custody of his or her child, and the State may infringe on this right only when necessary to protect the child from harm. "The family entity is the core element upon which modern civilization is founded." In re Smith, 137 Wn.2d 1, 15, 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) (a parent has a fundamental liberty interest in raising her child without state interference); Troxel, 530 U.S. at 65-66 (right to parent is oldest liberty interest recognized by Court); Santosky v. Kramer, 455 U.S. 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599

(1982). “The parents' right to custody of their children is described as being rooted in the natural and the common law, and as being a sacred right that is more precious than the right to life itself.” In re J.H., 117 Wn.2d 460, 473, 815 P.2d 1380 (1991). Where the State intervenes in the life of a family, “the most essential aspect of family privacy . . . the right of the family to remain together without the coercive interference of the awesome power of the State” is violated. Duchenese v. Sugerman, 566 F.2d 817, 825 (2nd Cir. 1977). In dependency matters, the State’s ostensible goal is to nurture the family unit and to keep the family intact “unless a child’s right to conditions of basic nurture . . . health, or safety is jeopardized.” RCW 13.34.020; In re J.B.S., 123 Wn.2d 1, 8-9, 863 P.2d 1344 (1993).

The State may interfere in the parent-child relationship only as necessary to protect the child from physical, mental or emotional harm. Wisconsin v. Yoder, 406 U.S. 205, 206, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972); Smith, 137 Wn.2d at 16-19; RCW 13.34.020. The State may gain legal custody of a child through a dependency proceeding. RCW 13.34.040, 050. To find a child dependent, the court must find by a preponderance of the evidence that the child

meets one of the statutory definitions of dependency. In re Key, 119 Wn.2d 600, 612, 836 P.2d 200 (1992).

A child is dependent if he or she (1) has been abandoned; (2) has been abused or neglected by a person responsible for his or her care; or (3) has no parent or guardian capable of caring for him or her such that the child's current circumstances constitute a danger to the child. RCW 13.34.030(5). A finding of dependency requires proof of present parental deficiencies. In re Walker, 43 Wn.2d 710, 715, 263 P.2d 956 (1953). In Walker, the Court noted "an existing ability or capacity of parents to adequately and properly care for their children is inconsistent with the status of dependency." Id.; see also In re Watson, 25 Wn. App. 508, 512-13, 610 P.2d 367 (1979). In this case, with regard to Mr. Carey, the trial court found D.M.J. "dependent" only under RCW 13.34.050(5)(c).

2. The State failed to prove under RCW 13.34.030(5)(c) that Mr. Carey was incapable of adequately caring for his daughter. A finding of dependency under RCW 13.34.030(5)(c) requires proof that Mr. Carey was not capable of adequately caring for D.M.J., "such that [D.M.J.] is in circumstances which constitute a danger of substantial damage to the [her] psychological or physical development." RCW 13.34.030(5)(c) (emphasis added).

The trial court made no specific finding that Mr. Carey was not capable of adequately caring for D.M.J., nor did it make a finding that the child was in danger of substantial damage to her development. It is presumed, then, that the State failed to prove facts to support these findings. State v. Armenta, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997).

RCW 13.34.030(5)(c) turns on a parent's ability to address the child's needs:

A dependency based on RCW 13.34.030(5)(c) does not turn on parental "unfitness" in the usual sense. Rather, it allows consideration of both a child's special needs and any limitations or other circumstances which affect a parent's ability to respond to those needs. Under RCW 13.34.030(5)(c), it is unnecessary to find parental misconduct in order to find a child dependent.

In re Schermer, 161 Wn.2d 927, 944, 169 P.3d 452 (2007).

While the trial court may consider the family's entire history, a finding of dependency must be based on proof of a parent's present inability to care for his child. Walker, 43 Wn.2d at 715; Watson, 25 Wn. App. at 512-13. However, the court in this case only made findings that articulate a "concern" over Mr. Carey's criminal history, substance abuse, and mental health issues, but made no finding that these "concerns" directly related to Mr.

Carey's ability to adequately care for his daughter. CP 42 (Findings of Fact 2-7).

3. The State must demonstrate by a preponderance of the evidence that a child is dependent. The State failed to meet its burden when it did not present sufficient evidence of Mr. Carey's criminal history, substance abuse, or mental health. Furthermore, the State failed to demonstrate a connection between each of these issues and Mr. Carey's ability to parent D.M.J. For example, as this court found in In re T.L.G.: "mental illness is not, in and of itself, proof that a parent is unfit or incapable. The court must examine the relationship between the mental condition and parenting ability." 126 Wn. App. 181, 205, 108 P.3d 156 (2005).

The court recognized a "concern" about how Mr. Carey's criminal history may have a "potential impact" on his availability to care for the child. CP 42 (Findings of Fact 4, 5). The court stated during its oral decision:

I think that his criminal history is relevant in a couple of different respects. One, obviously, the fact that he has several felony convictions means that if he gets another felony conviction, he's got a criminal score which means he's going to go away for quite a substantial period of time which, obviously, prevents him, then, from being able to care for the child.

9/9/08RP 210. At the time of the trial, Mr. Carey had no current felony conviction that would prevent him from being available to parent D.M.J. But, the court was required to find proof of present parental deficiencies, not simply a prediction that Mr. Carey may become unavailable to care for D.M.J. because a potential future felony conviction. Walker, 43 Wn.2d at 715. It is true that a hypothetical future felony would result in jail time for Mr. Carey. But it is equally true that every hypothetical felony committed by any person could result in jail time. Mr. Carey's past criminal history had no relevance to his present ability to parent.

The court recognized the issue of Mr. Carey's substance abuse, but made no finding that his abuse inhibits his ability to care for D.M.J. CP 42 (Finding of Fact 6). The court stated during its oral ruling:

we have issues with regard to Mr. Carey's substance abuse issues. This has been an ongoing problem for a long period of time. While he may be under treatment now, we don't have current UAs for him, and I think that that's a significant issue. We certainly don't have any indication that mental -- the substance abuse issues are necessarily behind him. They might be, but we don't know at this point.

9/9/08RP 210. The State failed to demonstrate by a preponderance of the evidence that Mr. Carey's substance abuse is even an issue in

relation to Mr. Carey's ability to care for D.M.J. Essentially, the court found because it does not know enough about Mr. Carey's substance abuse issues, that is enough to raise a concern and justify the finding of dependency. The State failed to meet its burden and demonstrate that Mr. Carey's substance abuse issue directly relates to his parenting of his daughter. Moreover, the court made similar findings in regards to Mr. Carey's mental health issues.

Again, the court expressed a "serious concern" regarding Mr. Carey's mental health issues. CP 42 (Finding of Fact 7). During the oral decision, the court indicated:

Mental health history is another serious concern. Mr. Carey has had substantial mental health problems, significant diagnoses. He is getting some treatment currently, but we don't have any real details on the nature of his mental health treatment [w]e don't have, therefore, the necessary information about what Mr. -- the status of Mr. Carey's mental health treatment is at this point.

9/9/08RP 211. The State did not prove that at the time of the dependency trial, Mr. Casey was unable to care for D.M.J. such that she was in danger of substantial damage to her development. Again, the State failed to meet its burden by demonstrating by a preponderance of the evidence that Mr. Carey's mental health inhibits his ability to care for D.M.J. As this court held in T.L.G., a

child “may not be removed from their homes merely because their parents are mentally ill. 126 Wn. App. at 205 (citing In re H.S., 94 Wn. App. 511, 528, 973 P.2d 474 (1999)). Because the State did not provide enough information about Mr. Carey’s mental health issues, the court improperly relied on this evidence in making its finding of dependency.

The State failed to meet its burden and prove through a preponderance of the evidence, that Mr. Carey’s criminal history, substance abuse, and mental health are even issues in this case. The State simply presented enough evidence to raise questions about these three areas, but made no specific determination that any one of these had a negative impact on the child. Furthermore, the State failed to demonstrate how these areas of “concern” directly influenced Mr. Carey’s ability to care for his daughter.

4. Due process rights apply in dependency cases. Courts have “carefully scrutinized deprivation hearings to assure the interested parties have been accorded the procedural fairness required by due process of law.” In re Luscier, 84 Wn.2d 135, 137, 524 P.2d 906 (1974); see also In re Myrick, 8 Wn.2d 252, 533 P.2d 841 (1975); In re A.V.D., 62 Wn. App. 562, 567, 815 P.2d 277 (1991).

a. The court was not permitted to infer from a pending, or dismissed, charge that Mr. Carey was guilty of domestic violence.

The court inferred from Mr. Carey's pending charge for domestic abuse that he would be unavailable to care for D.M.J., and that the domestic abuse of D.M.J.'s mother would have a negative effect on D.M.J. 9/9/08RP 210; CP 42 (Findings of Fact 3, 4, 5). The court was not permitted to infer Mr. Carey's guilt simply because he was charged with a crime, or after a charge was dismissed. Instead, the court was required to presume Mr. Carey was innocent until proven guilty beyond a reasonable doubt of a charge for domestic violence; probable cause is not enough to support such a finding. Lundberg v. Baumgartner, 5 Wn.2d 619, 623, 106 P.2d 566 (1940).

It is not proper for a court to draw conclusions regarding a parent's past misconduct based on a dismissed charge, or on the parent's arrest and the State's unproven allegation of criminal misconduct:

An arrest is not competent evidence of either conviction of crime or of misconduct. It is, in effect, only a charge or accusation of wrongdoing. The law presumes one so accused to be innocent until his guilt has been established in a court of competent jurisdiction, by legally admissible evidence, beyond reasonable doubt.

Id. The court may not rely on pending charges because the individual is presumed innocent of those charges until proven guilty.

Cf. State v. Melton, 63 Wn. App. 63, 72, 817 P.2d 413 (1991).

In this case, it is true that Mr. Carey had a pending criminal charge for domestic abuse during the fact-finding hearing.

9/9/08RP 43-45. But, the court was required to presume Mr. Carey was innocent of the charge until proven guilty beyond a reasonable doubt. Lundberg, 5 Wn.2d at 623. The court stated:

while . . . the previous [Domestic Violence] matter was ultimately dismissed, nevertheless, there was at least, an original determination of probable cause on DV matter. There's another DV matter pending currently.

While neither of those has been proven, they nevertheless create real concern about the nature of Mr. Carey's relationship with Ms. Jackson, who is the mother of the child. Which relates substantially to their ability to provide -- a safe and adequate home for the child.

9/9/09RP 210. The court did not presume Mr. Carey was innocent of the pending charge, or the dismissed charge, but instead, found that probable cause was enough to raise concern about the child's safety. In making such a finding, the court violated Mr. Carey's due process rights by relying on unproven allegations of domestic violence.

b. Finding that Mr. Carey's domestic violence charges were reliable enough to infer a safety concern for the child was improper, and the court erred in relying on that finding to conclude the child was dependent. To survive a challenge on appeal, the findings made by a trial court must be supported by substantial evidence in the record. State v. Macon, 128 Wn.2d 784, 799, 911 P.2d 1004 (1996). "Substantial evidence is evidence sufficient in quantum to persuade a fair-minded person of the truth of the stated premise." State v. Thetford, 109 Wn.2d 392, 406, 745 P.2d 496 (1987). Where findings are not supported by substantial evidence, the reviewing court is not bound by them. Truck Ins. Exchange v. Merrell, 23 Wn. App. 181, 184, 596 P.2d 1334 (1979).

The court's finding of dependency must be supported by a preponderance of the evidence. Key, 119 Wn.2d at 612. The State has not demonstrated that any type of violence ever occurred between Mr. Carey and Ms. Jackson, let alone violence against the child. However, because Mr. Carey had a previous charge of domestic violence dismissed, and now has a current charge pending, the court found the probable cause to support those charges was enough to sustain a concern for the child's safety. 9/9/09RP 210. The court improperly found that D.M.J. was subject

to an unsafe or inadequate home. 9/9/09RP 210. The court was therefore in error in finding that D.M.J. was subject to a violent home because of the existence of the domestic violence charges against Mr. Carey.

5. The trial court failed to properly abide by the Rules of Evidence. The rules of evidence apply at a fact-finding hearing on a dependency petition. RCW 13.34.110(1).

a. Irrelevant evidence is inadmissible. Evidence is inadmissible unless it is relevant. ER 402.

'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

ER 401.

When the State sought to admit documents pertaining to Mr. Carey's criminal history, his attorney properly objected on the grounds of relevancy. However, overruling the objection, the court stated:

Well, I think that the documents clearly are relevant because the ones that are being offered here are Mr. Carey's criminal history, which is obviously relevant to his ability to care for the child both in terms of his availability and in terms of problems the criminal history represents with regard to his ability to provide

a home for the child. So I'll overrule the objection as to relevance

9/9/08RP 128. This ruling is unfounded because the State did not present any evidence of how Mr. Carey's criminal history directly affected his ability to care for D.M.J. or his ability to provide a home for his daughter. The admission of the evidence pertaining to Mr. Carey's criminal history is irrelevant because the State failed to make a proper connection between Mr. Carey's criminal record and his ability to parent D.M.J.

b. Hearsay testimony is not admissible in a dependency proceeding unless an exception applies. Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. ER 801(c). Hearsay testimony is not admissible in a dependency proceeding, unless some exception applies. ER 802.

The State's witness presented inadmissible hearsay testimony, over defense counsel's objection, and no exception to the hearsay rule applied. The State sought to elicit testimony from a social worker regarding why she first made contact with the mother of D.M.J. 9/9/08RP 134-35. Defense counsel objected to these statements as being hearsay, and thus inadmissible. 9/9/08RP 135.

However, the court ruled, "I guess I'll overrule because . . . I agree that it's hearsay, [but] it's not really going directly to the issues, here." 9/9/08RP 135. After more hearsay statements were made by the social worker, defense counsel objected again. 9/9/08RP 136. The court then stated, "some of the hospital staff statements may be an exception to the hearsay rule if they're for diagnosis and treatment. But the ones we have so far are not, but I've just admitted them as just sort of general background as to what was going on." 9/9/08RP 136. Defense counsel responded by stating, "Your Honor . . . I don't think . . . there is a general background exception to the hearsay rule." 9/9/08RP 136. The court continued to allow the admission of hearsay statements during this time. 9/9/08RP 136-38. Eventually, the State sought to elicit testimony from the social worker about statements made by the mother to the social worker about the father's substance abuse and mental health issues. 9/9/08RP 138-43. Defense counsel objected again to hearsay. 9/9/08RP 138. The State responded to the objecting by arguing that the mother is a party to the action, and as such, her statements are admissible to the court.

The Rules of Evidence state that "[a] statement is not hearsay if . . . [t]he statement is offered against a party and is . . . the party's

own statement.” ER 801(d)(2). The court first acknowledged that it was not clear whether the mother was even a party opponent to the hearing, but ultimately ruled that the mother is a party opponent and her statements to the social worker may come in under the exception. 9/9/08RP 138-143.

The admission by a party-opponent is an exception to the hearsay rule, but it does not apply in this situation. ER 801(d)(2). In State ex. rel Children and Youth Families Department v. Jeremy N., the New Mexico Court of Appeals ruled on a similar situation. 2008-NMCA-145, 145 N.M. 198, 195 P.3d 365. In that case, the father fought an abuse and neglect petition filed by the Children, Youth and Families Department (the “Department”) against the mother and the father. Id. ¶ 1. The father sought to introduce evidence of statements made by the mother. Id. ¶ 12. The father relied on the admission of a party opponent exception, Rule 11-801(D)(2)(a).² Id. However, the court rejected this argument and held that the mother and father are not party-opponents but were “co-respondents against whom separate allegations of abuse and neglect were made.” Id. It further held: “[t]he ‘party-opponents’ were the Department and the Father on the one hand and the Department and the Mother on the other hand.”

² The language of New Mexico’s Rule 801(D)(2)(a) is identical to that of Washington’s ER 801(d)(2)(i).

Id. Additionally, the court went even further and stated that even if the mother was a respondent while the father presented evidence, it still would not be considered a statement of a party-opponent. Id.

The statements made by the social worker are analogous to the inadmissible statements made in Jeremy N. Like the father trying to introduce testimony of his father about the mother's statements, in this case, the State tried to introduce testimony of the social worker about Ms. Jackson's statements. Id. ¶ 12. Ms. Jackson and Mr. Carey are co-respondents in a dependency action filed by the state. As such, the party-opponent hearsay exception does not apply to the mother's statements and should not have been admitted.

Furthermore, if the mother was a party to the case, she would be present at trial and available for the State to call as a witness, but she was not present at the hearing as a party or as a witness. 9/9/08RP 141. Furthermore, if she was a party and not present, she would at least have been represented by counsel, or had her presence waived, and neither of these things occurred. 9/9/08RP 141. The hearing before the court was to determine the dependency of D.M.J. with regards to Mr. Carey. As such, the mother, Ms. Jackson, was not a party to this hearing and her statements to the social worker are inadmissible hearsay.

6. The dependency order must be reversed. The court's dependency order must be supported by a preponderance of the evidence. Key, 119 Wn.2d at 612. The State presented insufficient evidence that D.M.J. met the statutory definition of a "dependent child" by a preponderance of the evidence, and the trial court's decision entering the order of dependency must be reversed.

VI. CONCLUSION

For the reasons stated above, Mr. Carey respectfully requests that this Court reverse the finding of dependency as to his daughter, D.M.J.

Respectfully submitted this 30th day of June 2009.



Gregory C. Link – WSBA 25228
Washington Appellate Project
Attorneys for Appellant



Shawn E. Lovell – WSBA 9111447
APR 9 Legal Intern

FILED
KING COUNTY, WASHINGTON

OCT 03 2008

SUPERIOR COURT CLERK
BY ANNIE JOHNSON
DEPUTY

SUPERIOR COURT OF WASHINGTON
COUNTY OF KING
JUVENILE COURT

Dependency of:

JACKSON, DESTINY MARIE, a/k/a CAREY,
DESTINY MARIE
dob: 3/29/08

Minor Child.

NO: 08-7-00417-0 SEA

ORDER OF DEPENDENCY AND DISPOSITION
AS TO ALLEGED FATHER, REGINALD J.
CAREY
(OROD)

AGREED
 FROM HEARING
 DEFAULT

CLERK'S ACTION REQUIRED

I. CLERK'S ACTION REQUIRED

- 1.1 The matter is next set for an initial progress review hearing on November 18, 2008, at 8:00 a.m., at the King County Juvenile Court, Courtroom 5, 1211 E. Alder Street Seattle, Washington.

II. HEARING

- 2.1 A hearing was held on September 9, 2008, and the following persons appeared:
- | | |
|--|--|
| <input checked="" type="checkbox"/> Alleged Father | <input checked="" type="checkbox"/> Alleged Father's Lawyer |
| <input type="checkbox"/> Child's CASA | <input checked="" type="checkbox"/> CASA's Lawyer |
| <input checked="" type="checkbox"/> DCFS Social Worker | <input checked="" type="checkbox"/> Assistant Attorney General |
- 2.2 Testimony was taken -- See clerk's minutes.

III. FINDINGS OF FACT

- 3.1 Indian status: The child is not Indian as defined in 25 U.S.C. 1903 (4), and the Indian Child Welfare Act does not apply to these proceedings.
- 3.2 Indian Child: N/A.
- 3.3 The following facts establishing dependency are not disputed; have been proven by a preponderance of the evidence:

1. Destiny Marie Jackson was born on March 29, 2008. Her mother is Tanya Jackson. The alleged father of the child is Reginald Carey. No other possible fathers have been named. Mr. Carey has been swabbed for genetic testing and test results are pending.

2. Mr. Carey has a history of twelve felony convictions that date back to 1978. Mr. Carey's criminal history includes convictions for robbery, and multiple VUCSA convictions. Mr. Carey's most recent drug related felony conviction was in 2007.

3. In addition to his felony convictions, Mr. Carey had a domestic violence charge that involved Tanya Jackson that was dismissed, and he is currently in jail due to a recent alleged domestic violence incident with Tanya Jackson that occurred on September 4th, 2008. Mr. Carey is due back in court regarding this charge on September 15, 2008.

4. Though Mr. Carey's previous domestic violence charge was dismissed, that allegation, in conjunction with the current domestic violence allegation, create concerns about the nature of Mr. Carey's relationship with Ms. Jackson, and the potential impact of that relationship on the child

5. Mr. Carey's criminal history is relevant to this dependency action both due to the number of previous convictions, and the number of years over which the convictions span. In addition, Mr. Carey's criminal history and his pending domestic violence allegation create concern about his availability to parent a child.

6. Mr. Carey also has substance abuse issues that have been ongoing over a period of time. Mr. Carey reports completing substance abuse treatment, but no verification of this treatment was offered to the Court. Mr. Carey also reports that he has had several relapses and several positive UA's post treatment.

7. Mr. Carey's mental health history is of serious concern. Mr. Carey reports previous diagnoses of Post Traumatic Stress Disorder, severe depression, bi-polar disorder, and suicidal thoughts. Mr. Carey also reported suffering from anxiety. It has not been possible to verify whether Mr. Carey is receiving mental health treatment because he has not been willing to sign appropriate releases of information.

8. Mr. Carey reports that he is unable to work due to his mental health conditions. He receives approximately \$330.00 per month from the state due to his inability to work.

9. Though visitation with Destiny has been available to Mr. Carey since Destiny's birth, Mr. Carey's visitation has been inconsistent and sporadic. Since early April, 2008, Mr. Carey has only seen Destiny approximately eight times.

10. Mr. Carey does not have a stable place to live. He reports that he and the child's mother, Tanya Jackson, are a couple, and plan to reside together. Mr. Carey reports that he is not willing to separate from Ms. Jackson, even if it would allow him to have the child placed with him.

3.4 The child is dependent pursuant to RCW 13.34.030(5) (a) abandoned; (b) abused or neglected; and/or (c) no parent, guardian or custodian.

3.5 It is currently contrary to the child's welfare to return home. The child should be placed or remain in the custody, control, and care of DSHS because:

- there is no parent or guardian available to care for the child;
 the parent or guardian is unwilling to take custody of the child;

- the court finds by clear, cogent, and convincing evidence that a manifest danger exists that the child will suffer serious abuse or neglect if the child is not removed from the home, and an order under RCW 26.44.063 will not protect the child from danger.

3.6 Reasonable efforts have been made by DSHS to prevent or eliminate the need for removal of the child from the child's home and have been unsuccessful because:

- The health, safety, and welfare of the child cannot be adequately protected in the home;
 Specific services have been offered or provided to the parent(s), guardian or legal custodian and have failed to prevent the need for out-of-home placement and make it possible for the child to return home. The specific services offered or provided to the child and the child's parent(s), guardian or legal custodian are listed in the dependency petition and subsequent documents filed herein and/or the ISSP and are incorporated by reference.
 The whereabouts of the mother father alleged father guardian or legal custodian is unknown;

3.9 DSHS has made an effort to place the child with a relative known to the child and with whom the child has a relationship and a relative is is not available or willing to care for the child and to meet any special needs of the child.

- There is a relative available and willing to care for the child, but the child is not placed with the relative because:
 additional investigation of relative placement resources is needed;
 there is not a relative, willing and available to care for the child, with whom the child has a relationship and are comfortable;
 there is reasonable cause to believe that relative placement would jeopardize the safety or welfare of the child; and/or hinder efforts to reunite the parent(s) and child.

The child's placement is in the child's best interest.

3.10 The court has received and reviewed the agency report (ISSP/social study) and has considered whether this order is consistent with the allegations in the dependency petition and the problems that necessitated the child's placement in out-of-home care.

IV. CONCLUSIONS OF LAW

- 4.1 The court has jurisdiction over alleged father.
4.2 The alleged father received timely and proper notice.
4.3 Indian Child: N/A.
4.4 The child should be found dependent pursuant to RCW 13.34.030(5) (a); (b); and/or (c).

V. ORDER

IT IS ORDERED that:

- 5.1 Default: The mother father legal guardian or custodian anyone else claiming a parental interest in the child is in default.
5.2 The child is dependent pursuant to RCW 13.34.030(5) (a); (b); and/or (c).

- 5.3 The child is placed in the custody and supervision of DSHS which shall have the authority to place and maintain the child in licensed care. The Department is authorized to place the child with a suitable relative without further order of the court, pending completion of agency investigation of relative placement resources. ~~The Department shall place the child with the mother after she enters inpatient treatment, if recommended by the treatment provider, and as long as she remains in treatment.~~
- 5.4 The parents shall cooperate with reasonable requests by DSHS and provide the department with income and asset information necessary to establish and maintain the child's eligibility for medical care, evaluations, counseling and other remedial services, foster care reimbursement, and other related services and benefits.
- 5.5 Any authorized representative of DSHS may give consent to necessary, routine and emergency medical, dental, or psychological care, including the administration of anesthetics as deemed necessary by the child's treating health care provider. Reasonable efforts shall be made by DSHS to contact and obtain the consent of the child's parents, if they are available, to any emergency medical or surgical care needed by the child.
- 5.7 **The following is the disposition plan and disposition order entered pursuant to RCW 13.34.130:**

General Provisions:

1. DSHS shall provide casework services, make referrals and monitor case progress.
2. The treatment/service providers are to be mutually agreed upon within 30 days of entry of this order or shall be identified below with respect to a specific service. If the parties are unable to agree on a service provider, a contested hearing shall be set.
3. The alleged father shall sign current releases of information for exchange of information for evaluations and between all treating professionals, DSHS, CASA, Juvenile Court, the AAG, and the parent's attorneys. Releases for ongoing services shall be limited to diagnosis, prognosis, participation and progress, and treatment recommendations.
4. All professionals providing court ordered services to this family are authorized to freely share information and coordinate treatment among themselves. All information regarding the provision of, participation in, or parties' interaction with court ordered services or professionals may be shared with the parties and the court absent further order of the court.
5. DSHS and CASA shall have the opportunity to provide information to all evaluators or service providers prior to the commencement of any evaluation or service. Any information so provided shall be provided to the parents' counsel, if any, at the same time.
6. The parent shall keep DSHS informed of their current address and phone number.
7. The parent should establish and maintain a safe, stable, living environment suitable for the child. It shall be free of domestic violence, physical and psychological abuse of the child, drug and alcohol abuse, and criminal activity.

Specific Services/Requirements:

1. **Service: Drug/Alcohol evaluation by mutually agreed upon provider and follow recommended treatment.**
 - DCFS caseworker and CASA shall have the opportunity to provide input to the evaluator at the outset of the evaluation.
 - Father is responsible for making initial appointment and completing all steps necessary to complete the evaluation and enroll in a recommended program.
 - Service to begin within 30 days of entry of this order.
 - Service to be completed as service provider recommends.
 - Responsibility for payment: father.

2. **Service: Random urinalysis to supplement evaluation and/or treatment**
To address the issue(s) of father's history of substance abuse and the resultant risks to the children;

The agency will facilitate the delivery/ participation in the above service in the following way: **DCFS social worker will provide referrals to appropriate provider. DCFS caseworker will also contact provider and designate that father shall have no less than 2 random U/As per week.**

Father's compliance with above requirement will be evaluated on the following basis: **Attendance at all required U/As; consistent negative results. An unexcused missed appointment or violation of program rules shall be deemed a positive result. If the parent wishes the Department to consider an excuse for a missed UA, the parent shall provide in a timely manner written documentation to corroborate the reason claimed for missing the UA.**

Service to begin: **immediately.**

Service to be completed: **after 60 days of clean U/As.**

Responsibility for payment: **no charge if at provider referred to by DCFS social worker, parent to pay elsewhere.**

3. **Service: Parenting Classes;**
To address: **reinforce parenting skills; develop appropriate parenting techniques; enhance knowledge of developmental stages of child(ren);**
The agency will facilitate the delivery/ participation in the above service in the following way: **DCFS will provide referrals to no/low cost or sliding scale programs and information on how to access this program.**

Father's compliance with above requirement will be evaluated on the following basis: **Oral and written reports from provider, consistent attendance and completion of parenting class and demonstration of knowledge of parenting skills at visitation; no CPS referrals.**

Service to begin: **Father shall contact service provider(s) and complete all requirements for enrollment in the next available class within 30 days of entry of this order.**

To be completed: **consistent with program requirements.**

Responsibility for payment: DCFS will make referrals to low-cost/no-cost and/or sliding scale programs; Father will be responsible for payment of balance, including penalties for missed appointments or noncompliance.

4. Service: Psychological evaluation and follow through with any treatment recommended.

To address the issue of: The psychological evaluation shall be done by a mutually agreed upon psychologist. The evaluation shall assess the father's mental health as it relates to the father's ability to parent the child, the father's need for additional mental health services, and the father's prognosis for successfully benefiting from those services.

The agency will facilitate the delivery and participation in the above service by making referrals to appropriate psychological evaluators, providing the evaluator with relevant information about the family to assist in the evaluation, and assisting the father in determining eligibility for payment of the service.

The father's compliance with above service requirement will be made based upon the father's cooperation in selecting a mutually agreed upon evaluator in a timely fashion, the cooperation with and completion of the evaluation in a timely fashion, the compliance with recommended treatment, active participation in recommended treatment, and by progress reports by service providers.

Service to begin by: the evaluation is to be scheduled within thirty (30) days of the date of this order. Any follow-up treatment shall be initiated promptly.

To be completed by: the evaluation is to be completed within ninety (90) days of the start of the evaluation. Follow up treatment to be completed as determined by treatment provider.

Responsibility for payment: DCFS shall seek funding, if with a Department contracted provider. With regard to payment of any recommended treatment, medical coupons will be used if the parent is eligible. If the father is not eligible, the father will pay for the treatment, however the DCFS will make referrals to no-cost or low cost treatment providers.

5. Service: Individual mental health counseling.

To address the issue of: The individual mental health counseling shall be done by a mutually agreed upon mental health counselor. The counselor will address those issues which have affected the father's ability to adequately meet the children's physical, emotional and psychological needs.

The agency will facilitate the delivery and participation in the above service by making referrals to appropriate mental health counselors, providing the counselor with relevant information about the family to assist in the counseling, and assisting the parent in determining eligibility for payment of the service.

The father's compliance with above service requirement will be made based upon the father's cooperation in selecting a mutually agreed upon counselor in a timely fashion, the active participation in mental health treatment as recommended by the counselor, and by progress reports by the mental health counselor.

Service to begin by: the counseling is to begin within thirty (30) days of the date of this order or as soon as the counselor is available to begin the service, whichever is earlier.

To be completed by: the counseling is to be completed as determined by the treatment provider.

Responsibility for payment: Medical coupons will be used for the counseling if the parent is eligible. If the father is not eligible, the father will pay for the counseling or DCFS shall seek funding. With regard to payment of any recommended treatment, medical coupons will be used if the father is eligible. If the father is not eligible, the father will pay for the treatment, however the DCFS will make referrals to no-cost or low cost treatment providers.

6. **Service: Establish Paternity;**
To address: child's parentage;

The agency will facilitate the delivery/ participation in the above service in the following way: Father is referred for initiation of parentage action to the King County Prosecutor's office, Family Support Section, E400 King County Superior Court, 516 – 3rd Ave., Seattle, WA 98104, telephone (206) 296-9020.

Father's compliance with above requirement will be evaluated on the following basis: **Appearance and cooperation in the paternity action. Participate in genetic testing if necessary. Service shall be deemed completed upon entry of a final court order determining paternity; Alleged father shall keep DCFS social worker apprised of status of parentage action;**

Service to begin: **within 30 days of entry of this order.**

To be completed: **as soon as possible.**

Responsibility for payment: **As determined by the prosecutor's office.**

Services to the child: The child's medical, psychological, educational, social, ethnic and cultural needs shall be met while in care. :

Visitation:

Mr. Carey may have visits three times per week, supervised, for two hours each visit. Mr. Carey must confirm each visit two hours in advance, or the child will not be transported for the visit.

- 5.8 The primary permanency plan for the child is:

- | | | | |
|-------------------------------------|------------------------------------|--------------------------|--|
| <input checked="" type="checkbox"/> | Return/Remain Home | <input type="checkbox"/> | Third Party Custody |
| <input checked="" type="checkbox"/> | Adoption | <input type="checkbox"/> | Long-term Relative Placement Agreement |
| <input type="checkbox"/> | Guardianship (Dependency or Other) | <input type="checkbox"/> | Foster Care Long Term Agreement |
| <input type="checkbox"/> | Independent Living | | |

The parent shall provide DSHS within 30 days of entry of this order with a list of relatives for the agency to consider for out-of-home placement under RCW 13.34.130(1)(b). The list shall include instructions for locating family members and their relationship to the child.

- 5.10 If parentage has not been established regarding the above-named child, the court authorizes the King County Prosecutor's Office to proceed in King County Superior Court on the issue of parentage, current and past child support and costs.

5.11 DSHS and child's CASA shall have access to all records pertaining to the above-named child, including but not limited to educational, health care and mental health records, and including any protected health information as defined under the Health Insurance Portability and Accountability Act of 1996 (HIPAA).

5.12 The agency report for the next review hearing shall be submitted to the court and parties at least 14 days prior to the hearing.

5.13 Other: _____

Dated: October 2, 2008

Douglas A. North
JUDGE/COMMISSIONER

Presented by:

mac
MARY ANN COMISKEY WSBA #15249
Attorney for DSHS

Copy Received; Approved for Entry; Notice of Presentation Waived:

REGINALD J. CAREY
Alleged Father

See attached
NIKOLE HECKLINGER WSBA #25293
Father's Lawyer

Bryan Rhie by HCN
BRYAN RHIE
Child's CASA

Heidi R. Hazel
WSBA # 24160
CASA's Lawyer

GLADIES AARON
DSHS Social Worker

mac
MARY ANN COMISKEY WSBA #15249
DSHS' Attorney

NOTICE

A PETITION FOR PERMANENT TERMINATION OF THE PARENT-CHILD RELATIONSHIP MAY BE FILED IF THE CHILD IS PLACED OUT-OF-HOME UNDER AN ORDER OF DEPENDENCY. (RCW 13.34.180.)

YOU REMAIN FINANCIALLY RESPONSIBLE FOR THE FOSTER CARE COSTS TO THE EXTENT YOU CAN AFFORD TO PAY.

**AGREED DEPENDENCY/DISPOSITIONAL STATEMENT
WAIVER OF RIGHT TO APPEAR IN COURT FOR PRESENTATION
AND ENTRY OF AGREED ORDER OF DEPENDENCY**

If the alleged father agrees to dependency and desires to waive presentation and not appear in court for entry of this order, the following certification shall also be signed.

The undersigned declares that:

I have read or been told the contents of this Agreed Order of Dependency and Disposition, and I agree that the order is accurate and should be signed by the court. I understand the terms of the order being entered, including my responsibility to participate in remedial services as provided in the dispositional order.

I understand that entry of this order starts a process that could result in the filing of a petition to terminate my relationship with my child if I fail to comply with the terms of this order and/or I fail to substantially remedy the problems that caused the child's out-of-home placement.

I understand also that entry of this order is an admission that the child is dependent within the meaning of RCW 13.34.030 and it shall have the same legal effect as a finding by the court that the child is dependent by at least a preponderance of the evidence. I understand that I will not have the right in any subsequent proceeding to challenge or dispute the fact that the child was found to be dependent.

I stipulate and agree to entry of this order, and do so knowingly and willingly without duress, misrepresentation or fraud by any other party.

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

Child's Alleged Father

Date/Place of Signature

5.11 DSHS and child's CASA shall have access to all records pertaining to the above-named child, including but not limited to educational, health care and mental health records, and including any protected health information as defined under the Health Insurance Portability and Accountability Act of 1996 (HIPAA).

5.12 The agency report for the next review hearing shall be submitted to the court and parties at least 14 days prior to the hearing.

5.13 Other: _____

Dated: _____

JUDGE/COMMISSIONER

Presented by:

MARY ANN COMISKEY WSBA #15249
Attorney for DSHS

Copy Received; Approved for Entry; Notice of
Presentation Waived:

As to form only:



REGINALD J. CAREY
Alleged Father

NIKOLE HECKLINGER WSBA #25293
Father's Lawyer

BRYAN RHIE
Child's CASA

WSBA #
CASA's Lawyer

GLADIES AARON
DSHS Social Worker

MARY ANN COMISKEY WSBA #15249
DSHS' Attorney

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YOU REMAIN FINANCIALLY RESPONSIBLE FOR THE FOSTER CARE COSTS TO THE EXTENT YOU CAN AFFORD TO PAY.

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

IN RE D.M.J.
MINOR CHILD

REGINALD CAREY,

APPELLANT FATHER.

RECEIVED
COURT OF APPEALS
DIVISION ONE

JUN 30 2009

NO. 62576-4-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 30TH DAY OF JUNE, 2009, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2009 JUN 30 11:51 AM

- | | |
|---|--|
| <p>[X] MICHAEL COLLINS, AAG
OFFICE OF THE ATTORNEY GENERAL
DSHS DIVISION
800 FIFTH AVENUE, SUITE 2000
SEATTLE, WA 98104</p> | <p>(X) U.S. MAIL
() HAND DELIVERY
() _____</p> |
| <p>[X] LORI LARCOM IRWIN
ATTORNEY FOR CASA/GAL
1401 EAST JEFFERSON ST., STE 500
SEATTLE, WA 98122</p> | <p>(X) U.S. MAIL
() HAND DELIVERY
() _____</p> |
| <p>[X] REGINALD CAREY
PO BOX 1025
MCCLEARY, WA 98557</p> | <p>(X) U.S. MAIL
() HAND DELIVERY
() _____</p> |

SIGNED IN SEATTLE, WASHINGTON THIS 30TH DAY OF JUNE, 2009.

X _____ 

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
☎(206) 587-2711