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NO. 63495-0-I

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

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IN RE M.S. (d.o.b. 10/29/05),  
A MINOR CHILD.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR SKAGIT COUNTY

The Honorable G. Brian Paxton, Commissioner

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APPELLANT'S OPENING BRIEF

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## **I. SUMMARY OF ARGUMENT**

Waiver of a constitutional right must be knowing, intelligent and voluntary. Appellant Carmen Sigurdson's relinquishment of her fundamental right to parent was not voluntary. She relinquished this right only because of the duress she experienced when her mother, the child's guardian, threatened her. Ms. Sigurdson moved to revoke her relinquishment under the statute permitting revocation of relinquishment due to duress and during the subsequent hearing she presented un rebutted evidence of duress. The trial court erred by applying the wrong legal standard and denied the motion.

## **II. ASSIGNMENT OF ERROR**

The trial court erred by denying Ms. Sigurdson's motion to revoke the relinquishment agreement.

## **III. ISSUE PERTAINING TO ASSIGNMENT OF ERROR**

RCW 26.33.160 allows the court to revoke a consent to adoption where the person, department or agency requesting the consent practiced fraud or duress as a relinquishment made under duress is not a voluntary relinquishment. Did the trial court err in denying Ms. Sigurdson's motion to revoke her relinquishment of parental rights when the consent to relinquish was obtained through duress and was therefore invalid?

#### **IV. STATEMENT OF THE CASE**

Carmen Sigurdson is the biological mother of daughter, M.S. CP 48.<sup>1</sup> On February 5, 2008, Ms. Sigurdson signed a Relinquishment of Custody, Consent to Termination/Adoption & Waiver of Right to Receive Notice of Proceedings (hereinafter “Relinquishment”) of her parental rights to M.S. CP 7-10, 48. At the same time she also signed an Agreement Regarding Contact and Communication (hereinafter “Open Adoption Agreement”) that set the terms for the open adoption of M.S. by Ms. Sigurdson’s mother, Bari Willard, and stepfather Andrew Willard. CP 1-6, 48. Both the relinquishment and open adoption agreement were signed in the presence of Ms. Willard. Supp. CP \_\_\_, Sub. No. 36 (social worker declaration).

At the time Ms. Sigurdson signed the relinquishment and open adoption agreement, she was in jail following an incident where she had attempted to recover a check in her mother’s possession made out to her. CP 12, 20, 49. Ms. Willard had

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<sup>1</sup> M.S. became a dependent child in July 2006 and went to live with her maternal grandmother, Bari Willard. CP 48; RP 9. The Department filed a petition to terminate Ms. Sigurdson’s parental rights in September 2007. CP 48. M.S. remained with her grandparents until December 2008 when the Department revoked their foster care license and moved M.S. out of their home due to concerns regarding Ms. Willard’s truthfulness and criminal activities. CP 49; RP 60.

reported this incident to the police, and as a result of the altercation, Ms. Sigurdson was charged with robbery and reckless endangerment. CP 12, 20.

Ms. Sigurdson later filed a timely motion to revoke the relinquishment. CP 11, 49. As grounds to revoke the relinquishment, Ms. Sigurdson asserted that she had signed the relinquishment only as a result of duress by her mother, Ms. Willard. CP 12-13; RP 11-12, 14-15.

An evidentiary hearing on the issue of whether Ms. Sigurdson's relinquishment was obtained by duress was held on April 8, 2008. CP 49. According to Ms. Sigurdson's unrebutted testimony, her mother came to the jail and informed Ms. Sigurdson that she would go to police with additional information that would lead to further criminal charges against Ms. Sigurdson, including identity theft and forgery, if she did not relinquish her parental rights to M.S.<sup>2</sup> CP 12, 19, 49. Ms. Sigurdson did not tell her attorney about her mother's threat. CP 13, 19.

When Ms. Willard threatened to go to the police if Ms. Sigurdson did not relinquish her parental rights, Ms. Sigurdson was

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<sup>2</sup> When Ms. Willard was called to testify during the hearing on the motion to revoke Ms. Sigurdson's relinquishment she invoked her Fifth Amendment right against self-incrimination. CP 49-50.

facing a four and a half year sentence if convicted of all charges. CP 12, 20. If Ms. Willard carried out her threat, Ms. Sigurdson would then be facing up to ten years in prison. CP 12, 16, 20. Ms. Sigurdson believed her mother would carry out the threat because it was her mother's report to the police that had resulted in the robbery charge. CP 19.

Ms. Sigurdson was seeking to enter drug court, and because she knew that the basis of her mother's threats was accurate, she feared that the additional charges would increase her offender score and restitution, and prevent her from qualifying for drug court. CP 16, 49. After the relinquishment, her attorney negotiated a reduction in the robbery charge, allowing Ms. Sigurdson to be considered for drug court.<sup>3</sup> CP 13, 20.

As the State conceded, the Department had an unusual relationship with Ms. Willard during the dependency.<sup>4</sup> RP 41-42. The Department usually does not include the child's placement and/or prospective adoptive parent to such an extent in the dependency process. Here, statements by the attorney for the

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<sup>3</sup> Ms. Sigurdson entered drug court on February 27, 2008, and has been successful in that program. CP 13, 19. If she successfully completes the program the criminal charges will be dismissed. CP 20.

<sup>4</sup> This brief will use the "Department" to refer to the Washington State Department of Social and Health Services (DSHS).

Department, Department correspondence and testimony from trial established that the Department worked through Ms. Willard to communicate with Ms. Sigurdson. Supp. CP \_\_, Sub. Nos. 36 (social worker declaration), 42 (email from Department attorney); RP 32, 41-42. Ms. Willard was copied on correspondence between the Department and Ms. Sigurdson. Supp. CP \_\_, Sub. No. 42 (email from Department attorney); RP 41-42. The following portion of an email from the attorney general to Ms. Sigurdson's attorney illustrates the Department's procedure of communicating with Ms. Sigurdson by way of Ms. Willard:

Attached please find the proposed Relinquishment and Open Adoption paperwork on the [M.S.] case. The above terms have been review [sic] and approved by DCFS and the potential adoptive parents (maternal grandparents). They are very eager to have this paperwork signed and completed, and were hopeful to have things done by Christmas, if possible. The mother is currently in jail, and I think it is their understanding that she is willing to relinquish.

Please review these terms with your client and let us know if she would accept and sign. . . .

(Emphasis added). Supp. CP \_\_, Sub. No. 42 (email from Department attorney).

Similarly, the social worker's declaration illustrates the dynamic between the Department, Ms. Willard (the "relative

caregiver”) and Ms. Sigurdson. Supp. CP \_\_\_, Sub. No. 36 (social worker declaration) (Nos. 3, 4, 5, 7, 8, 9). For example, the declaration states, “On January 17, 2008 the relative caregiver indicated that Ms. Sigurdson was able to get into treatment court and she was ready to relinquish her parental rights. (Emphasis added). *Id.* (No. 4).

This unusual relationship created an environment where Ms. Willard communicated information about M.S to Ms. Sigurdson and the Department. When a social worker went to the jail to inform Ms. Sigurdson of the Department’s plans to pursue termination and her option to relinquish, Ms. Sigurdson initially refused. Supp. CP \_\_\_, Sub. No. 36 (social worker declaration). However, after Ms. Willard later threatened to pursue additional criminal charges against Ms. Sigurdson if she did not relinquish, Ms. Sigurdson agreed. RP 11, 16.

Ms. Sigurdson’s unrebutted testimony established her legitimate fear that additional charges would prevent her qualifying for entry into drug court and would also result in a substantially longer sentence. RP 12. Ms. Sigurdson knew that if she capitulated to her mother’s threat she would likely still be able to see M.S. Supp. CP \_\_\_, Sub. No. 36 (social worker declaration)

(No. 8); RP 19-20. Because of the pressure being exerted against her, she agreed to relinquish and told the social worker she would only relinquish to Ms. Willard. Supp. CP \_\_\_, Sub. No. 36 (social worker declaration); RP 20.

After qualifying for drug court and within the statutory period, Ms. Sigurdson moved to revoke the relinquishment due to duress. CP 11, 49; RP 13. Following a hearing, a Commissioner denied Ms. Sigurdson's motion to revoke the relinquishment of her parental rights to M.S., finding that: (1) Bari Willard was not a party to the relinquishment agreement; and (2) Bari Willard was not acting as an agent of the State. CP 48-53 ("Court's Decision by Letter"). Ms. Sigurdson seeks review of those findings.

## **V. ARGUMENT**

### **THE TRIAL COURT ERRED IN DENYING THE MOTHER'S MOTION TO REVOKE HER RELINQUISHMENT OF PARENTAL RIGHTS.**

Parental termination proceedings are accorded strict due process protections. *In re Darrow*, 32 Wn. App. 803, 806, 649 P.2d 858 (1982) (citing *Stanley v. Illinois*, 405 U.S. 645, 31 L. Ed. 2d 551, 92 S. Ct. 1208 (1972)); *see also Santosky v. Kramer*, 455 U.S. 745, 747-48, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982). Because of the fundamental interest at stake, the process that is due in

termination cases in Washington includes the full panoply of rights guaranteed under the Washington Constitution, Article I, Section 3 and Fourteenth Amendment to the United States Constitution.<sup>5</sup> See *In re Moseley*, 34 Wn. App. 179, 184, 660 P.2d 315 (1983).

Under the Fourteenth Amendment to the United States Constitution, waiver or relinquishment of a fundamental constitutional right must be knowing, voluntary and intelligent. See *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). Relinquishment of the right to parent therefore requires a knowing, voluntary and intelligent waiver. These due process requirements must guide the application of the statute, RCW 26.33.160, that governs the outcome of this case.

Under RCW 26.33.160 sections (3) and (4)(g), a consent to relinquish parental rights may be revoked for fraud or duress practiced by the person, department, or agency requesting the consent.<sup>6</sup> Duress under this statute must be proven by clear,

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<sup>5</sup> "No person shall be deprived of life, liberty, or property, without due process of law." Wash. Const. art. I, § 3.

"Nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

<sup>6</sup> RCW 26.33.160 sets forth the procedure for when consent for adoption may be revoked. RCW 26.33.160(3) provides as follows: "Within one year after approval, a consent may be revoked for fraud or duress practiced by the person, department or agency requesting the consent, or for lack of mental competency..." (Emphasis added). Similarly, RCW 26.33.160(4)(g) provides "...

cogent and convincing evidence. *In re J.N.*, 123 Wn. App. 564, 573, 95 P.3d 414 (2004).

Here, the trial court denied Ms. Sigurdson's motion to revoke her relinquishment of parental rights under RCW 26.33.160, finding that because the person who had inflicted the duress was not a party to the relinquishment agreement made with the State, the duress did not vitiate the agreement. CP 50-52. In this case, the trial court incorrectly interpreted and applied RCW 26.33.160. The trial court reasoned that because Ms. Sigurdson relinquished her parental rights to the State, the State was the "department or agency requesting the consent." Thus, the trial court erroneously concluded Ms. Willard's wrongful acts could not constitute duress put upon Ms. Sigurdson because the State was requesting the consent.

However, the statutory language in question is not limited to duress by a department or agency. The plain language of the statute recognizes that a "person" requesting consent may also engage in duress. Furthermore, the case law relied upon by the trial court actually supports an interpretation that other persons

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after it has been approved by the court, the consent is not revocable except for fraud or duress practiced by the person, department, or agency requesting the consent or for lack of mental competency. . ." (Emphasis added). RCW 26.33.160(3), (4)(g).

involved in the case could practice duress that would invalidate a relinquishment. Moreover, the trial court also erred by applying a purely contract law analysis to this case when the fundamental constitutional rights at issue require a due process analysis.

This Court should therefore reverse the trial court's order denying Ms. Sigurdson's motion to revoke her relinquishment of parental rights.

1. The plain language of the statute demonstrates that the trial court erred in applying RCW 26.33.160. The interpretation of a statute is a question of law, and will be considered *de novo* by an appellate court. *State Dept. of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). Review begins with the plain meaning of words used in a statute. *Lacey Nursing Ctr., Inc. v. Dept. of Revenue*, 128 Wn.2d 40, 53, 905 P.2d 338 (1995). As a general principle of statutory construction, words in a statute are given their plain and ordinary meaning unless a contrary intent is evidenced in the statute. *Dept. of Ecology*, 146 Wn.2d at 9-10. If, after inquiring into the plain meaning of the statute, the statute remains susceptible to more than one reasonable meaning, the statute is ambiguous and it is appropriate to resort to aids of construction, including legislative history. *Id.* at 10-12. Where a

statutory term is undefined, it should be given its usual and ordinary meaning. *Burton v. Lehman*, 153 Wn.2d 416, 422-23, 103 P.3d 1230 (2005).

If the statute is unambiguous, its meaning will not be construed and must be derived solely from the language of the statute. *Matter of Eaton*, 110 Wn.2d 892, 898, 757 P.2d 961 (1988). While examining the plain language of the statute, the court should bear in mind that the principal aim of statutory construction is to give effect to the legislature's intent. *Campbell v. Dept. of Social and Health Services*, 150 Wn.2d 881, 894, 83 P.3d 999 (2004). "[I]f the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent." *Dept. of Ecology*, at 9-10.

Further, a statute is not ambiguous merely because different statutory interpretations are conceivable. *Densley v. Department of Retirement Systems*, 162 Wn.2d 210, 221, 173 P.3d 885 (2007). Constructions that would result in unlikely or absurd results should be avoided. *Id.*

RCW 26.33.160 is not ambiguous. As discussed above, the relevant portions of RCW 26.33.160 provide that consent may be revoked for fraud or duress practiced by the person, department or

agency requesting the consent. RCW 26.33.160(3), (4)(g). Here, the plain meaning of the statute is apparent from the language in RCW 26.33.160. The language clearly shows that it is not only the Department or another agency that can request the parent consent, but also a “person.” Thus, the appropriate inquiry under the statute is: who requested that the parent consent to relinquish her parental rights?

Here, the record shows that Ms. Willard was the person who requested Ms. Sigurdson’s consent. The Department had filed a petition to terminate Ms. Sigurdson’s parental rights to M.S. CP 48. Ms. Sigurdson was upset at the prospect of losing her parental rights and told her social worker during their visit in jail that she would not relinquish. Supp. CP \_\_\_, Sub. No. 36 (social worker declaration). It was not until Ms. Sigurdson spoke with her mother that she changed her mind regarding relinquishing her parental rights. CP 12-13; RP 11-12, 14-15.

Consequently, it was only after Ms. Willard threatened to file additional charges against Ms. Sigurdson unless she relinquished her parental rights that Ms. Sigurdson agreed to relinquish. *Id.* Ms. Willard was the one to inform the Department that Ms. Sigurdson was ready to relinquish. Supp. CP \_\_\_, Sub. Nos. 36, 42. After Ms.

Willard informed the Department of Ms. Sigurdson's new willingness to relinquish, the Department responded in an email to Ms. Sigurdson's attorney, with a copy to Ms. Willard, that it would set a court date for the relinquishment and open adoption agreement to be entered. Supp. CP \_\_\_, Sub. No. 42 (email from Department attorney). Thus, the undisputed evidence established that Ms. Sigurdson relinquished to the Department at the request of her mother, Ms. Willard.

Under the plain language of the statute, the focus is properly on the acts of the person who is requesting that the parent consent to relinquish. In *J.N.*, the court reasoned that the social worker, the potential adoptive parents, or the biological mother's foster mother could have perpetrated fraud or duress upon the mother. *In re J.N.*, 123 Wn. App. 564. In that case, the court examined whether the conduct of any of the parties who had requested that the mother relinquish, or had made statements to the mother suggesting they requested the relinquishment, constituted fraud or duress under RCW 26.33.160. Thus, the court here misapplied *J.N.*, which actually supports an interpretation of the statute that considers the conduct of all persons who requested the parent's consent to relinquish.

In addition, it is clear that the mother in *J.N.*, like Ms. Sigurdson, also relinquished to the Department. Both the mother in *J.N.* and her child were dependent, and the Department is entrusted with caring for dependent children. Moreover, the mother in *J.N.* contested her relinquishment on grounds that the Department failed to provide her a copy of the Consent to Termination/Adoption and Waiver of Right to Receive Notice of Pleadings (relinquishment documents). Accordingly, even though the mother in *J.N.* relinquished her parental rights to the Department, the appellate court nevertheless reviewed the conduct of persons who sought the mother's consent for relinquishment. The court examined whether the conduct of persons requesting consent amounted to a fraud or exertion of duress upon the mother, and found that none of the persons requesting consent had engaged in conduct amounting to fraud or duress.

Thus, the trial court erred by misapplying RCW 26.33.160. Under the statute's plain language, if a person requesting consent practiced fraud or duress against the parent, the parent may revoke the consent. RCW 26.33.160(3), (4)(g).

2. The trial court erred by narrowly construing “requesting the consent” to mean “requesting the consent through a relinquishment agreement.” The trial court ruled that, because the form Ms. Sigurdson signed in which she relinquished her parental rights to M.S. was a DSHS form stating that the relinquishment was to the Department, the Department was therefore the only party that had requested Ms. Sigurdson’s consent.

However, as discussed above, the statute is not and cannot be, so narrowly drawn. In order for the trial court’s interpretation of the statute and subsequent denial of the motion to revoke to be valid, the statute would have had to read “the person, department or agency requesting the consent through a relinquishment agreement” or “the person, department or agency with whom the parent enters into the relinquishment agreement” – instead of “the person, department or agency requesting the consent.” RCW 26.33.160(3), (4)(g).

The trial court’s alternative reading of the statute is unreasonable because it substitutes narrower language for the statute’s plain language. The trial court misapplied the statute because it over narrowly interpreted what “requesting the consent” means. *J.N.* holds that a court must consider the conduct of all

parties who “requested” the parent’s consent to relinquish, and not just parties who entered into a relinquishment agreement with the parent. Thus, *J.N.* supports Ms. Sigurdson’s argument.

3. The trial court’s narrow interpretation and application of RCW 26.33.160 fails under the doctrine of “constitutional doubt.” Because the fundamental constitutional right to parent one’s child is at issue in a relinquishment of parental rights, the trial court’s narrow interpretation of the statute is especially improper. “A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score.” *Almendarez-Torres v. United States*, 523 U.S. 224, 237, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998) (quoting J. Holmes, *United States v. Jin Fuey Moy*, 241 U.S. 394, 401, 36 S.Ct. 658, 60 L.Ed. 1061 (1916)). This doctrine of “constitutional doubt” stands for the principle that the legislature legislates in light of constitutional limitations. *Almendarez-Torres*, at 238.

For the doctrine of “constitutional doubt” to apply, this Court must first interpret the statutory language under its *de novo* review. If this Court finds that the trial court’s narrow statutory interpretation is a legitimate statutory interpretation, then it must decide if the broader interpretation, the one that avoids the constitutional

question, is a fair interpretation of the statute. *Almendarez-Torres*, at 238. The doctrine of “constitutional doubt” should be invoked here because, under the trial court’s narrow “alternative” reading of the statute, there is a serious likelihood that the statute would be held unconstitutional.

The trial court’s narrow interpretation of RCW 26.33.160 falls squarely within the doctrine of constitutional doubt. The effect of the trial court’s interpretation is that, in cases where custody of a dependent child is being relinquished to the Department, any other person not affiliated with the Department could fraudulently deceive or put duress upon the parent in order to obtain their consent to relinquish their parental rights with impunity. In practical effect, under such a reading, even if the relinquishing parent’s own attorney or spouse deceived or forced them into consent, there would be no statutory remedy for the parent to obtain relief. This outcome violates procedural due process under the Fourteenth Amendment because waivers of one’s constitutional rights must be made knowingly, voluntarily and intelligently. Therefore, under the doctrine of constitutional doubt, the trial court’s narrow statutory interpretation fails in favor of the constitutionally effective broader statutory interpretation.

4. The trial court erred by applying contract law analysis in this case. RCW 26.33.160 sets forth the procedure for when consent to adoption may be revoked. As discussed above, the statute provides that consent may be revoked for fraud or duress practiced by the person, department or agency requesting the consent. RCW 26.33.160(3), (4)(g). The application of the statute is determinative of the result in this case. However, while the trial court recognized the applicability of RCW 26.33.160, it also found that a contract law analysis controlled in this case.

The trial court found that the *J.N.* court applied a contract law analysis to the motion to revoke the relinquishment of parental rights under RCW 26.33.160. CP 50. The trial court's decision states that in its analysis of duress, "In re J.N adopted the definitions and provisions of the Restatement of Contracts." CP 50-51. The trial court goes on to quote from Section 175 of the Restatement (Second) of Contracts ("When Duress By Threat Makes A Contract Voidable") and then proceeds to analyze Ms. Sigurdson's case based solely on the principles of the Restatement (Second) of Contracts. CP 51-52.

Contrary to the trial court's conclusion that *J.N.* compelled a contract law analysis, the court in *J.N.* did not apply a contract law

analysis to the motion to revoke relinquishment in that case. *J.N.*, 123 Wn. App. 564. In *J.N.* the mother, seeking to overturn her prior relinquishment, presented several arguments, including the argument that her consent to relinquish was improperly obtained by fraud or duress on the part of her social worker, her foster mother, and the child's adoptive mother. 123 Wn. App. at 574-77.

The *J.N.* court examined the mother's claims in light of the applicable standards for fraud and duress and found that the conduct of the aforementioned parties did not constitute fraud or duress. *Id.* In its analysis of the mother's claims, the court did not use a contract law analysis. In fact, the only support in *J.N.* for the trial court's ruling that application of contract law analysis is appropriate is the following:

Duress has not yet been applied in a Washington adoption case. Generally, a showing of duress requires proof of a wrongful act that either compels or induces a person to enter a transaction involuntarily. *Pleuss v. City of Seattle*, 8 Wash.App. 133, 137, 504 P.2d 1191 (1972) (quoting RESTATEMENT (FIRST) OF CONTRACTS § 497 (1932)). See also 2 AM.JUR.2D Adoption § 101 (2004).

*J.N.*, 123 Wn. App. at 577. Thus, the only portion of the Restatement the court in *J.N.* cited was for the definition of duress.

Consequently, because the trial court erred in analyzing *J.N.*, its decision should be reversed. The issue of when consent to relinquish is revocable is governed by an unambiguous statute. Moreover, because of the fundamental constitutional rights at issue in a relinquishment of parental rights, any doubt regarding application of the statute should be construed to provide full procedural due process protections. The trial court's narrow reading of the statute coupled with its application of contract law resulted in approval of a constitutionally defective consent to relinquish. Ms. Sigurdson's due process right to have her consent be voluntarily obtained has been violated.

5. Ms. Willard acted as an agent of the Department. Even if this Court accepts the trial court's narrow interpretation of RCW 26.33.160, under which the Department was deemed the only party requesting consent, Ms. Sigurdson's revocation was valid because Ms. Willard acted as the Department's agent when she practiced duress.

Under the doctrine of "apparent agency," a principal may be held liable for the acts of its agent where a principal makes objective manifestations leading a third person to believe the wrongdoer is an agent of the principal. *D.L.S. v. Maybin*, 130 Wn.

App. 94, 98-99, 121 P.3d 1210 (2005) (quoting Restatement (Second) of Agency § 267 (1957)). Consequently, a principal may be vicariously liable for the unauthorized conduct of an agent who is acting on the principal's behalf. *McGrane v. Cline*, 92 Wn. App. 925, 929, 973 P.2d 1092 (1999).

A person asserting the doctrine of apparent agency must have a subjective belief that the agent is acting for the principal. *D.L.S.*, 130 Wn. App. at 99. Apparent authority can only be inferred from acts of the principal, which cause a third party to actually, or subjectively believe that the agent has authority to act for the principal. *D.L.S.*, 130 Wn. App. at 99. The third party's belief must also be objectively reasonable in order to support justifiable reliance by the third party upon the representations made by the principal. *D.L.S.*, 130 Wn. App. at 99.

In addition, a principal may later ratify an act done by a third party having no authority to act as an agent. "Ratification is the affirmance by a person 'of a prior act which did not bind him but was done or professedly done on his account.'" *Smith v. Dalton*, 58 Wash. App. 876, 881, 795 P.2d 706 (1990) (citing *Nichols Hills Bank v. McCool*, 104 Wn.2d 78, 83, 701 P.2d 1114 (1985)). Likewise, ratification means that one affirms that which he had a

right to repudiate. *Poweroil Mfg. Co. v. Carstensen*, 69 Wn.2d 673, 678, 419 P.2d 793 (1966).

Here, Ms. Willard had a special relationship with the Department, clearly shown by (1) the fact that communication routinely went through Ms. Willard, and (2) the fact that Ms. Willard obtained her daughter's consent to relinquish and immediately informed the Department that it was time to act on that consent. Furthermore, the Department conceded that its communication and involvement with and through Ms. Willard was unusual. RP 41-42. The Department usually does not include the child's placement and/or prospective adoptive parent to such an extent in the dependency process. Here, the record established that the Department worked through Ms. Willard to communicate with Ms. Sigurdson and that Ms. Willard was privy to all correspondence. Supp. CP \_\_, Sub. Nos. 36, 42; RP 32, 41-42. Department emails demonstrate its procedure of communicating with Ms. Sigurdson by way of Ms. Willard. Supp. CP \_\_, Sub. No. 42 (email from Department attorney). In the same way, the social worker's declaration revealed how Department communication with Ms. Sigurdson went through Ms. Willard. Supp. CP \_\_, Sub. No. 36 (social worker declaration).

Because the Department chose to communicate with Ms. Sigurdson mainly through Ms. Willard, the Department made an objective manifestation to Ms. Sigurdson that led her to believe that Ms. Willard, in acting to obtain her consent, was an agent of the principal. The Department's own actions in allowing Ms. Willard to take such a dominant role caused Ms. Sigurdson to believe that her mother had authority to act for the Department. In light of these circumstances, Ms. Sigurdson's belief and subsequent reliance that her mother sought her consent on behalf of the Department was objectively reasonable.

Finally, even if Ms. Willard had no apparent authority to act as an agent, the Department ratified her actions because it affirmed Ms. Willard's actions that were done on its behalf. As soon as the Department received news from Ms. Willard that Ms. Sigurdson was ready to relinquish, the Department could have instructed the parties that Ms. Willard was not authorized to seek relinquishment and followed up on its own with Ms. Sigurdson, but instead it emailed Ms. Sigurdson's attorney that, assuming Ms. Willard was correct it wanted to set a court date for relinquishment. Supp. CP \_\_\_, Sub. No. 42 (email from Department attorney).

Thus, because Ms. Willard acted as the Department's agent, her practice of duress provided grounds for revocation of Ms. Sigurdson's consent.

6. Reversal of the relinquishment order is required. The trial court erred in interpreting the statute. A decision based on an erroneous view of the law is an abuse of discretion. *State v. Kinneman*, 155 Wn.2d 272, 289, 119 P.3d 350 (2005). Ms. Sigurdson presented evidence of duress sufficient to carry her burden.

Ms. Sigurdson's testimony established that Ms. Willard's threat of criminal prosecution was an improper threat constituting duress. Under *J.N.*, to determine whether Ms. Willard's actions constituted duress, application of the definition of duress from the Restatement of Contracts is proper. *J.N.*, 123 Wash.App. at 577. The Restatement (Second) of Contracts § 175 discusses when duress by threat makes a contract voidable, it provides:

- (1) If a party's manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim.

(Emphasis added). Restatement (Second) of Contracts § 175.

Thus, for a duress defense to succeed, the manifestation of assent must be induced by an improper threat. The Restatement (Second) § 176 discusses when a threat is improper. The Restatement (Second) § 176 provides:

- (1) A threat is improper if
  - (a) what is threatened is a crime or a tort, or the threat itself would be a crime or a tort if it resulted in obtaining property,
  - (b) what is threatened is a criminal prosecution . . .
- (2) A threat is improper if the resulting exchange is not on fair terms, and
  - (a) the threatened act would harm the recipient and would not significantly benefit the party making the threat, or . . .
  - (c) what is threatened is otherwise a use of power for illegitimate ends.

In addition to the Restatement (Second) of Contracts, Farnsworth on Contracts also provides that the threat of a criminal prosecution is an improper threat:

A threat to instigate criminal prosecution has generally been regarded as an improper means of inducing the victim of the threat to make a contract. The question ordinarily arises in the context of a threat to instigate prosecution for embezzlement unless the victim of the threat repays or promises to repay the sum allegedly embezzled. The victim of the threat may not be the alleged embezzler but his relative or friend. The impropriety lies in the use for 'private benefit ... of the criminal process of the court provided for the prosecution of the crime and the protection of the public.' On this ground, the threat is improper even if the person who makes it honestly

believes that the one whose prosecution is threatened is guilty and even if in fact that person is guilty.

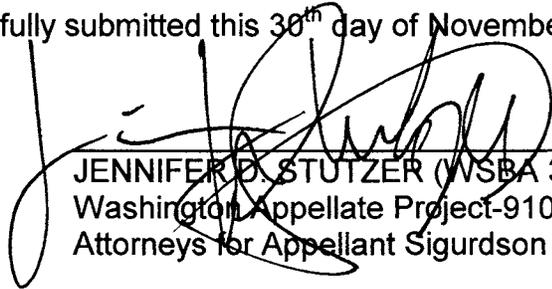
E.A. Farnsworth, *Contracts*, § 260 (1982). Therefore, such a threat is improper even where, as in this case, the person who makes the threat honestly believes that the one threatened is guilty, and even if in fact Ms. Sigurdson was guilty of the alleged crimes. Here, Ms. Sigurdson admitted that the basis for the charges her mother threatened against her were true and could have resulted in additional convictions. CP 49; RP 27. Ms. Sigurdson was seeking to enter drug court and had a legitimate fear that the additional charges would not only prevent her from entering drug court, but would result in a significant increase in sentence.

Thus, Ms. Sigurdson made a prima facie showing of duress through her unrebutted testimony at trial. Ms. Sigurdson's testimony showed not only that Ms. Willard's threat of criminal prosecutions was an improper threat but also that she only relinquished because of Ms. Willard's improper threat. Thus, because the trial court misapplied the law in this case, and because Ms. Sigurdson presented a prima facie case of duress that would invalidate the relinquishment agreement reversal of the relinquishment order is required.

## VI. CONCLUSION

For the reasons stated herein, Ms. Sigurdson respectfully requests that this Court reverse order of relinquishment.

Respectfully submitted this 30<sup>th</sup> day of November, 2009.



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