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I. COUNTER STATEMENT OF THE CASE

The basic facts of this case are not in dispute. Appellants J. M. and C. B. (also referred to as custodians) correctly lay out the procedural history of the case below. However, while Respondent Department of Social and Health Services (DSHS or department) does not dispute the factual summary provided by appellants in their brief, it does not necessarily agree with the emphasis given certain facts by them. The following additional facts are essential for an accurate understanding of the case:

D.M. was born on May 15, 1996 and S.R. was born on March 22, 1998. Their mother has a long history of drug addiction and prostitution. The identity of their biological fathers has never been determined. Their mother has previously had her parental rights to two older children terminated in the State of Oregon. CP 1-6, RP 192.

Appellant J. M. is the mother's sister and the aunt of D.M. and S.R. Appellant C. B. is J. M.'s long time partner. They have never been married and he is not related to the children. CP 1-6.

J. M. raised two children of her own with the assistance of C. B. From 1990 to the commencement of the dependency proceeding for D.M. and S.R., their family had extensive contact with DSHS. There were a number of referrals alleging physical abuse and neglect made to Child

Protection Services. In addition, the family sought Family Reconciliation Services from DSHS due to their inability to care for their own children. CP 1-6. During this period, the appellants received a number of services from DSHS and community agencies, including long term counseling, parenting classes and skill building, and in-home alternative response services. RP 135. On a number of occasions, they failed to follow through or did not cooperate with services. CP 3.

In early 1999, the mother left her children with a paramour in Portland, Oregon, and failed to return. The paramour, who was also a drug user, apparently contacted the appellants who went to Portland and picked up the children. CP 2. While the children were not placed in DSHS custody at that time, they did have contact with a CPS social worker in Vancouver, Washington, who had been involved with the mother's older children. He told them they could petition the court for nonparental custody and gave them a letter of support, but did not contact the Aberdeen DSHS office or request that it conduct a home study of the appellants. RP 149-150, 192.

The appellants filed a petition for nonparental custody pursuant to chapter 26.10 RCW in Grays Harbor Superior Court on April 26, 1999. A custody decree was entered in that court on July 12, 1999 granting custody of D.M. and S.R. to the appellants. CP 65-68. It appears that the mother

did not appear in the proceeding and that the custody decree was obtained by default. RP 235.

After J. M. and C. B. became the custodians of the children, CPS in Grays Harbor County began receiving referrals alleging physical and emotional abuse of the children. Between April 1999 and March 2003, fifteen separate referrals were received, although most of them were unfounded or inconclusive. CP 3, RP 132-135.

On March 24, 2003, following a referral from D.M.'s school, the department filed dependency petitions as to both children in Grays Harbor County Juvenile Court. CP 1-6. Both custodians were full parties to the proceeding and were appointed an attorney by the court. RP 1, 42, 238.

On April 29, 2003, both custodians and their attorney signed agreed orders of dependency as to the children. The findings of the order specifically provide that all of the allegations of the dependency petitions are incorporated as established facts and that the custodians agreed that the children had been abused and neglected pursuant to RCW 13.34.030(5)(b) and had no parent or custodian capable of adequately caring for them, such that the children were in circumstances constituting a danger of substantial damage to their psychological or physical development pursuant to RCW 13.34.030(c). CP 7-13. At the same time, they agreed to a disposition order pursuant to RCW 13.34.130 that required them to

participate in services including a psychological evaluation, anger management assessments and parenting classes. CP 14-20.

In May 2004, the department moved in juvenile court to intervene in the custodian's nonparental custody proceeding and to consolidate with the dependencies of D.M. and S.R. An order was entered to this effect on May 10, 2004. CP 63-64.

On October 7, 2004, the department moved to set aside the nonparental custody decree of the appellants. CP 61-62. An evidentiary hearing was held in response to the department's motion on December 7, 2004. At the conclusion of the hearing, the court continued it for additional evaluation of the custodians. The hearing resumed on June 21, 2005, after which the court granted the department's motion and vacated the custodian's custody decree. CP 69-73. Additional facts relating to evidence introduced at the two hearings are set forth in the argument section below.

II. ARGUMENT

A. THE TRIAL COURT DID NOT COMMIT ERROR BY DISMISSING APPELLANTS FROM THE DEPENDENCY PRIOR TO THE FILING OF A TERMINATION PETITION.

Appellants argue that because they were the legal custodians of the children at the time the dependency proceeding was commenced, they were entitled to participate in any subsequent termination proceeding and

that the court erred in vacating their nonparental custody order in the course of the dependency proceeding. Implicit in this is the claim that juvenile court can not dismiss a non-parent from a dependency proceeding if it is known or anticipated that a petition to terminate the parent-child relationship will be filed against the parents of the child in question. They base their argument on one case on the right of custodians to be heard in dependency proceedings, In re the Dependency of J.W.H., 147 Wn.2d 687, 57 P.3d 266 (2002), and a strained reading of the notice provisions of the dependency and termination statute.

As a threshold issue, there is nothing in the record to indicate that the custodians raised this issue below. It is well established that issues not raised to a trial court should not be considered on appeal. Marriage of Rideout, 110 Wn App. 370, 382, 40 P.3d 1192 (2002). This includes issues relating to such fundamental interests as parenting. State v. Pesta, 87 Wn. App. 515, 525, 942 P.2d 1013 (1997), review denied 135 Wn.2d 1002 (1998). RAP 2.5(a) provides that the appellate court may refuse to review any claim of error not raised in the trial court, absent some exceptional factors not present here. This is particularly compelling in juvenile court cases where the rights of a child to safety and permanency are at issue. Parents or custodians may not fail to raise an issue in a timely manner to the trial court and then expect relief on appeal. In such cases, "parties, attorneys and the court have an obligation to expedite resolution of the issues to limit the period during which children face an uncertain

future." In re Dependency of O.J., 88 Wn. App. 690, 696, 947 P.2d 252 (1997) review denied 135 Wn.2d 1002 (1998).

If this court considers appellants' argument, they are technically correct in that if they had still been parties to the dependency at the time a termination petition was filed, they would have been entitled to notice and the opportunity to participate in the termination proceeding. However, the implication in their argument that they were entitled to participate in a termination proceeding as the sole means of resolving their status and standing vis-à-vis D.M. and S.R. is not supported by authority and lacks merit. Appellants ignore a clear statutory scheme that distinguishes between legal custodians and guardians and parents in termination proceedings in juvenile court.

First, appellants misconstrue the holding of J.W.H., supra. That case is limited to the right of custodians in dependency proceedings and does not address termination proceedings at all. The court held that the custodians "shall be full participants and shall have the right to present evidence for determination of both the custody and dependency matters." J.W.H., at 702. The appellants in the present case had all of those rights in the dependency proceeding below. They were served with a dependency petition that identified the allegations against them. CP 1-6. An attorney was assigned to represent them in the proceeding. RP 1, 42, 238; CP 7-27. The custodians had the opportunity to contest the allegations in the dependency petition, but chose instead to stipulate to an agreed order of

dependency.¹ CP 7-27. The custodians received notice of both the department's motions to intervene in and consolidate their nonparental custody action with the dependency proceeding and for the juvenile court to vacate their nonparental custody order. CP 56-57; CP 61-68. They were provided with a full evidentiary hearing on the motion to vacate their nonparental custody order. RP 86-216, 221-236. The exact rights that the Supreme Court found lacking in J.W.H. were provided to the custodians in the present case.

All of this is consistent with the requirements of Chapter 13.34 RCW, which treats legal custodians and legal guardians the same as parents for purposes of the establishment of dependency and disposition. The term "parent, guardian, or custodian" is used throughout the first part of the chapter in sections that define or specify, among other things, the basis of dependency (RCW 13.34.030(1), (5)(c)), the right to a shelter hear hearing (RCW 13.34.060(1)(b)), notice of a shelter care hearing (RCW 13.34.060(2), RCW 13.34.062), the summons for a dependency fact finding hearing (RCW 13.34.070), the rights of parties in proceedings (RCW 13.34.090), and disposition and permanency planning (RCW 13.34.130(2), 13.34.136(1)(a), 13.34.138(1)(a), RCW 13.34.145(1)(a)).

However, those sections of Chapter 13.34 RCW that address termination of the parent child relationship only use the term "parent" in

¹ Courts have noted that where dependency is established by agreed order, this can be construed to exceed the preponderance of the evidence standard. Krause v. Catholic Community Services, 47 Wn. App. 734, n.2, 737 P.2d 280, review denied, 108 Wn.2d 1035 (1987).

relation to their substantive requirements. RCW 13.34.180 - .210. “Parent” is defined for purposes of dependency and termination proceedings as “the biological or adoptive” parent of the child, a use that clearly excludes nonparental custodians or guardians, whatever the nature of the order creating their legal status. RCW 13.04.011(5). It is clear that the specific statutory elements of a termination proceeding apply only to parents, and not to other caretakers. Additional words or clauses should not be added to a statute when the legislature has chosen not to include such language. State v. Delgado, 148 Wn.2d 723, 727, 63 P.3d 792 (2003).

Appellants’ correctly point out that RCW 13.34.180 and 13.34.190 refer back to RCW 13.34.070 and 13.34.110 and incorporate some of the language from 13.34.090 in the notice and procedural provisions of the termination statutes. However, their argument fails to address what exact role they as legal custodians would have played in proceedings that apply only to biological or adoptive parents had they remained in the case. They appear to simply claim that because they were parties to the underlying dependency proceeding, it was improper for the court to set aside their nonparental custody decree under any circumstances. This argument ignores the fact that their status as parties in the dependency proceeding was only because they were the legal custodians or guardians of the children. Even if they had participated in a termination proceeding as to the children’s biological parents, it would not have resolved any issues as to them. The court at some point would still have had to either return the

children to their care or modify or set aside the order giving them custody of the children. A termination proceeding is not a remedy, exclusive or otherwise, for nonparents in dependency proceedings.

As is the case with any legal guardian or custodian, their status can be modified or terminated at any time pursuant to RCW 11.88.120 (guardianship), RCW 13.34.233 (dependency guardianship), or RCW 26.10.190 and RCW 26.09.260 (nonparental custody). Assuming juvenile court has jurisdiction (as was the situation below), any of these statutes could be invoked and applied at any point in the dependency proceeding – prior to, in conjunction with, or subsequent to a termination proceeding as to the parents. While appellants would have received notice of a termination proceeding as to the parents had they still been parties at the time one was filed, once their nonparental custody decree was set aside, they had no further standing in the dependency proceeding and were properly dismissed as parties.

B. THE CUSTODIANS WERE NOT THE DE FACTO PARENTS OF THE CHILDREN D.M. AND S.R.

In addition to claiming a general right to participate in a termination proceeding as parties to the underlying dependency, appellants also claim that they are the de facto parents of D.M. and S.R. Further, they claim that as de facto parents, they would have the same rights in the dependency as biological parents and should have been the subjects of a termination proceeding pursuant to RCW 13.34.180 and RCW 13.34.190

instead of a motion and hearing to set aside their nonparental custody decree.

They base their argument entirely on the recent Washington Supreme Court decision in In re the Parentage of L.B. and the four criteria set forth therein:

(1) the natural or legal parent consented to and fostered the parent-like relationship, (2) the petitioner and the child lived together in the same household, (3) the petitioner assumed obligations of parenthood without expectation of financial compensation, and (4) the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship, parental in nature.

In re the Parentage of L.B., 155 Wn.2d 679, 708-709, 122 P.3d 161 (2005). However, a careful reading of L.B. shows that their claims are without merit.

The present case is distinguished from L.B. in three key aspects. First, the holding in L.B. should be limited only to situations where there is not an existing statutory scheme or remedy. The court in L.B. determined that it had the authority to establish that there was a common law basis for de facto parentage in cases that “may otherwise lack statutory recognition.” L.B., at 693. This is largely due to societal changes reflected in the composition of families and the concept of parentage:

Yet, inevitably, in the field of familial relations, factual scenarios arise, which even after a strict statutory analysis remain unresolved, leaving deserving parties without any appropriate remedy, often where demonstrated public policy is in favor of redress.

L.B., at 687. In L.B. it was same sex relationships where two partners committed to raise a child or children together and later had a falling out, similar to that of a separating heterosexual couple where paternity was not an issue, but without any recognition in existing statutes. All of the cases reviewed by the court from other jurisdictions appear to have involved such same sex relationships. L.B., at 702-706. In contrast, appellants below became the legal custodians of D.M. and S.R. pursuant to Chapter 26.10 RCW, a well established statutory scheme that both defines - in statute and case law – the standards for entry of a nonparental custody decree as well as those to modify or set aside such a decree. In its most recent decision on nonparental custody, the Washington Supreme Court cautioned that L.B. and other decisions should not be construed to mean that “this court has recognized ‘de facto family’ as a legal status.” In re the Custody of C.W.S., __ Wn.2d __, __ P.3d __ (Slip opinion 75263-0, June 8, 2006).

The court in L.B. concludes part of its analysis by holding that:

Our state's current statutory scheme reflects the unsurprising fact that statutes often fail to contemplate all potential scenarios which may arise in the ever changing and evolving notion of familial

relations... While the legislature may eventually choose to enact differing standards than those recognized here today, and to do so would be within its province, until that time, it is the duty of this court to "endeavor to administer justice according to the promptings of reason and common sense." (Citation omitted).

L.B., at 706- 707. It is clear that when the legislature has enacted specific standards, they should be applied before the courts look to common law remedies. In the present case, specific statutes exist that directly apply to the appellants. Standing in nonparental custody actions is conferred by statute and courts should give effect to clear statutory intent and purpose. C.W.S., at ___. In addition to the overall application of the nonparental custody statute, chapter 26.10 RCW, chapter 13.34 RCW also clearly addresses the standing of nonparental custodians in dependency proceedings, including the standards by which nonparental custody decrees may be modified or set aside. RCW 13.34.155(2). Appellants' contention that they are entitled to different treatment as de facto parents is at odds with the decision of the Supreme Court in L.B.

The present case is also distinguished from L.B. in the nature of the relationships considered by the courts in finding a de facto relationship. In addition to cases from other jurisdictions regarding same sex relationships, the court relied on two Washington Court of Appeals cases: In re Marriage of Allen, 28 Wn. App. 637, 626 P.2d 16 (1981) and

In re Custody of Stell, 56 Wn. App. 356, 783 P.2d 615 (1989). L.B. at 707.

In both of these cases, the recognition of an implicit de facto parent relationship was based in part on the special needs of the children and the unique ability of the nonparental custodian to care for the child. In Allen, a trial court awarded custody to a child's stepmother over the objection of the child's biological father because the child was deaf and only the stepmother could effectively care for and communicate with her. The Allen court noted that "unique circumstances may warrant unique custody decrees." Allen, at 639. In Stell, the child had been physically and sexually abused while young and needed extensive therapy at a level the parent could not provide.

Contrast this with the present case. The dependency petition listed a litany of physical neglect and mental and physical abuse suffered by D.M. and S.R. while in the appellants care. CP 1-6. When the appellants stipulated to an agreed order of dependency, the allegations listed in the dependency petition were incorporated into the findings of fact without challenge and they agreed that the children had been both abused and neglected pursuant to RCW 13.34.030(5)(b) and had no parent or custodian capable of adequately caring for them, such that they were in circumstances constituting a danger of substantial damage to their psychological or physical development pursuant to RCW 13.34.030(c).

Even after extensive remedial services, the appellants could at best only be marginal caretakers for the children. RP 228. This is not the type of relationship accepted by courts as the basis for a *de facto* parental status in the past and should not become the basis for such a status in this case. To the limited extent that courts may find the existence of a *de facto* parental relationship in cases where there is an existing statutory scheme, it should be limited to cases where children have unique needs and circumstances that can only be met by the *de facto* parent.

Third, the Supreme Court in L.B. established an essential threshold requirement which the appellants can not meet. As indicated above, the first criteria adopted by the court is that “the natural or legal parent consented to and fostered the parent-like relationship.” L.B., at 708. The court elaborated on this requirement in holding:

Critical to our constitutional analysis here, a threshold requirement for the status of the *de facto* parent is a showing that the legal parent "consented to and fostered" the parent-child relationship. *See supra* p. 177. The State is not interfering on behalf of a third party in an insular family unit but is enforcing the rights and obligations of parenthood that attach to *de facto* parents; a status that can be achieved only through the active encouragement of the biological or adoptive parent by affirmatively establishing a family unit with the *de facto* parent and child or children that accompany the family.

L.B., at 712. In the present case, there is no showing that the biological parent consented to or fostered any parent-child relationship between the appellants and D.M. and S.R. to this or to any extent.

Appellants argue in their brief that “the children’s natural parents consented to and fostered the parent-like relationship.” Appellants’ brief, page 23. This claim is disingenuous, if not a clear misrepresentation of the record. In listing their issues pertaining to assignments of error, appellants say that their relationship with the children developed with the “apparent consent of the absent biological parents.” Appellants’ brief, page xi. Even this statement is unsupported by the record. Both the undisputed allegations of the dependency petition and the testimony of Charles Binkley in the initial shelter care hearing make it clear that the children’s mother, a prostitute and drug addict, left them with one of her paramours and disappeared. CP 1-6, RP 27. Further, the identity of the biological fathers of the children is unknown. The appellants obtained their nonparental custody decree by default. RP 235. There is no showing to indicate that the biological parents actively encouraged the appellants to become the custodians of the children, or otherwise consented to or fostered the existence of a parent type relationship. The threshold requirement established in L.B. can not be met and no de facto parental relationship can be found to exist in the present case.

Because the appellants can not show that they are the de facto parents of D.M. and S.R., they can not establish that they stand in legal parity to or otherwise have the same rights as biological or adoptive parents in a termination proceeding. Juvenile court was not required to treat the appellants as parents and terminate their "parental" rights pursuant to RCW 13.34.180 and 13.34.190.

C. THE PROCEDURE USED TO SET ASIDE APPELLANTS' CUSTODY DECREE SUBSTANTIALLY COMPLIED WITH ALL STATUTORY REQUIREMENTS AND DID NOT PREJUDICE APPELLANTS.

Appellants argue that the trial court erred in vacating their nonparental custody decree by not following the procedures set forth in RCW 26.10 and 26.09.² They claim that they were prejudiced by the department's failure to use mandatory pattern forms and to otherwise strictly adhere to the procedures for modification in those chapters. Their argument is inconsistent with statute, case law and common sense.

First, there is nothing in the record to indicate that appellants raised these issues below. While they opposed the motion to set aside their nonparental custody decree, they failed to challenge the procedure or the form of the pleadings used in juvenile court. Issues not raised to a trial

² The use of the term vacate is somewhat confusing and misleading. The department's motion was for an order to set aside the custodians' nonparental custody decree, a more accurate description of the relief sought. CP 61-62. However, both a motion to continue the hearing on the matter (CP 58) and the court's order of August 8, 2005 (CP 69-73) use the term vacate.

court should not be considered on appeal. Marriage of Rideout, 110 Wn App. at 382. An appellate court may refuse to review any claim of error not raised in the trial court. RAP 2.5(a). This is particularly compelling in juvenile court cases where the rights of a child to safety and permanency are at issue. Parents or custodians may not fail to raise an issue in a timely manner to the trial court and then expect relief on appeal. In such cases, "parties, attorneys and the court have an obligation to expedite resolution of the issues to limit the period during which children face an uncertain future." In re Dependency of O.J., 88 Wn. App. at 696.

Appellants do not dispute that juvenile court had jurisdiction to hear all issues relating to their nonparental custody decree under RCW 13.34.155. See also RCW 26.10.030, which refers to nonparental custody proceedings "brought under chapter 13.34 RCW." Appellants signed the May 10, 2004 order allowing the department to intervene in their nonparental custody proceeding and to consolidate it with the dependencies of D.M. and S.R. and did not appeal it or seek review from this court. CP 56-57. They base their argument on one subsection of RCW 13.34.155

(2) Any court order determining issues under chapter 26.10 RCW is subject to modification upon the same showing and standards as a court order determining Title 26 RCW issues.

From this, they argue that the exact procedures required in chapters 26.10 and 26.09 RCW must be followed.

Chapter 26.10 RCW does not contain a specific provision on modification or termination of nonparental custody decrees. Rather, RCW 26.10.190 refers to the modification provisions of chapter 26.09:

The court shall hear and review petitions for modifications of a parenting plan, custody order, visitation order, or other order governing the residence of a child, and conduct any proceedings concerning a relocation of the residence where the child resides a majority of the time, pursuant to chapter 26.09 RCW.

Appellants cite RCW 26.09.006 for their argument that the department was required to use mandatory pattern forms to bring its motion to set aside their nonparental custody decree.³ However, they ignore subsection (2) of the statute which refers to RCW 26.18.220. RCW 26.18.220(3) clearly states that a “party's failure to use the mandatory forms or follow the format rules shall not be a reason to dismiss a case, refuse a filing, or strike a pleading.” Any failure to use mandatory pattern forms is harmless error. Daubert v. Johnson, 124 Wn. App. 483, 491, 99 P.3d 401 (2004). As long as jurisdiction is properly established and the necessary parties are

³ **RCW 26.09.009 Mandatory use of approved forms.**

(1) Effective January 1, 1992, a party shall not file any pleading with the clerk of the court in an action commenced under this chapter unless on forms approved by the administrator for the courts.

(2) The parties shall comply with requirements for submission to the court of forms as provided in RCW 26.18.220.

before the court, procedural errors as to the form of pleadings or orders are harmless. In re the Marriage of Farrell, 67 Wn. App. 361, 364-365, 835 P.2d 267 (1992).

As for other requirements of RCW 26.10.190 and RCW 26.09.260, the modification section of chapter 26.09, appellants argue that the court failed to hold an adequate cause hearing or properly articulate the basis for setting aside the nonparental custody decree. While a showing of adequate cause is generally required before a nonparental custody decree can be entered or modified, a hearing is not mandatory. Adequate cause can be established by other means, such as affidavits or the stipulation of parties. RCW 26.10.032 and 26.10.200; Adler v. Adler, 131 Wn. App. 717, 723-724, 129 P.3d 293 (2006). Further, “the primary purpose of the threshold adequate cause requirement is to prevent movants from harassing non-movants by obtaining a useless hearing.” Adler, at 724.

This was not a concern in the present case. First, it was part of an ongoing dependency proceeding subject to periodic review by the court. Second, adequate cause had already been established by the entry of the agreed orders of dependency as to D.M. and S.R. in which the appellants acknowledged having abused and neglected and otherwise mistreated the children. CP 7-27. The procedures used in the dependency proceedings below to set aside the appellants nonparental custody decree substantially

complied with those required in chapters 26.10 and 26.09 RCW for modification of custody orders. It is well established that courts may find that a party substantially complied with otherwise mandatory statutory procedural requirements in a given case. James v. County of Kitsap, 154 Wn.2d 574, 588, 115 P.3d 286 (2005). The Washington Supreme Court in James cited a decision from this Court in a case involving a challenge to an adoption. There the appellants claimed that the adoption was fatally deficient because the petitioners failed to satisfy two statutory requirements, both of which used the term “shall”. This Court noted that:

Although both statutory provisions are couched in mandatory language, the trial court concluded that they are merely directory and that noncompliance did not render invalid the relinquishment order entered in this case.

In re Santore, 28 Wn. App. 319, 326, 623 P.2d 702 (1981). In affirming the trial court, this Court held:

With this in mind we conclude there need not be strict compliance with each and every provision of the adoption statutes, even though such provisions may be couched in mandatory language... Substantial compliance has been defined as actual compliance in respect to the substance essential to every reasonable objective of the statute. It means a court should determine whether the statute has been followed sufficiently so as to carry out the intent for which the statute was adopted. What constitutes substantial compliance with a statute is a matter depending on the facts of each particular case. (Citations omitted).

Santore, at 328. In the present case, the procedures used in juvenile court required the “same showing and standards” for modification of a nonparental custody decree as do the procedures set forth in chapters 26.10 and 26.09 RCW.

Appellants also claim that the court failed to make required findings or to articulate a statutory basis for setting aside their nonparental custody decree. Their argument is based on a strained reading of RCW 26.09.260, which provides in part:

(1)...[T]he court shall not modify a prior custody decree or a parenting plan unless it finds, upon the basis of facts that have arisen since the prior decree or plan or that were unknown to the court at the time of the prior decree or plan, that a substantial change has occurred in the circumstances of the child or the nonmoving party and that the modification is in the best interest of the child and is necessary to serve the best interests of the child.

(2) In applying these standards, the court shall retain the residential schedule established by the decree or parenting plan unless:

(c) The child's present environment is detrimental to the child's physical, mental, or emotional health and the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child;

Appellants first argue that because there was little or no evidence regarding what facts were before the court when the nonparental custody decree was entered in 1999, it is impossible to now determine whether the substantial change in circumstances found by the court was based on

recent events or facts that were unknown to the court at the time the initial decree was entered. Given what is clearly known about the circumstances of the case below, this argument defies logic. The children had been removed from the care of the custodians by Child Protective Services because of allegations of abuse and neglect in March 2003, the custodians had admitted to the abuse and neglect when they stipulated to the agreed order of dependency in June 2003, the children had been in foster care for over 18 months when the department filed its motion to set aside the nonparental custody decree in October 2004, and they had been out of the custodians' home for two and a half years by the time the court entered its order vacating the custody decree on August 8, 2005. This is clearly enough to establish that a substantial change had occurred in the circumstances of both the children and the custodians on the basis of facts that had arisen since the initial nonparental custody decree was entered.

Appellants further argue that the court's order vacating their nonparental custody decree failed to make two findings required by RCW 26.09.260. First, while the court found that setting aside the custody decree was in the best interests of D.M. and S.R., it did not make a separate determination that it was "necessary to serve the best interests" of the children. Second, the court did not specifically find that "the harm likely to be caused by a change of environment is outweighed by the

advantage of a change” to the children. However, the pattern form order for modification of parenting plans and custody decrees that appellants say should have been used below does not require that particularized findings be made on these issues. Rather, it simply has check boxes for all of the elements of RCW 26.09.260(1) and (2), after which facts supporting the requested modification can be inserted.⁴ The findings of fact in the court’s order of August 8, 2005 clearly establish both of these elements.

D. THE PROCEDURE USED BY JUVENILE COURT IN SETTING ASIDE APPELLANTS’ NONPARENTAL CUSTODY DECREE DID NOT VIOLATE THEIR DUE PROCESS RIGHTS.

In a related argument, appellants claim that the procedure used by the trial court to set aside their nonparental custody decree violated their substantive due process rights under the Fourteenth Amendment to the U.S. Constitution. The cases cited by appellants address the fundamental liberty interests of parents to the care, custody and control of their children and appellants argument is based wholly on their claim that they are the de facto parents of D.M. and S.R. pursuant to the holding of In re the Parentage of L.B., supra. As they clearly do not meet the criteria set forth in L.B. and are not the de facto parents of the children, their argument can not be sustained.

⁴ Order re Modification/Adjustment of Custody Decree/Parenting Plan/ Residential Schedule. WPF DRPSCU 07.0400.

However, regardless of their status in the case below vis-à-vis the children, they received all substantive and procedural due process rights they were entitled to under both state statute and the U.S. Constitution. The rights of parties in dependency and termination cases are set forth in RCW 13.34.090, which provides in relevant part:

(1) Any party has a right to be represented by an attorney in all proceedings under this chapter, to introduce evidence, to be heard in his or her own behalf, to examine witnesses, to receive a decision based solely on the evidence adduced at the hearing, and to an unbiased fact-finder.

(2) At all stages of a proceeding in which a child is alleged to be dependent, the child's parent, guardian, or legal custodian has the right to be represented by counsel, and if indigent, to have counsel appointed for him or her by the court.

Appellants were appointed counsel by the court. RP 1, 42, 238; CP 7-27. They received notice of all hearings that were related to their care of the children, including the initial shelter care hearing, the dependency fact finding hearing, dependency review and permanency planning hearings, the department's motion to intervene in and consolidate the nonparental custody proceeding with the dependency hearing, and the hearing to set aside their nonparental custody decree. CP 1-6, 7-27, 56-57, 61-68. They were provided with a full evidentiary hearing on the motion to vacate their nonparental custody order and both examined the department's witnesses and introduced evidence on their own behalf. RP 86-216, 221-236. While

they appeal from the results of the hearing, they do not raise any claim that the court was unbiased.

In addition, even assuming for the sake of argument that appellants have a fundamental liberty interest in D.M. and S.R., the procedure used by juvenile court did not in any way violate their due process rights. It is well established that a parent's fundamental right to the care, custody and control of her or his children is not absolute and that the State has both the right and the obligation to intervene to protect children when the parent's actions or inactions endanger the child. Dependency of A.V.D., 62 Wn. App. 562, 567, 815 P.2d 277(1991). When the rights of the parents and the welfare of the children conflict, the welfare of the children must be the court's paramount concern. RCW 13.34.020; RCW 26.44.010; In Re Pawling, 101 Wn.2d 392, 399, 679 P.2d 916 (1984). In a termination proceeding, the dominant consideration is the moral, intellectual and material welfare of the children. Dependency of J.W., 90 Wn. App. 417, 427, 953 P.2d 104 (1998).

In assessing the constitutionality of a procedure which infringes upon a parent's rights, the court should weigh three factors: (1) the parent's interests; (2) the risk of error created by the State's chosen procedure; and (3) the State's interest. Krause v. Catholic Comty. Servs., 47 Wn. App. 734, 738, 737 P.2d 280, review denied, 108 Wn.2d 1035

(1987). As stated above, the State's *parens patriae* interest in a termination proceeding, or in the present case, a hearing to set aside a nonparental custody decree in the course of a dependency proceeding, is compelling and the custodians must show that their individual interests outweigh those of both the State and D.M. and S.R.

The hearing on the motion to set aside appellants nonparental custody decree was conducted in a manner substantially similar to a termination fact finding hearing. It was an evidentiary hearing in which the appellants were represented and availed themselves of the right to examine witnesses and introduce evidence. As in a termination fact finding, the court applied the burden of proof of clear, cogent and convincing evidence.⁵ Conclusion of Law 2, CP 69-73. The court's Findings of Fact and Conclusions of Law address all of the required elements of RCW 13.34.180 as well as the required elements for modification of a nonparental custody decree set forth in RCW 26.09.260(1) and (2). The procedure used by juvenile court in the present case properly weighed the factors listed above, was not "ad hoc" as

⁵ While the department did not oppose the application of this burden of proof below, it does not concede on appeal that it is the correct burden of proof for purposes of modification of custody decrees pursuant to RCW 26.09.260. Case law does not clearly define what level of proof is required. Rather, it appears that the burden is on the moving party to prove to the court that modification is appropriate in the context of a given case. In re Custody of Halls, 126 Wn. App, 599, 607, 109 P.3d 15 (2005). In the event this matter is remanded for further proceedings, that is the standard that should be applied by the trial court.

claimed by the appellants, and did not in any way violate their substantive or procedural due process rights.

E. THE COURT'S FINDINGS OF FACT ARE SUPPORTED BY SUBSTANTIAL EVIDENCE.

Appellants challenge 16 of the 21 Findings of Facts, as well as all of the Conclusions of Law, of the trial court's August 8, 2005 order setting aside their nonparental custody order. They claim that the findings and conclusions are not supported by substantial evidence introduced during the course of the evidentiary hearing. A number of their challenges are hyper-technical in nature. None survive a careful review of the record.

1. Standard of Review.

For purposes of this analysis, the department will refer to the standard of appellate review for termination proceedings, since the trial court made its findings by clear, cogent and convincing evidence, the burden of proof used in such hearings. However, this should not be construed to imply that the department agrees that appellants have the same rights or standing as do biological or adoptive parents facing the termination of their parental rights in juvenile court.

The trial court in a termination of parental rights proceeding has broad discretion to evaluate evidence in light of the rights and safety of the children. Dependency of C.B., 61 Wn. App. 280, 287, 810 P.2d 518 (1991). The dominant consideration in such a case is the moral, intellectual, and material welfare interests of the children. Dependency of

J.W., 90 Wn. App. at 427. Where the parent's interests conflict with the children's rights to basic nurture, physical health, mental health, and safety, the rights of the children prevail. RCW 13.34.020; In re Sego, 82 Wn.2d 736, 738, 513 P.2d 831 (1973).

The decision of the trial court is entitled to great deference on review and its findings of fact must be upheld if they are supported by substantial evidence in the record. Dependency of K.S.C., 137 Wn.2d at 925. The reviewing court may not decide the credibility of witnesses or weigh the evidence. Dependency of A.V.D., 62 Wn. App. at 568. Substantial evidence is evidence in sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise. Worldwide Video v. Tukwila, 117 Wn.2d 382, 387, 816 P.2d 18 (1991). In the case below, the court applied the clear, cogent, and convincing evidence standard as the burden of proof. The clear, cogent, and convincing standard is satisfied if the ultimate facts in issue are shown by the evidence to be highly probable. Dependency of K.S.C., 137 Wn.2d at 925.

When a trial court has weighed conflicting evidence, appellate review of the trial court's findings of fact is limited to determining whether they are supported by substantial evidence and the reviewing court will not substitute its judgment for that of the trial court, even if it might have resolved the factual dispute differently. Mairs v. Dep't of Licensing, 70 Wn. App. 541, 545, 854 P.2d 665 (1993). Findings of fact are presumed to be correct and the party claiming error has the burden of

showing that they are not supported by substantive evidence. Fisher Properties v. Arden-Mayfair, 115 Wn.2d 364, 369, 798 P.2d 799 (1990). Further, by claiming insufficiency of the evidence, the custodians admit the truth of the department's evidence and all inferences that can be reasonably drawn from it. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); State v. Madarash, 116 Wn. App.500, 509, 66 P.3d 682 (2003).

2. The Trial Court Had Discretionary Authority To Take Judicial Notice Of Undisputed Facts.

Appellants challenge a number of findings as to undisputed adjudicative facts contained in the court's Findings of Fact and Order of August 8, 2005. They claim that because there was no specific testimony as to the date an event occurred or because a prior court order was not specifically introduced into evidence, even though its existence or contents were not in dispute, any Findings of Fact that refer to the event or order must be vacated on appeal. Their challenge includes FF 1, referring to the dates of birth of D.M. and S.R., their residency in Grays Harbor County and the fact they were in the legal custody of DSHS; FF 2, referring to the date in 1999 that the appellants filed their petition for nonparental custody of the children; FF 3, referring to the date in 1999 that the nonparental custody decree was entered; FF 4, referring to the date that the dependency petitions as to D.M. and S.R. were filed and the initial shelter

care order entered; part of FF 5, referring to the date the agreed order of dependency was entered; FF 7, referring to the fact that D.M. and S.R. were not members of an Indian tribe; and FF 8, that the children had been removed from the custody of the appellants continuously since the entry of the shelter care order in March 2003.

The hearing on the department's motion to set aside the appellants' nonparental custody decree took place in the context of an ongoing dependency proceeding. In addition, the dependency proceeding had been consolidated with appellants' previous nonparental custody proceedings for modification purposes so that both matters were properly before the court. None of the findings now challenged by appellants were disputed by the parties; rather, they are primarily background information necessary to provide a clear context for the substantive findings of the court. ER 201 allows a court to take notice of adjudicative facts in a case before it. This includes undisputed facts reflected in the court's own records in the same case. State v. Duran-Davila, 77 Wn. App. 701, 705, 892 P.2d 1125 (1995). That a court should be freely able to consider and rely on undisputed information contained in its own files is particularly important in dependency cases, where the court has an enhanced oversight role beyond

that of the more traditional roles of the court as legal-decision maker or arbiter of disputes.⁶

3. Disputed Findings of Fact Are Supported By Substantial Evidence.

Appellants' remaining challenges to the court's findings are to disputed Findings of Fact. They challenge FF 6, which states: "Services were offered to correct the deficiencies of [J. M. and C. B.]" CP 70. While they acknowledge that testimony established that services were offered to them, they claim that there was no testimony establishing that the services were geared toward correcting their deficiencies. However, their parenting deficiencies were clearly identified in the agreed order of dependency of April 29, 2003. CP 7-13. Attached to and incorporated into the agreed order of dependency was the court's disposition order

⁶ There has been considerable emphasis in Washington and other states in recent years on improving judicial oversight, training and continuity in juvenile dependency cases. See for example this recent statement in the Washington State Court Improvement Project Re-Assessment: Final Report:

The Resource Guidelines asserts that a unique judicial perspective is developed by a single judge hearing all matters related to a single family's court experience. The long term perspective afforded by the one family-one judge approach helps to identify patterns of behavior exhibited over time by all parties involved in the case, preventing a judge from too heavy a reliance on social service agency recommendations. A judge who has remained involved with a family is more likely to make decisions consistent with the best interests of the child. Thus, the cumulative knowledge gained of family circumstances and responses to court orders may increase the quality of response to family crises.

Court Improvement Project Re-Assessment: Final Report, June 2005, citing the *Resource Guidelines: Improving Court Practice in Child Abuse & Neglect Cases* (1995), National Council of Juvenile and Family Court Judges.

pursuant to RCW 13.34.130, which listed the specific services required of the custodians to correct their parenting deficiencies: psychological evaluations, parenting classes, and anger management classes. CP 14-20. These are the specific services provided to them and about which there was testimony in the hearing to set aside their nonparental custody decree. RP 86-120, 142, 151-154, 222-229. They also participated in a parent protection group after the December 7, 2004 hearing to address concerns raised on that occasion. RP 223.

In addition to hearing testimony about the remedial services provided in the dependencies of D.M. and S.R., the court heard testimony from a DSHS social worker regarding prior referrals and services provided to the custodians between 1991 and 2003 regarding their own children. RP 134-135. These services included assistance with parenting, long term counseling, and in-home alternative response services provided to them in their home. RP 135. A court may consider services offered to parents or custodians prior to a dependency proceeding to determine whether they were offered sufficient services to correct their parenting deficiencies. Dependency of C.T., 59 Wn. App. 490, 496-497, 798 P.2d 1170 (1990), review denied, 116 Wn.2d 1015 (1991).

Appellants challenge FF 14, which states: “There remain, however, significant concerns about [Mr. B. and Ms. M.’s] ability to parent these

children. There is concern about a lack of empathy on the part of the nonparental custodians with regard to the children. There is also a concern about the lack of understanding as to why the children originally came into care.” CP 71. They acknowledge that these concerns existed at the start of the hearing on December 7, 2004, but allege they had been resolved by the time the hearing resumed and was completed on June 21, 2005. This is based on a misreading of the testimony of the two primary witnesses at the June 21st hearing.

Dr. David Hawkins did psychological evaluations of both C. B. and J. M. and testified as to his professional findings and opinion at the December 7, 2004 hearing. RP 86-104. He testified that both custodians were in significant denial, although C. B. did admit to some abusive behavior towards D.M. and S.R. RP 89-91, 93-94. He opined that both custodians had personality issues and intellectual deficits that would make it difficult for them to accept responsibility for their treatment of the children and make positive changes. RP 91-92, 94-98. He felt that J. M., the primary care provider for the children, had a “borderline personality structure” and a “passive-aggressive posture” that was particularly resistant to change even with “long-standing therapy, very in-depth therapy.” RP 94, 96-98. On cross-examination, he stated that while

services could overcome the appellants' parenting deficiencies, "it's beyond what is practical. It would take years of intervention." RP 99.

The trial court asked for further evaluation of the custodians and Dr. Hawkins met with them again between the December 7, 2004 hearing and the second hearing on June 21, 2005. RP 223. At the second hearing, he had softened his views regarding the custodians based on their participation in parenting classes and a parenting protection group, especially as regards to the progress made by C. B. RP 224. However, he still felt that J. M. in particular still had limited skills and abilities and "slipped into playing the victim." RP 225-226. He opined that while they had done what the court and department has asked of them, their chances of becoming effective parents were "marginal." RP 228. Contrary to the claim of appellants, Dr. Hawkins did not recommend that the children be returned to them. Rather, he was willing to consider moving forward with expanded visitation "to see if they [D.M. and S.R.] can be returned." RP 228. DSHS child welfare services social worker Linda Smith also testified at the second hearing. She referred to Dr. Hawkins' report and noted that the custodians continued to score very low on levels of empathy. RP 231-232. She, too, acknowledged that they had made progress, but opined that they continued to have some of the issues that were addressed when the children first came into care and that they "may be unable to handle

parenting stresses.” RP 232. The concerns of involved professionals had not been resolved by the second hearing and there was substantial evidence to support Finding of Fact 14.

Appellants next challenge FF 15, which states: “It would take a considerable length of additional time for the parental deficiencies of [J. M. and C. B.] to correct their parental deficiencies in order for [D.M. and S.R.] to return to their care.” (sic). CP 71. They raise an identical challenge to FF 18, which is similar in nature to FF 15: “It would be a minimum of six months to a year in order for these children to be returned to the [B-M] home, which is a considerable length of time in these children’s lives.” These Findings or Fact are also supported by substantial evidence.

First, given Dr. Hawkins’ opinion that the custodians’ chances of becoming effective parents were “marginal,” coupled with his “very guarded” conclusion that visits could be expanded “to see if [D.M. and S.R.] can be returned,” the estimate that it would take six to twelve months to return the children to the care of the custodians was speculative at best. RP 228. Even the custodians’ attorney, in his closing argument on June 21, 2005, acknowledged to the court that additional efforts to reunify the children with the custodians had no guarantee of success. He told the court:

I guess at some point you are going to have some sort of gauge in which you can evaluate this case one way or the other, I'm not sure how to make that decision. I guess after the attempt to reunify and see what happens. It's a tough case, your honor.

RP 235. Second, by the time this recommendation was made, the children had already been in foster care for over twenty-six months. In a termination case, the standard for assessing the effects of remedial services for a parent is whether the child can be returned to parental care "in the near future" and there is a rebuttal presumption that a parent shall have twelve months to remedy their parental deficiencies. RCW 13.34.180(1)(e).⁷ It is in the best interests of children in a proceeding such as the present case that the court consider their age in assessing whether reunification is reasonable in a given length of time. Dependency of P.D., 58 Wn. App. 18, 27, 792 P.2d 159 (1990) review denied, 115 Wn.2d 1020 (1990). The unrefuted testimony of Dr. Hawkins was that six to twelve months would be a significant period of time in the lives of these children. RP 229. Substantial evidence supports the court's findings that it would take a considerable length of additional time for the custodians to correct their parenting deficiencies, if they can do so at all, so that D.M.

⁷ It should also be noted that federal law requires that state child welfare agencies file a termination petition against parents in dependency cases when a child has been in foster care for 15 months. 42 U.S.C. §675(5)(E) (The Adoption and Safe Families Act of 1997).

and S.R. can be placed back in their home, especially when viewed through the eyes of the children.

Appellants challenge FF 16, which states: “[D.M. and S.R.] continue to have fears of [C. B. and J. M.] and physical abuse.” CP 71-72. They concede that the evidence established that S.R. fears the appellants, but contest the finding as to D.M. However, the only testimony on this issue at the second hearing on June 21, 2005 clearly supports the court’s finding. DSHS social worker Linda Smith testified that D.M and S.R. “still have fears of their parents [e.g. the custodians] hitting and slapping them. [D.M.] not so much as [S.R.]” RP 231. Appellants did not cross-examine Smith on this issue and her testimony was not refuted and is sufficient to support Finding of Fact 16.

Appellants also claim that there was no testimony or evidence introduced to support FF 17, which states: “Continuation of the Non-parental custody of [J. M. and C. B.] diminishes these children’s prospects for early integration into a stable and permanent home.” CP 72. Again, undisputed testimony supports the court’s finding. In the first hearing on December 7, 2004, Linda Smith testified that setting aside the nonparental custody order would allow the department to proceed with permanency with regard to the children: “It would give these children the chance to be adopted and placed in a family home.” RP 154. She reiterated her concern

in the second hearing when she testified that “it’s been over two years that [D.M. and S.R.] have been in care...They deserve a permanent home.” RP 232. This is sufficient to support Finding of Fact 17.

FF 19 incorporates the required elements for modification of a custody order set forth in RCW 26.09.260 and has two elements. One is that “There has been a substantial change in the circumstances of the [B-M’s] since the placement of these children in the [B-M] home.” CP 72. Appellants argue that since there was no testimony as to their circumstances when they assumed custody of the children in 1999, the court’s finding is not supported by the record. However, the events surrounding the filing of dependencies as to the children and their removal from the custodian’s home in March 2003 are clearly sufficient to establish that there had been a substantial change in circumstances in the B-M home, regardless of what the conditions and circumstances in the home were in 1999. There was testimony regarding this in the hearings and it was documented in the court’s legal file. CP 1-6, 7-13, RP 132-142.

The second element of FF 19 is that: “The environment of the [B-M] home would be detrimental to [D.M. and S.R.’s] physical, mental and emotional health, should they be returned to their care.” CP 72. While there may be some evidence to dispute this finding, there is nonetheless sufficient evidence in the record for the court to have made this finding by

the necessary quantum. This includes the testimony of Dr. Hawkins and social worker Linda Smith at both hearings. All inferences that can be reasonably drawn from their testimony should be construed in favor of the department's position. State v. Salinas, 119 Wn.2d at 201; State v. Madarash, 116 Wn. App. at 509. Even viewing the testimony through a lens most favorable to appellants, the best that can be said is that they have a guarded chance of being able to care for the children in six to twelve months. Until then, placement of the children in the B-M home would clearly be detrimental to their mental and emotional health, if not also to their physical health. Both elements of Finding of Fact 19 are supported by substantial evidence.

F. THE COURT'S ORDER SETTING ASIDE THE APPELLANTS' NONPARENTAL CUSTODY DECREE WAS IN THE BEST INTERESTS OF D.M. AND S.R

The appellants also challenge Findings of Fact 20 and 21, as well as Conclusions of Law 2 and 3, which state that vacating their nonparental custody decree is in the best interests of D.M. and S.R. respectively. CP 72-73. While appellants claim that the testimony establishes that the children were bonded with the custodians, they fail to cite to the record. As a threshold issue, the trial court found that vacating the nonparental custody decree would be in the best interests of the children by clear, cogent and convincing evidence. Conclusion of Law 2, CP 73. This is

more than what is legally required for this particular finding. Even in termination cases involving fundamental liberty interests of biological parents, the best interests of the child requirement of RCW 13.34.190 need only be established by a preponderance of the evidence. Welfare of S.V.D., 75 Wn. App. 762, 775-776, 880 P.2d 80 (1994).

The factors involved in determining the best interests of a child are not capable of easy specification. Each case must be decided on its own facts and circumstances. Dependency of A.V.D., 62 Wn. App. at 571. In the present case, the following factors support the court's findings and conclusions that setting aside the nonparental custody order was in the best interests of D.M. and S.R.:

- The long and extensive history of physical and emotional abuse suffered by the children in appellants' home, which was admitted by them when they stipulated to dependency. CP 1-6, 7-13.
- The fact that this occurred after appellants had received extensive counseling and assistance with parenting issues related to their own children. RP 134-135.
- The reports and testimony from Dr. Hawkins and other service providers regarding the personality issues and intellectual limitations of the appellants and the difficulty they would have learning to effectively parent the children, even if provided

extensive long term services not readily available in the community. RP 86-104.

- The reports and testimony from Dr. Hawkins at the second hearing that, even after appellants received additional services, their chances of effectively parenting the children were marginal. RP 228.
- The fears expressed by the children of physical abuse and of returning to the custody of appellants, both at the time of their initial removal and after more than two years in foster care. RP 130-131, 136-139, 231.
- The length of time the children had been in foster care and their need for permanency. CP 70, RP 154, 232.

There is clearly substantial evidence to support the court's findings that vacating appellants' nonparental custody decree was in the best interests of the children.

III. CONCLUSION

Appellants have failed to establish that they were entitled to participate in a termination of parental rights proceeding, either as non-parent parties to the underlying dependency or as the de facto parents of D.M. and S.R. Their claim to be the de facto parents of the children is not supported by the facts of the case or the criteria established by the

Washington Supreme Court. Regardless of their status in the case below, the procedure used by the trial court to set aside their nonparental custody decree provided them with all due process rights to which they were entitled. Substantial evidence supports all of the trial court's disputed Findings of Fact. Appellants' assignments of error are without merit and the order of the trial court should be affirmed.

RESPECTFULLY SUBMITTED this 16th day of August, 2006.

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CERTIFICATE OF SERVICE

I certify that on August 16, 2006, I served a copy of the Department of Social and Health Service's RESPONDENT'S AMENDED BRIEF/ RESPONSE TO MOTION FOR ACCELERATED REVIEW by delivering by legal messenger service, to the following address:

Jodi R. Backlund
Attorney at Law
203 East Fourth Avenue, Suite 404
Olympia, WA 98501

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

DATED this 16th day of August, 2006, at Olympia, Washington.



Janet L. Cutlip

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