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DIVISION II

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STATE OF WASHINGTON

BY

DEMENT

**COURT OF APPEALS  
DIVISION II  
OF THE STATE OF WASHINGTON  
Case No. 44552-2**

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**In re: THE ADOPTION OF HMG,  
A MINOR CHILD**

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**RESPONDENT'S OPENING BRIEF**

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**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

In re the adoption of

HMG,

A minor child.

**No.44552-2**

**RESPONDENT'S RESPONSE TO  
APPELLANT'S BRIEF**

**I. NATURE OF THE CASE**

This case involves a petition to terminate the parental rights of Appellant Mother, PNP, and to allow the minor child to be adopted by the child's stepmother, CNG, Respondent. A default order was entered against Appellant when she failed to answer or appear after being personally served with a Summons and Petition to Terminate the Parent/Child Relationship and a Petition for Adoption. A Final Decree terminating her parental rights and a Decree of Adoption were subsequently entered.

## II. STATEMENT OF THE CASE

KNG is the biological father of HMG, born May 7, 2007. CP 92. Appellant PNP is the natural mother of HMG. CP 98. KNG and PNP were never married. CP 113. CNG is the wife of KNG, the stepmother of HMG, and the adoptive parent of HMG. CP 97-98. KNG and CNG were married on August 16, 2008, when HMG was one year of age. CP 92.

A Parentage action was commenced in Thurston County Superior Court in 2007 under cause number 07-5-50175-2 to establish paternity and to develop a final parenting plan for HMG. CP 595. An Amended Final Parenting Plan Final Order was entered in Thurston County on June 24, 2010, when HMG was three years of age. CP 599. The Father, KNG, was designated the primary caretaker of HMG. CP 602. The following restrictions were entered by the court regarding the Mother, PNP:

“PNP’s involvement or conduct may have an adverse effect on the child’s best interests because of the existence of the factors which follow:

Neglect or substantial nonperformance of parenting functions.

A long-term emotional or physical impairment of which interferes with the performance of parenting functions as defined in RCW 26.09.004. (From the previous findings.)

The absence or substantial impairment of emotional ties between the parent and child.

The abusive use of conflict by the parent which creates the danger of serious damage to the child's psychological development. (From modification action as well as previous findings.)

A parent has withheld from the other parent access to the child for a protracted period without good cause. (From previous findings)" CP 600

Paragraph 3.1 of the Final Parenting Plan stated in part as follows:

"The mother shall have no contact with the child until after she is released from prison. At such time she may seek to resume limited supervised contact with the child. Any contact shall be supervised at all times in the presence of a Ph.D.-level therapist who is fully familiar with the circumstances of this case; has had contact with KNG; has had contact with the Guardian ad Litem, and who has either been agreed to by KNG or appointed by the court. All costs associated with the therapist or visitation shall be paid in advance by the mother. The therapist, with knowledge of the situation, may come up with a plan to restore some relationship between the child and PNP."

CP 600-601.

An Order regarding Modification of the Parenting Plan was entered in Thurston County Superior Court the same day as the Final Parenting Plan, on June 24, 2010. CP 607. The court made the following findings under paragraph 2.2 of said Order:

"The mother was charged and subsequently convicted of three (3) counts of perjury and one (1) count of

bribing a witness (Snohomish County Cause No. 09-1-01710-1). These crimes involved attempting to fabricate criminal domestic violence charges against KNG, the father.”

Following trial in which the court heard testimony in regard to the facts surrounding the mother’s criminal convictions and supervised visitation with the child, the court finds the following:

The court finds that visitation pending the mother’s release from prison could be a disadvantage to the child.

The court finds additional factors under RCW 26.09.191. The court finds that the mother has physically assaulted the child by squeezing him to make him cry. The court finds that the mother has emotionally abused the child through the way in which she has conducted herself and used visitation for her own purposes instead of for the benefit of the child.

The court also finds under RCW 26.09.191 (3) (d) that there is an absence or substantial impairment of emotional ties between the mother and child. This absence existed before the mother was incarcerated. The court also finds that the mother has again engaged in the abusive use of conflict under RCW 26.09.191 (3) (e).

The court also finds that under RCW 26.09.191 (m) (i) that the limitations on the mother’s residential time with the child will not adequately protect the child from the harm or abuse that could result if the child has contact with the mother and therefore all contact is restrained.” CP 609.

An amended Order regarding Modification was entered in Thurston County Superior Court on December 9, 2010. CP 615. This Order continued the restraining order against PNP, restraining her from having

any contact with KNG, CNG or the child, HMG. CP 616-617.

Subsequently, on July 14, 2011, in Thurston County Superior Court, PNP filed a Petition to Modify the Parenting Plan. CP 620. The court denied the petition as no adequate cause had been found. CP 629-631.

The case was subsequently filed in Pierce County Superior Court under cause number 11-3-03358-8. CP 597. No adequate Cause was found and the case was dismissed on September 20, 2011. CP 633. The court's final order was entered on March 9, 2012. CP 635. The court order included the language, "No visitation will take place prior to further court review and order." CP 635.

In summary, the final orders entered in both Thurston County Superior Court and Pierce County Superior Court allowed no visitation between the minor child HMG and his Mother, PNP. CP 616, 635

PNP had not seen the minor child HMG for almost three years when the Amended Petition for Termination of Parental Rights and Amended Petition for Adoption were filed in March of 2012. CP 595. KNG and CNG filed an Amended Summons and an Amended Petition for Relinquishment/Termination of Child/Parental Relationship in Pierce County Superior Court on April 4, 2012, as well as an Amended Petition for

Adoption by CNG, the stepmother, of HMG. CP 92-101. The earlier petitions had been dismissed so an amended summons and amended petition had to be filed. CP 90, CR 4, CR 5. PNP was personally served on the 9<sup>th</sup> day of March, 2012, with the amended summons, an amended petition for termination and an amended petition for adoption. CP 103-107. PNP never appeared nor filed a response, resulting in a default order being entered by the court against her on the 6th day of April, 2012. CP 110, 111. Subsequently, Judge Thomas Felnagle entered on April 27, 2012, Findings of Fact, Conclusions of Law, and an Order of Relinquishment/Termination of Parent/Child Relationship, and a Decree of Adoption. CP 131-140. The court reviewed the report of the Adoption Investigator, who recommended to the court that the adoption was in the best interest of the child. CP 112-130.

Approximately two months after the default order was entered, PNP filed a Motion for an Order to Vacate the Default Order. CP 145-149. On June 12, 2012, Court Commissioner Diana Kiesel denied the Motion to Vacate the Default Order. CP 154-155. PNP failed to file a motion for revision or motion for reconsideration within the ten days of entry of the order as required by RCW 2.24.050, and CR 59 so the Court's order became

the final Order of the Court. CR 59..

Sixteen days later, PNP filed a motion for CR 60 relief from Judgment. CP 196-231. The motion was noted at least five times prior to the motion being heard more than six months after filing, on January 25, 2013, before Judge Thomas J. Felnagle. The court denied PNP's motion to vacate the default order. CP 559-560. On February 4, 2013, PNP filed a Motion for Reconsideration of the January 25, 2013, Order. CP 563-566. On March 22, 2013, the court denied the motion for reconsideration. CP 651. This appeal followed.

### **III. ARGUMENT**

#### **A. THE ORDER OF DEFAULT WAS PROPER.**

The Appellant, PNP, admits that she was duly served with an Amended Summons and Amended Petition for Adoption in this case on March 9, 2012, that she knew that she was required to file a response, and that she failed to file a timely response to that Amended Summons and Amended Petition. CP 145-149. There is no dispute on this issue. When a party fails to appear, plead, or otherwise defend, an order of default may be entered on motion and affidavit. CR55 (a). On April 6, 2012, with no response of any kind having been made by PNP to the duly served

Amended Summons and Amended Petition for Adoption, the Petitioners filed a motion and Declaration for Default. CP 103-107. An Order of Default was entered more than 20 days after respondent PNP was personally served. CP 110-111.

PNP filed a motion to vacate the Order of Default on May 31, 2012, and the matter was heard by Commissioner Diane Kiesel on June 12, 2012. CP 154-155. After hearing the arguments and considering all the records and files in the case, Commissioner Kiesel denied PNP's motion to vacate. PNP did not seek reconsideration or review of Commissioner Kiesel's Order denying the motion to vacate. PNP's later Motions to Vacate were all denied.

Appellant argues that she was not in default because she answered a petition filed in 2011. She cites Duryea v. Wilson, 135 Wn. App. 233, 144 P.3d 318 (2006); C. Ryhne Associates v. Swanson, 41 Wn.App. 323, 704 P.2d 164 (1985); and Tacoma Recycling v. Capital Material Handling Co., 34 Wn.App. 392, 395, 661 P.2d 609 (1983) as authority for vacating the Order of Default. These cases are not applicable to the facts in the present case. These cites by Appellant involve cases where the defendants appeared and filed answers in ongoing litigation, but then plaintiffs

obtained orders of default, on an amended complaint (See Duryea), a new complaint (See C. Ryhne) and a failure to attend trial (See Tacoma Recycling). Duryea and C. Ryhne involve defaults entered against defendants who failed to answer an amended complaint (Duryea) and a defendant who failed to answer the complaint filed with the Court after earlier answering the complaint plaintiff served on defendant prior to filing a complaint in the court (C. Ryhne). In these two cases the court vacated the default, holding that the defendants had answered the first complaint and did not believe they needed to answer the second complaints because they were almost exactly the same as the complaints the defendants had already answered. In the Tacoma Recycling case the defendant failed to attend the trial date due to a mistake and a judgment was entered without notice to the defendant. The appeals court vacated the judgment against the defendant because the defendant had appeared and answered and in that circumstance the plaintiff was required to give the defendant the same notice it would have been required to give to obtain a default order after a party appears. The circumstances in these cases are totally different from the present case. None of the cases cited by Appellant involved the case being dismissed or the subsequent service of a new summons.

In the instant case the original proceeding in which PNP filed her answer was **dismissed** on December 2, 2011 and the case was closed. Dismissal of a case causes the court to lose jurisdiction. Cork Insulation Sales Co. v. Torgeson, 54 Wn.App. 702, 775 P.2d 970 (1989). An order of dismissal of the case was entered on December 2, 2011. CP 90. (There were no dismissals in the cases cited by Appellant.)

In March 2012, KNG and CNG decided to file an adoption proceeding and served PNP with an Amended Summons, Amended Petition for Relinquishment/Termination of Child/Parent Relationship and Amended Petition for Adoption on March 9, 2012. This was a new filing in which PNP was personally served with an Amended Summons directing that she had to respond to the Amended Petition within 20 days or a default could be taken without notice. (There was no summons involved in the cases cited by respondent and discussed above.)

The Summons served on PNP stated in part as follows:

“In order to defend against this petition, you must respond to the petition by stating your defense in writing and by serving a copy upon the petitioners at the address below within twenty (20) days after the date of service in the state of Washington or sixty (60) days if served outside the State of Washington, or an order permanently terminating your parent-child relationship with the child by default will be entered. A default order is one where the petitioner is

entitled to what he asks for because you have not responded. If you serve a notice of appearance on the petitioner at the address below you are entitled to notice before a default order may be entered.” CP 95-96.

PNP filed neither response nor a Notice of Appearance within 20 days after being personally served with the summons, resulting in a default order being entered against her. CP 110-111.

There are cases where the defendant, after having answered an original complaint but failing to answer an amended complaint, subsequent Default Orders and Judgments entered were confirmed by the Supreme Court. See Skidmore v. Pacific Creditors, Inc., 18 Wn.2d 157; 138 P.2d 66 (1943). In Skidmore, the Supreme Court found that the filing of an amended Complaint constituted an abandonment of the original complaint and the action rested on the amended Complaint, Skidmore at p. 160. The amended complaint was the same as the original complaint except for incorporation of a copy of a purchase and sale agreement. Skidmore at 158. The court found that though defendant answered the original complaint, defendant’s failure to answer the amended complaint, entry of a default was proper.

In the instant case, entry of a default order was proper. The earlier case had been dismissed. Appellant had been served with a new summons.

She failed to answer or appear.

B. ENTRY OF THE FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECREE OF ADOPTION WERE PROPER.

Following entry of the Order of Default on April 6, 2012 KNG and CNG were entitled to obtain a judgment after default. CR 55 (b). Once a party is adjudged in default they are not entitled to notice of any further proceedings. J-U-B Engineers, Inc. v. Routsen, 69 Wn.App. 148, 848 P.2d 733 (1993); and C. Ryhne Associates v. Swanson, 41 Wn.App. 323, 704 P.2d 164 (1985). Thus, once the court has properly made an entry of default, the defendant is not entitled to notice of the presentation of judgment or findings. Allison v. Boondock's, Sundecker's & Greenthumbs, Inc., 36 Wn. App. 280, 283, 673 P.2d 634 (1983). C. Ryhne at 326.

In accordance with their legal rights KNG and CNG subsequently presented Findings of Fact, Conclusions of Law and a Decree of Adoption on April 27, 2012, which were approved and entered by Judge Felnagle.

Judge Felnagle reviewed the files and records of the case and received testimony from the parties prior to entry of the final orders. The Court reviewed the 19-page Adoption Report submitted by the Adoptive Investigator, Joni Irvin, Pierce County Adoptions, who prepares Preplacement and Post-placement reports pursuant to RCW 26.33. CP

117. Ms. Irvin was appointed to the case pursuant to PCLSPR 93.04(c). The Adoption Investigator concluded that it was in HMG's best interests that the court approve the adoption. CP 116.

C. THE ORDER DENYING THE MOTION TO VACATE SHOULD BE CONFIRMED.

A motion to vacate a default judgment is to be considered and decided by the trial court in the exercise of the court's discretion, and the decision of the court will not be overturned on appeal unless it plainly appears that the court abused its discretion in granting the judgment. Martin v. Pickering, 85 Wn.2d 241, 533 P.2d 380 (1975). It is true that courts generally prefer to resolve cases on their merits, but default judgments serve the important purpose of promoting "an organized, responsive, and responsible judicial system where litigants acknowledge the jurisdiction of the court to decide their cases and comply with court rules." Little v. King, 160 Wn.2d 696, 703, 161 P.3d 345 (2007); Showalter v. Wild Oats, 124 Wn. App. 506, 510, 101 P.3d 867 (2004).

In this case, the court has not abused its discretion in denying the respondent's motion to vacate the Order of Default and Decree of Adoption. Substantial justice has been done and done twice in this case. The first time was on June 12, 2012, when Commissioner Kiesel heard the

respondent's first motion to vacate under CR 60. The Appellant had her day in court, presented declarations and argument and the Commissioner denied her motion to vacate. The Appellant did not seek revision or reconsideration of the Commissioner's order. Later, the respondent filed her second motion to vacate the default and find Orders. This motion was heard by the court on January 25, 2013, and after reviewing the records and files in the case and hearing the arguments of counsel for both parties the Court denied PNP's motion to vacate. The Appellant's Motion for Reconsideration of the Court's January 25, 2013, Order denying her motion to vacate was also denied.

D. RESPONDENT HAS FAILED TO ESTABLISH CAUSE TO VACATE ORDER.

Generally, a court will consider two primary factors in determining whether to vacate a default judgment. The primary factors include (1) the existence of substantial evidence to support at least a prima facie defense to the claim upon which the judgment is issued and (2) the reason for the party's failure to timely respond to the pleading that led to the default. Calhoun v. Merritt, 46 Wn.App. 616, 619, 731 P.2d 1094 (1986), citing White v. Holm, 73 Wn.2d 348, 352, 438 P.2d 581 (1968). The factors identified in White include:

(1) That there is substantial evidence extant to support, at least prima facie, a defense to the claim asserted by the opposing party;

(2) that the moving party's failure to timely appear in the action, and answer the opponent's claim, was occasioned by mistake, inadvertence, surprise or excusable neglect;

(3) that the moving party acted with due diligence after notice of entry of the default judgment; and

(4) that no substantial hardship will result to the opposing party.

White at 352.

Respondent is required to present evidence of the merits of her claim. Johnson v. Asotin County, 3 Wn.App. 659, 477 P.2d 207 (1970), citing CR60 (e) (1).

There is nothing in the record to indicate that even if the respondent was successful with her motion to vacate the final orders that the Petition to Terminate the Parent/Child Relationship and Petition for Adoption would not be granted. The Appellant had absolutely no visitation with her own son pursuant to the most recent court order entered in Thurston County Superior Court and the most recent Court order entered in Pierce County Superior Court. CP 616, 635. Her efforts to modify these orders were

unsuccessful. CP 629-631. The records and files and report of the Adoption Investigator concludes the adoption is in the best interest of HMG. CP 116.

Judge Felnagle, at the Motion to Vacate hearing on January 25, 2013, found that there was no evidence that the Appellant would ultimately prevail in the adoption proceeding. CP 560. The restrictions against the Appellant in the child's Final Parenting Plan are substantial and numerous. CP 600, 609. Appellant was awarded absolutely no residential time with the child until she was released from prison, at which time she could seek limited contact with the child, supervised at all times in the presence of a Ph.D.-level therapist. CP 600-601. Appellant was approximately \$3,800 in arrears with the child support obligation when the Decree of Adoption was entered. CP 597.

Adoption in Washington State is governed by RCW 26.33. A stepparent adoption occurs when the biological parent of a child marries an individual who seeks to adopt the spouse's child. Since the parental rights of the other biological parent will be extinguished by the stepparent adoption, the adoption cannot go forward without either the consent of the biological parent whose rights will be terminated or a termination of that

parent's right by notice and court order. RCW 26.33.

KNG and his wife CNG filed a petition to terminate the parental rights of PNP. Said petition was filed pursuant to RCW 26.33.110.

The standard for terminating parental rights is enumerated in RCW 26.33.120 entitled "Termination - Grounds - Failure to Appear ", which states in part as follows:

(1) Except in the case of an Indian child and his or her parent, the part-child relationship of a parent may be terminated upon a showing by clear, cogent, and convincing evidence that it is in the best interest of the child to terminate the relationship and that the parent has failed to perform parental duties under circumstances showing a substantial lack of regard for his or her parental obligations and is withholding consent to adoption contrary to the best interest of the child.

The Washington courts have interpreted this statute to define "failure to perform parental duties under circumstances showing a substantial lack of regard for his parental obligations". Parental obligations entail, at a minimum, expressed love and affection for the child, expressed personal concern over health, education, and the general well-being of the child, a duty to supply necessary food, clothing, and medical care, a duty to provide adequate domicile, and a duty to furnish

social and religious guidance. Matter of Interest of Pawling, 101 Wash.2d 392 (1984).

In determining whether to terminate parental rights in the context of a petition for adoption, the threshold question is whether the parent has failed to perform parental duties under circumstances showing substantial lack of regard for parental obligations, which must be resolved by the court before it may consider the best interests of the child. Matter of Adoption of McGee, 86 Wash.App 471 (1997); review denied 133 Wash2d 1014.

Clear cogent and convincing evidence in parental rights termination proceeding established that the father exhibited substantial lack of regard for his parental obligations, so as to support termination if in the best interest of the child; father had the ability to pay support but failed to do so, he did not communicate with the child in any way that effectively, persistently or consistently demonstrated love or affection for the child. Matter of H.J.P., 114 Wash.2d 522 (1990).

A father's total disregard of his former wife and children for four years following divorce, with only an occasional gift and single visit during the next five years, in addition to his failure to meet his duty to provide support for the children during the total period, constituted willful

substantial lack of regard for his parental obligations and, in view of the interests of the children involved, constituted abandonment under CR 26.32.040 (repealed) such as would render unnecessary father's consent to adoption of children by another. In Re: Adoption of Lybbert, 75 Wash.2d 671 (1969).

In termination of parental rights proceedings, evidence that a child's psychological parents were mother and stepfather and that child was integrated into the family was sufficient to support findings that it was in the child's best interest that the father's parental rights be terminated and that the child be adopted by the stepfather. Pawling, Supra.

It is clear that PNP has failed to perform parental duties under circumstances showing a substantial lack of regard for her parental obligations. The Thurston County Superior Court findings entered on June 24, 2010, support this conclusion.

"PNP's involvement or conduct may have an adverse effect on the child's best interests because of the existence of the factors which follow:

Neglect or substantial nonperformance of parenting functions.

A long-term emotional or physical impairment of which interferes with the performance of parenting functions as defined in RCW 26.09.004. (From the previous

findings)

The absence or substantial impairment of emotional ties between the parent and child.

The abusive use of conflict by the parent which creates the danger of serious damage to the child's psychological development. (From modification action as well as previous findings.)

A parent has withheld from the other parent access to the child for a protracted period without good cause. (From previous findings)" CP 600.

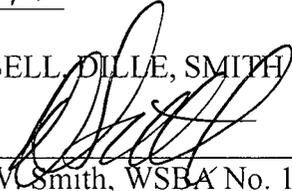
Appellant has established no credible basis to support at least a prima facie defense to the petition to terminate her parental rights.

#### IV. CONCLUSION

The rulings of the trial court should be affirmed. Appellant was properly served with a summons and petition to terminate her parental rights. She did not respond or appear. The previous case had been dismissed. Entry of a default and final judgment was proper. There is no credible evidence that even if the Motion to Vacate was granted that Appellant would successfully challenge the petition to terminate her parental rights.

Dated: Sept 3, 2013

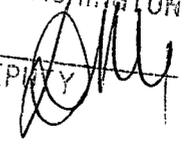
CAMPBELL, DILLE, SMITH & BARNETT, PLLC

  
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STATE OF WASHINGTON

BY  DEPUTY

**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

In re the adoption of

HMG,

A minor child.

No.44552-2

**DECLARATION OF SERVICE**

THE UNDERSIGNED, hereby declares as follows:

1. That I am now and at all times herein mentioned, a citizen of the United States and resident of the State of Washington, an employee of Campbell, Dille, Barnett and Smith, over the age of 18 years, not a party to the above-entitled action and competent to be a witness therein.

2. That on the 4th day of September, 2013, she caused a copy of the following documents:

- (1) Respondent's Opening Brief and a Declaration of Service to be served on the parties listed below by the method(s) indicated:

Court of Appeals Division II  
David Ponzoha, Clerk/Administrator  
950 Broadway, Suite 300  
Tacoma, WA 98402

regular first class U.S. mail  
 facsimile at 206-389-2613  
 Fed-Express/overnight delivery  
 **personal delivery via Daniel Smith**  
 via electronically to: [coa2filings@courts.wa.gov](mailto:coa2filings@courts.wa.gov)

Timothy R. Gosselin, Attorney for Appellant  
Gosselin Law office PLLC  
1901 Jefferson Ave Ste 304  
Tacoma, WA 98402-1611

regular first class U.S. mail  
 facsimile  
 Fed-Express/overnight delivery  
 personal delivery via ABC Legal Messengers  
 **via electronically to [tim@gosselinlawoffice.com](mailto:tim@gosselinlawoffice.com)**

**DATED** this 4th day of September, 2013.

  
\_\_\_\_\_  
Donita G. Deck