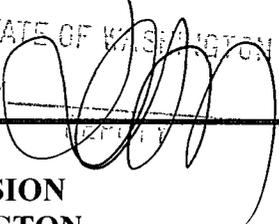


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STATE OF WASHINGTON

NO. 44649-9-II

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

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In Re the Welfare of:

H.Q.,

A Minor Child.

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**ON APPEAL FROM THE SUPERIOR COURT OF  
THE STATE OF WASHINGTON FOR KITSAP COUNTY  
THE HONORABLE SALLY OLSEN**

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**BRIEF OF RESPONDENT**

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ROBERT W. FERGUSON  
Attorney General

STEPHANIE A. WHITE  
Rule 9 Intern  
WSBA No. 9134025

PETER E. KAY  
Assistant Attorney General  
WSBA No. 24331  
1250 Pacific Avenue, Suite 105  
PO Box 2317  
Tacoma, WA 98401  
(253) 593-5243

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## I. INTRODUCTION

This is an appeal from an action terminating the parent-child relationship between the minor child, H.Q., and her father, C.Q., who was determined to be legally incompetent at the commencement of the dependency proceedings underlying this termination. Because of the father's legal incompetency, the juvenile court appointed a legal guardian to protect the father's rights. Two years later, the legal guardian for the father wanted to voluntarily relinquish his parental rights and enter into a voluntary adoption agreement as to H.Q. Well-established case law provides that legal guardians may not waive substantive rights of incompetent persons, including the right to parent. The case, therefore, proceeded to trial as to the father's parental rights.

On appeal, the father contends that he has a fundamental right to relinquish his parental rights, regardless of his established incompetency. The father also contends that the inability to relinquish creates an Equal Protection violation. However, the father has no fundamental right to relinquish his parental rights. Moreover, because the father was found incompetent in the underlying dependency proceeding, neither the father nor his guardians are able to relinquish his parental rights. Significantly, in this case, there is no evidence that the father wanted to relinquish his parental rights, even if he could.

In addition, the trial court's decision to proceed to a termination trial did not violate equal protection. Incompetent individuals are not a suspect class under Equal Protection analysis and no fundamental right is implicated, making rational basis review appropriate. Yet even if strict scrutiny were required, the State has a compelling interest in protecting the rights of incompetent individuals, and requiring a trial before termination of their parental rights is narrowly tailored to protect those interests.

Finally, the father asserts that parents whose parental rights have been terminated are ineligible to participate in open adoption agreements, and this consequence of termination violates equal protection. But the equal protection implications of this statutory restriction are not properly before this court in this case—a challenge to the validity of the termination. This court has recognized that the State is not a party to open adoption agreements, and here, there has been no state action denying the father participation in an open adoption agreement. There is no evidence in the record that the father wanted to enter into an open adoption agreement or that he was capable of entering into an open adoption agreement as a result of his incompetency. Therefore, this is not the appropriate time to address this argument.

## **II. RESTATEMENT OF THE ISSUES**

This appeal raises the following issues:

1. Whether a parent has a fundamental right to relinquish parental rights to a child.
2. Whether substantial evidence supports the trial court's findings that the incompetent father is not capable of voluntarily relinquishing his parental rights.
3. Whether an incompetent person or his guardians may waive substantial rights of the incompetent person.
4. Whether the trial court violated the Equal Protection Clause of the Fourteenth Amendment when it denied the guardian's request to relinquish the father's parental rights.
5. Whether the constitutionality of the open adoption agreement statute is properly before the court at this time.

## **III. RESTATEMENT OF THE CASE**

### **A. Factual and Procedural History.**

H.Q., a little girl, was born on July 1, 2008. CP 1. Her mother is C.H., and her father is C.Q. CP 1. The Department of Social and Health Services (Department) first filed a dependency petition in 2008 on the child when she was just an infant because she was brought to the hospital with a broken leg. Ex. 1; RP 12. The father was later arrested and criminally charged with injuring his daughter. CP 47, Ex 4-5. However, the criminal court found him legally incompetent and, as a result, the criminal charges were dismissed. CP 47, Ex. 5.

The father, who is now 30, suffered a serious brain injury when he was eight or nine years old. RP 28, 31. As a result, he has a cognitive impairment that affects his executive decision-making and he has mild mental retardation. RP 28. Although the father has some general literacy, he cannot generalize from one idea to the next idea and is not able to apply something learned in one situation to another situation. RP 30. He performs at about the first grade level academically, as a six year old. RP 30. The father has a Global Assessment Functioning of 40. RP 28.

Francis Peck serves as the guardian for the father. RP 35. She first began caring for him when he was an eight-year-old foster child. RP 35. Ms. Peck established a guardianship under chapter RCW 11.88 for the father when he turned 18; the guardianship has been in effect for 12 years. RP 35, CP 45, 47. She is the legal guardian over both his estate and his person. RP 36. Ms. Peck handles all of the father's financial matters and transportation, and she makes all of his medical decisions. RP 33, 36.

As part of the first dependency in 2008, the father participated in a psychological evaluation and parenting assessment both to determine his need for services and to recommend appropriate services for him. Ex. 2, RP 13. The child was subsequently returned to the mother's care, and the dependency action was dismissed in December 2009. Ex. 3.

The Department then filed a second dependency petition in 2010 due to the unsafe home environment and neglect H.Q. was experiencing in her mother's care. RP 11, 14. At a preliminary hearing in this dependency, the juvenile court found the father incompetent and appointed a guardian ad litem to protect his rights. Ex. 6. The court subsequently held a contested dependency trial in December 2010, attended by the father, his attorney, and the GAL appointed for the father as a result of his incompetency. Ex. 6. The trial court found that the "[f]ather has significant mental health issues and head trauma causing developmental and cognitive delays such that he is currently unable to adequately care for the child." Ex 6. The father did not appeal any of the court orders entered in the underlying dependency proceeding, including the order finding him incompetent and appointing him a GAL, and the order of dependency.

The Department subsequently filed a termination petition in September 2011, alleging that the parents of H.Q. were unfit to parent their young daughter, and that they would be unlikely to be able to do so in her near future. CP 1-4. In recognition of the father's previously established incompetency, the juvenile court reappointed the same GAL to serve again for the father in the termination proceeding. CP 26. The court also reappointed the same attorney who had represented the father in the dependency. CP 23. The father has not appealed the order appointing a GAL

to him in the termination proceeding. In August 2012, the court substituted the Pecks, as the father's guardians, for the GAL who had been previously appointed. CP 32, 37. The father has not appealed this substitution order.

The father, his guardians, and his attorney all appeared at the scheduled termination trial date. RP 3. Significantly, the record includes no evidence indicating that the father himself wanted to relinquish his parental rights, even if he were competent to do so. RP 4; CP 47, 26, 32; Ex. 6. Instead, the Pecks, as the father's guardians, wanted to relinquish the father's parental rights on his behalf. CP 47. The guardians wanted to do so because under RCW 26.33, voluntary open adoption agreements are available to parents whose parental rights have not been terminated if all parties are in agreement with such an outcome. CP 47-48, RP 4-5.

The father's attorney correctly informed the court that under *In re Houts*, 7 Wn. App. 476, 481, 499 P.2d 1276 (1972), the guardians could not waive substantive rights of the father, including his parental rights. CP 48; RP 4. Even so, the father's counsel argued that it violated the equal protection clause to accept a voluntary relinquishment from other parents, but not from the father due to his incompetency. RP 4-5, CP 47-48.

The trial court acknowledged that "there cannot be an open adoption in involuntary termination cases under RCW 13.34. An open adoption requires a voluntary relinquishment of parental rights under RCW 26.33, and

the agreement of all of the parties, and the adoptive parents, to an open adoption under RCW 26.33.295. The father is apparently not capable of voluntarily relinquishing his parental rights and thus this case had to proceed to trial.” CP 72, Finding XVI. The case proceeded to trial on the merits of the case.

The evidence established that during the first dependency, in 2008, the father participated in a psychological evaluation and parenting assessment aimed at determining his need for services and recommending services that could address his parenting deficits. RP 13. Although the evaluator did not believe services would be able to aid the father in remedying his deficits, the evaluator suggested that the father participate in hands-on parenting education or parenting coaching. RP 13. In the second, current dependency, the court ordered that the father participate in parent coaching, and further ordered that the father not have unsupervised contact with the child. Ex. 7.

The father attended hands-on parenting education with an instructor experienced in working with parents who are developmentally disabled or low functioning. RP 27-28. After two sessions, the instructor requested that the sessions end because the service could not benefit the father. RP 18. There were no other services available to remedy the father’s inability to safely parent his young daughter. RP 18.

The evidence also showed that the father continued to have supervised visitation with the child. The visitation has always remained supervised because of the father's limitations. RP 19, Ex. 11. The father and his young daughter had pleasant but superficial interactions. H.Q., who is now five years old, is a very active mischievous preschooler. RP 19. She is an energetic and developing little girl. RP 39. The father presented as an eight or nine year old in the visits. RP 19. The two had a child-to-child relationship, as peers, rather than a parent-to-child relationship. RP 19-20.

The father was not able to follow the instructor's directions, nor could he discuss matters with her that would give him insight or help develop his parenting skills. RP 20. The father is not able to generalize learning, he is not able to provide limits for a child, nor is he able to be aware of dangers to a child. RP 21. The father is not able to care for himself, and he does not understand, nor can he meet, H.Q.'s needs. RP 21, 40. Ms. Peck did not believe that the father can care for his young daughter. RP 35.

After hearing all of the evidence, the trial court terminated the father's parental rights. The court found that the father has the intellectual functioning of a six to eight year old and has been functioning as an eight or nine year old during visits. CP 70, Finding VIII. The court further found that the father appears frozen in terms of his abilities. CP 71, Finding IX. The court ultimately found that terminating the father's parental rights was

in the best interests of H.Q. CP 71, Finding XIII. As the little girl gets older, it is likely that she would end up having to parent her father, which would not be healthy for her. CP 71, Finding XIII. Accordingly, the court terminated the father's parental rights. CP 74-75.

#### **IV. SUMMARY OF ARGUMENT**

The father does not have a constitutional right to relinquish his parental rights. He confuses his right to parent his daughter with what he characterizes as a right to relinquish parental rights. No right to relinquish parental rights has been established under either the Constitution or state jurisprudence.

The father failed to appeal the trial court's finding that he was incompetent for purposes of the dependency and termination proceedings, that he could not comprehend the nature and effect of the legal action in general. Moreover, substantial evidence supports the trial court's finding that that the father was incompetent for purposes of these proceedings, and was thus unable to relinquish his rights. Significantly, there is no evidence that the father wanted to relinquish his parental rights, even if he were competent to do so. While the father's guardians wanted to relinquish the father's parental rights on his behalf, Washington case law is clear that a guardian cannot waive a substantial right of a protected ward, in this case the right to a parent-child relationship. The guardians had no right to

relinquish the father's parental rights for him. The trial court, therefore, properly conducted a trial, with the necessary substantive and procedural due process safeguards, to resolve the issue of the father's ability to parent his child in the foreseeable future.

The trial court did not violate equal protection when it entered the termination order. Only rational basis review is necessary, but even if strict scrutiny were required, there is a compelling state interest to protect the fundamental rights of mentally incompetent persons in legal proceedings. Moreover, this is not the appropriate context to address an equal protection argument based on the father's inability to enter into an open adoption agreement where 1) there is no evidence in the record that the father ever wanted to enter into an open adoption agreement; and 2) even if he obtains the relief he seeks—relinquishment—an open adoption agreement would still depend on the agreement of the adoptive parents, the father's desire and capacity to enter into the agreement, and the adoption court's approval. These issues were not before the trial court.

## V. ARGUMENT

### A. **The Father Did Not Have a Constitutional Right to Relinquish His Parental Rights**

A parent does not have a fundamental right to relinquish his parental rights in his child. The father argues that he could not relinquish his parental rights and that this violated his rights to both due process and

equal protection. However, a parent's right to parent a child does not include the right to relinquish parental rights, assuming arguendo that the father both wanted to relinquish his parental rights and was capable of doing so in this case.

The father first argues that a parent has a fundamental right to relinquish his parental rights, Br. of Appellant at 11-12, 23-24, but the right to parent one's child does not include the right to relinquish those parental rights. Parents have a fundamental right to raise their children without state interference, subject to the child's right to a safe and healthy environment. *In re Custody of Smith*, 137 Wn.2d 1, 13-14, 969 P.2d 21 (1998) (quoting *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982)); *In re Dependency of K.D.S.*, 176 Wn.2d 644, 652, 294 P.3d 695 (2013). The father's argument fails because it conflates his right to care for his daughter with a right to relinquish all parental responsibility in her. There is no support in Washington jurisprudence for this position.

Courts apply a two-part test to determine if a right qualifies as "fundamental" under the due process clause. *Washington v. Glucksberg*, 521 U.S. 702, 720-21, 117 S. Ct. 2258, 138 L.Ed.2d 772 (1997). First, fundamental rights are so "deeply rooted in this Nation's history and tradition . . . and implicit in the concept of ordered liberty, such that

neither liberty nor justice would exist if they were sacrificed.” *Andersen v. King County*, 158 Wn.2d 1, 25, 138 P.3d 963 (2006) (quoting *Glucksberg*, 521 U.S. at 720-21). Second, courts require a “careful description” of the asserted fundamental right, limiting strict scrutiny protections to those matters “outside the arena of public debate and legislative action.” *Id.* (quoting *Glucksberg*, 521 U.S. at 720). Even if the father actually wanted to relinquish his rights, he does not have a fundamental constitutional right to do so because (1) the “right” to forfeit parental responsibility is not deeply rooted in our nation’s history and traditions and (2) relinquishing parental rights is well outside the “careful description” of the existing fundamental right to parent.

First, relinquishing parental rights is not “outside the arena of public debate and legislative action” and not “implicit in the concept of ordered liberty.” *Andersen*, 158 Wn.2d at 25 (quoting *Glucksberg*, 521 U.S. 720). To the contrary, family abandonment is a class C felony. RCW 26.20.030. Failing to support one’s family is a gross misdemeanor in Washington, RCW 26.20.035, and nonpayment of child support can be the basis for finding contempt, RCW 26.18.050. Recognizing a fundamental right to relinquish parental responsibility would render statutes penalizing family abandonment and nonpayment of child support unconstitutional.

Even if a parent desires to relinquish his or her parental rights, the courts will only approve such a relinquishment if it is in the best interest of the child. RCW 26.33.090(3). Such a relinquishment may not be in the best interests of the child, regardless of the parent's position, and in such cases, the court can deny relinquishment. *Id.* The parent's rights are not absolute and must yield to the child's rights; including the child's right to support that is adequate to provide him or her with a safe and healthy environment. *K.D.S.*, 176 Wn.2d at 652. Thus, relinquishment of parental rights is not a right so "deeply rooted in this Nation's history and tradition" as to classify it as fundamental. *Andersen*, 158 Wn.2d at 25 (quoting *Glucksberg*, 521 U.S. 720).

Second, relinquishing parental rights is not part of the existing fundamental right to parent. Determining the scope of a fundamental right requires a "careful description" of the right at issue, based upon our nation's "history, legal traditions, and practices." Courts describe the fundamental right to parent in many ways, but always as an affirmative right to care for one's child. *See, e.g., Smith*, 137 Wn.2d at 14 (quoting *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972)) (describing the fundamental right to parent as the "interest of a parent in the companionship, care, custody, and management of his or her children"). Historically, courts premised the right to parent on our

nation's tradition of respecting the integrity of the family unit. *Id.* at 15. Expanding this fundamental right to include relinquishing parental rights and breaking up the integrity of the family unit impermissibly expands the right to parent because it divorces this right from its historical underpinnings.

The father's reliance on a District of Columbia case, *In re T.J.*, 666 A.2d 1, 12-15 (D.C. 1996), to support his fundamental right to relinquish argument is misplaced. *See* Br. Of Appellant at 12-13. In the *T.J.* case, the mother had designated an adoptive preference for her child. *Id.* at 5. The issue before the *T.J.* court was which of two different competing individuals would ultimately adopt her child, not whether the mother could relinquish her rights. *Id.* at 5. Washington law accords parents who want to relinquish their parental rights, and who are able to do so, the ability to so designate adoptive preferences. *See* RCW 13.34.125 (parental preferences regarding proposed adoptive placements). But, that ability arises from statute and it is not the issue before the court today. This case is not about competing potential adoptive homes and the adoptive preferences designated by a competent parent. Instead, this case is about the ability of an incompetent father or his guardians to waive his substantial rights.

The *T.J.* decision instead supports the trial court's ruling in this case. The *T.J.* Court held that "unless it is established that the parent is *not competent* to make such [adoptive preference designations] . . . a parent's choice of a fit custodian for the child must be given weighty consideration." 666 A.2d at 11 (emphasis added). In the present case, the father is not competent and, thus, incapable of making decisions concerning this legal proceeding. The father's reliance on this case is misplaced.

Finally, in the context of adoption, courts have been clear that where an ability to do something is created entirely by statute, that ability is not protected to the same extent that fundamental rights are protected. For example, a prospective adoptive parent does not have a fundamental right to adoption of a child following relinquishment of parental rights. *See Mullins v. Oregon*, 57 F.3d 789, 794 (9th Cir. 1995) ("[W]hatever claim a prospective adoptive parent may have to a child, we are certain that it does not rise to the level of a fundamental liberty interest"). Far from being deeply rooted in our nation's history and traditions, adoption is wholly a creature of statute and not of common law. *Loflon v. Secretary of Dept. of Children and Family Services*, 358 F.3d 804, 811-12 (11th Cir. 2004) ("adoption is a privilege created by statute and not by common law"). Similarly, a Washington statute, RCW 26.33, creates and governs

the statutory procedure to relinquish one's parental rights; this right does not exist independent from this statute. *See Adoption of Hickey*, 18 Wn. App. 259, 261, 567 P.2d 260 (1977) (finding that the Washington Supreme Court "has consistently held that adoption, not known to the common law was purely statutory" and thus adoption statutes "must be strictly complied with"). Thus, a parent does not have a fundamental right to relinquish parental rights to a child.

**B. Substantial Evidence Supports the Trial Court's Finding That the Father Was Incompetent to Agree to Waive His Right to Parent His Daughter**

There is no evidence in the record that the father wanted to relinquish his rights, nor was he competent to do so. In reviewing a termination of parental rights, the trial court is "afforded broad discretion and its decision is entitled to great deference on review." *In re A.W.*, 53 Wn. App. 22, 31, 765 P.2d 307 (1988), *review denied*, 112 Wn.2d 1017 (1989). The findings of the trial court will not be disturbed on appeal if they are supported by substantial evidence. *In re Chubb*, 112 Wn.2d 719, 729, 773 P.2d 851 (1989). If substantial evidence exists, the appellate court must uphold the trial court's findings. *In re Dependency of A.V.D.*, 62 Wn. App. 562, 568, 815 P.2d 277 (1991). In this case, substantial evidence supports all of the trial courts' findings.

**1. The Father Functioned at the Level of a Six Year Old.**

The father next contends that the trial court erred in its findings regarding his general level of functioning and his intellectual level. Br. of Appellant at 10. Substantial evidence, however, supports the trial court's detailed findings on this issue.

The father suffered a serious brain injury when he was about eight years old while in his mother's care. RP 28. Francis Peck first began caring for the father when he was eight years old and in foster care. RP 35. The father has a cognitive disorder that affects his executive decision making and he has mild mental retardation. RP 28. He performs at about the first grade level academically, as a six year old. RP 30. He has a Global Assessment Functioning (GAF) of 40. RP 28. A GAF score of 40 denotes "some impairment in reality testing or communication" or "major impairment in several areas such as work or school, family relations, judgment, thinking or mood." Diagnostic and Statistical Manual of Mental Disorders, DSM-IV 32 (4<sup>th</sup> ed. 1994).

The father cannot generalize from one idea to the next idea and cannot apply something learned in one situation to another situation. RP 30. He was not able to follow the parenting instructor's directions, and the instructor was not able to discuss matters that would give him insight or develop his skills. RP 20.

The father and his five-year-old daughter have a child-to-child relationship, as peers, rather than a parent-to-child relationship. RP 19-20. The little girl is only a preschooler, and yet the father interacts with her as a peer. He presented as an eight or nine year old in his visits with his daughter. RP 40, 19. Substantial evidence, therefore, supports the trial court's findings that the father has the intellectual level of a six to eight year old, and functioned as an eight or nine year old during the visits.

**2. The Father Lacked the Capacity to Relinquish his Parental Rights.**

The father next argues that the record does not support the finding that the father lacked the capacity to relinquish his parental rights. Br. of Appellant at 20. However, substantial evidence supports this finding.

First, the father was found incompetent in 2010 at the beginning of this current dependency proceeding, and the juvenile court appointed him a guardian ad litem as a result. Ex. 6, RP 4. Because of this determination, the father did not possess sufficient mind or reason to enable him to comprehend the nature and effect of the dependency action. *See In re Adoption of Hernandez*, 25 Wn. App. 447, 454, 607 P.2d 879 (1980). The court then properly reappointed both the same guardian ad litem and the same court appointed attorney for the father upon the filing of the termination action within this dependency. CP 23, 26. The father's counsel, thus, properly

conceded that the father was not competent because this issue had already been addressed by the juvenile court. RP 4. The father did not appeal any of the orders entered in the dependency proceeding, including the order finding him incompetent and appointing his guardian ad litem.

The court subsequently substituted the Pecks, as guardians, for the guardian ad litem as a legal party to the case when the Pecks resumed their active involvement with the father. CP 32, CP 37. The father did not appeal this order either.

The father has continuously been appointed a guardian since 2010, because he was incompetent to understand the nature and effect of these legal proceedings. The juvenile court's actions were consistent with the prior criminal court's actions in 2009, in which the father was also found legally incompetent. As a result of this incompetency finding, the criminal charges brought against him were dismissed in 2009. CP 47, Ex. 5. Finally, the father has been a ward in a Title 11 guardianship as to both his person and his estate for the past 12 years. RP 36. Ms. Peck makes all of the father's medical decisions as a result of this guardianship, because he is unable to make them himself. RP 36.

In sum, the father was found incompetent and appointed a guardian ad litem for purposes of the underlying dependency proceeding, a decision that was renewed for purposes of the termination. Neither decision was

appealed. These decisions were consistent with similar findings under RCW 11.88, and in the father's criminal case. Substantial evidence supports the trial court's findings that the father was not capable of relinquishing his parental rights because of his incompetency. CP 72, Finding XVI.

The father appears to argue that the issue of competency should have been re-litigated during the actual termination trial. *See* Br. of Appellant at 22. However, the issue was previously litigated by the parties in 2010, with the juvenile court finding the father to be incompetent and appointing a guardian ad litem to protect the father's rights. *See* Ex. 6, RP 4. Competency concerns the ability, or inability, of a person to comprehend the nature and effect of a legal action in general. *Adoption of Hernandez*, 25 Wn. App. at 454. The father did not appeal this 2010 decision. There also was no evidence indicating that the father regained his competency during the intervening two years of this dependency action either. Instead, as the trial court found here, the father appears frozen in terms of his abilities. Finding IX, CP 71.

Furthermore, the interests of justice were served when the court determined the father's competency at a separate preliminary hearing, prior to conducting a fact finding hearing on issues such as a dependency or a termination. In a termination trial, for example, the court must determine whether a parent is fit to care for a child or is likely to be fit

within the child's near future. *See* RCW 13.34.180, RCW 13.34.190. Competency, however, concerns whether a person possesses sufficient mind or reason to enable the person to comprehend the nature and effect of a legal action. *Adoption of Hernandez*, 25 Wn. App. at 454. These are separate and distinct determinations with differing elements that must be established.

There is a significant potential for prejudice to a vulnerable parent if competency is addressed as part of the same substantive hearing concerning parental unfitness. *See, e.g., Helvey v. Illinois*, 86 Ill.App.3d 154, 408 N.E.2d 17 (1980). In *Helvey*, the trial court terminated the incompetent person's parental rights based on the person's incompetency, not based on the issue of parental unfitness under the Illinois termination statute. *Id.* 408 N.E.2d at 157. On appeal, the *Helvey* court reversed the trial court's rulings as a result of the prejudice that had occurred. *Id.*

In this case, however, the juvenile court properly addressed the father's competency separately and distinctly from the substantive fact finding proceedings involving the dependency and the termination. Ex 6, RP 4. The *Helvey* decision also gives insight into the reason why a party may concede that the issue of competency had already been addressed, as the father's counsel did in this case. See RP 4. A contrary action would instead draw renewed attention to a settled matter in a trial concerning

separate and distinct legal issues. Thus, the trial court appropriately examined the father's competency in the context of the underlying dependency in a separate hearing. The trial judge did not err in accepting the father's counsel's agreement that this established competency ruling remained effective for purposes of the termination. The father remained incapable of comprehending the nature and effect of this legal action.

**C. Guardians Cannot Waive Substantive Rights of Incompetent Persons.**

Here, there was no evidence that the father himself wanted to relinquish his parental rights. Despite being present throughout the entire proceeding, RP 3, the father did not testify at the trial, nor did he utter any comments on the entire trial record. RP 1-52. There is no evidence to indicate that the father actually wanted to relinquish his parental rights, even if the court had found him competent to do so.

Instead, the record demonstrates that it was the *guardians* who wanted to relinquish the parental rights of their ward, the father. CP 47-48, RP 4. They are unable to do so because, in Washington, a third party representative cannot waive the substantial rights of an incompetent person.

The Washington Supreme Court has held that an attorney has no authority to waive any substantial rights of a client. *Quesnell v. State*. 83,

Wn.2d 224, 238-39, 517 P.2d 568 (1973). A guardian ad litem is no more permitted to waive a substantial right of an incompetent person than an attorney for a competent client. *In re Houts*, 7 Wn. App. 476, 482, 499 P.2d 1276 (1972). Furthermore, the trial court has the duty to protect the rights of incompetent litigants. *Vo. v. Pham*, 81 Wn. App. 781, 785, 916 P.2d 462 (1996).

The father's counsel correctly informed the court of the controlling law. CP 47-48, RP 4. As a result, the court properly declined to permit the Pecks to relinquish the parental rights of the father, the incompetent parent whom they had a duty to advocate for and to protect. The trial court did not err in its ruling that a termination trial was required by law.

**D. The Court's Order Terminating the Father's Parental Rights Did Not Violate the Equal Protection Clause.**

The father next contends that the adoption and termination statutes violate equal protection. Brief of App. at 23. He alleges that the trial court violated equal protection when it did not allow him to relinquish his parental rights, which, he argues, also foreclosed his ability under Washington statute to participate in an open adoption agreement under RCW 26.33.295. *Id.* at 23-26.

Assuming the father actually did want to relinquish his parental rights, the trial court's decision to proceed with a termination trial, rather

than to allow an incompetent parent to relinquish, does not violate equal protection claim for two reasons. First, the trial court's decision does not trigger strict scrutiny review because a) as discussed above, the fundamental right to parent does not include the right to relinquish those parental rights and b) mental incompetency is not a suspect classification. Second, even if evaluated under strict scrutiny, the trial court's ruling did not violate the father's equal protection rights by requiring a termination trial in this case because doing so was narrowly tailored to forward the state's compelling interest in protecting the rights of incompetent persons.

The father focuses on the statutory restriction that a parent whose rights have been terminated cannot participate in an open adoption agreement, RCW 26.33.295. But whether that statutory distinction—between parents who have relinquished and parents whose rights have been terminated—survives equal protection review as applied is not properly before this court.

The Court reviews the constitutionality of a statute *de novo*. *In re Dependency of K.R.*, 128 Wn.2d 129, 142, 904 P.2d 1132 (1995). Statutes are presumed to be constitutional. *Id.* The challenging party bears the burden of proving otherwise beyond a reasonable doubt. *In re Dependency of C.B.*, 79 Wn. App. 686, 689, 904 P.2d 1171 (1995), *review denied*, 128 Wn.2d 1023 (1996). The father is unable to meet this burden.

Equal protection requires that people similarly situated receive similar treatment under the law. *State v. Schaaf*, 109 Wn.2d 1, 17, 743 P.2d 240 (1987). Courts apply one of three tests to determine if a statute violates equal protection: strict scrutiny, intermediate scrutiny, or rational basis review. *State v. Harner*, 153 Wn.2d 228, 235-36, 103 P.3d 738 (2004). The proper standard for determining whether state action violates equal protection depends upon the nature of the classifications or rights at issue. *State v. Haq*, 166 Wn. App. 221, 253, 268 P.3d 997 (2012).

Strict scrutiny review applies to state action that targets suspect classifications, such as race or alienage, or that burdens fundamental rights. *Id.* Intermediate scrutiny applies only if a statute implicates both an important right and a semi-suspect class. *State v. Hirschfelder*, 170 Wn.2d 536, 550, 242 P.3d 876, 883 (2010). If state action does not trigger strict or intermediate scrutiny then courts apply rational basis review. *Id.*

Rational basis review, also called minimal scrutiny, requires a court to uphold a legislative classification “unless the classification rests on grounds wholly irrelevant to the achievement of legitimate state objectives.” *State v. Harner*, 153 Wn.2d 228, 235-36, 103 P.3d 738 (2004). By contrast, a court applying strict scrutiny will only uphold a statute if it is narrowly tailored to a compelling state interest. *Madison v.*

*State*, 161 Wn.2d 85, 99, 163 P.3d 757 (2007). The father does not argue that this court should apply intermediate scrutiny.

Where there is no suspect classification or fundamental right, rational basis review is appropriate. *Philippides v. Bernard*, 151 Wn.2d 376, 391, 88 P.3d 939 (2004). There is no fundamental right to relinquish one's parental rights. *See supra part A*. Moreover, the State Supreme Court has already concluded that mental incompetency is not a suspect classification. *Foundation for the Handicapped v. Dept. of Social and Health Services*, 97 Wn.2d 691, 696, 648 P.2d 884 (1982) (holding that distinguishing based on legal incompetency "does not amount to a suspect classification"). Thus, only rational basis review can be applied to the father's equal protection argument, and there is a clear rational basis for advancing a legitimate state interest, the protection of an incompetent parent's rights. It is rational to protect those rights by requiring the Department to prove the necessary elements for termination at trial.

The father's argument, however, fails under any standard of review. Even if the court were to apply strict scrutiny, the trial court's actions here were narrowly tailored to achieve the state's compelling interest in protecting the fundamental rights of a mentally incompetent parent. *See, e.g., Madison v. State*, 161 Wn.2d 85, 99, 163 P.3d 757 (2007) (articulating the strict scrutiny test). The trial court refused to

allow the guardians of a mentally incompetent person to relinquish his fundamental right to parent his child, and instead proceeded to a termination trial where the state had to prove all of the elements supporting termination. Far from infringing on a fundamental right, the trial court's actions protected the father's affirmative right to parent his child. The trial court correctly concluded that the father could not relinquish his right to parent because he could not understand the meaning of such an agreement. In fact, the father could not even comprehend the nature and legal effect of this legal action, as a result of his incompetency. The court also correctly concluded that the guardians could not relinquish these same rights on behalf of the father. *Houts*, 7 Wn. App. at 481.

The law carefully guards the fundamental rights of mentally incompetent persons involved in legal proceedings. For example, in criminal law, a defendant's competency is "fundamental to the adversary system of justice." *Drope v. Missouri*, 420 U.S. 162, 172, 95 S.Ct. 896 (1975). Convicting a mentally incompetent person of a crime violates that person's Fourteenth Amendment guarantee of due process. *Id.*; *In re Fleming*, 142 Wn.2d 853, 862, 16 P.3d 610 (2001). Due process also prohibits mentally incompetent persons from entering into plea agreements because a guilty plea waives three constitutional rights: the privilege against compulsory self-incrimination, the right to jury trial, and

the right to confront one's accusers. *Fleming*, 142 Wn.2d at 862; *Godinez v. Moran*, 509 U.S. 389, 397 n.7, 113 S.Ct. 2680, 125 L.Ed. 2d 321 (1993).

Washington law also protects the fundamental right of mentally incompetent individuals to parent. For example, Washington adoption law permits revoking a consent to adoption within one year of court approval “for lack of mental competency on the part of the person giving the consent at the time the consent was given.” RCW 26.33.160. Moreover, neither a mentally incompetent person's attorney nor the person's guardian ad litem may waive the mentally incompetent person's substantial rights, including the fundamental right to parent. *In re Houts*, 7 Wn. App. 476, 482, 499 P.2d 1276 (1972).

These protections recognize that the state has a compelling interest in protecting the fundamental rights of mentally incompetent persons, including their right to parent. *See, id.* at 482; *State v. Rotherham*, 122 N.M. 246, 262, 923 P.2d 1131 (1996) (concluding that the state has a compelling interest in protecting mentally incompetent persons deriving from the state's *parens patriae* powers to provide care to its citizens when necessary). The state has a compelling interest in protecting these parental rights because incompetent persons are a vulnerable population presenting

a “compelling case for legal protection.” *Tinkle v. Henderson*, 730 S.W.2d 163, 166 (Tex. App. 1987).

In this case, the juvenile court had previously found the father to be mentally incompetent in 2010 and appointed a guardian ad litem for the father. Ex. 6, RP 4. The court refused to allow the guardians to forfeit the father’s fundamental right to parent without the father possessing the capacity to make this decision. By doing this, the trial court exercised its “power to take action to provide for the needs of a mentally incompetent person,” furthering the state’s compelling interest in protecting the fundamental rights of mentally incompetent persons. *In the Matter of Hayes*, 93 Wn.2d 228, 233, 608 P.2d 635 (1980); *See also Henderson*, 730 S.W.2d at 166; *Rotherham*, 122 N.M. at 262.

The trial court’s actions here were also narrowly tailored in this case. *See, e.g., Madison v. State*, 161 Wn.2d 85, 99, 163 P.3d 757 (2007) (articulating the narrow tailoring requirement in the strict scrutiny test). The trial court refused to allow the guardians to relinquish the father’s parental rights because he lacked the capacity to knowingly relinquish these rights. In other words, the trial court’s action related directly to the basis for treating competent and incompetent persons differently: the inability of incompetent persons to enter into valid legal agreements,

whether it is a contract, a criminal plea agreement, or a relinquishment of parental rights.

Instead of permitting the guardians to waive the father's fundamental right to parent, the trial court required the Department to prove the father's parental unfitness during a termination trial, with constitutionally sufficient procedural protections. See *In re Welfare of C.B.*, 134 Wn. App. 336, 346, 139 P.3d 1119 (2006) (holding that the statutory scheme governing terminating parental rights survives strict scrutiny and is thus constitutional). The trial court's actions were narrowly tailored to the state's compelling interest in protecting the fundamental rights of incompetent persons, and thus did not violate equal protection under any standard of review. The father has failed to show that what the trial court did in this case, namely to proceed to trial on termination, violated equal protection.

The father argues that ultimately the termination will result in the father's inability to enter into an open adoption agreement under RCW 26.33.295. But that issue is not properly before this court at this time. The trial court here did not enter an order denying a proposed open adoption agreement involving the father. Nor is there evidence in the record that the father wished to enter into an open adoption agreement. Nor does this record indicate whether the prospective adoptive parents

would agree to a specific written open adoption agreement with respect to the father. Nor is there any indication in the record whether the adoption court would conclude that such a specific written open adoption agreement with respect to the father would otherwise be in the child's best interest. *See* RCW 26.33.295(2).

This court has recognized that the state is not a party to agreements entered into under RCW 26.33.295, and such agreements do not constitute state action. *See In re Dependency of T.C.C.B.*, 138 Wn. App. 791, 800, 158 P.3d 1251 (2007). The agreement is between the adoptive parent(s) and the birth parent(s), and then is approved by the adoption court if it finds the agreement is in the child's best interest. *Id.*; RCW 26.33.295. To warrant application of the equal protection clause, the treatment or classification at issue in an equal protection claim must be the result of state action or significant state involvement. *In re Dependency of T.C.C.B.*, 138 Wn. App. at 800 (citing *Kennebec, Inc. v. Bank of the West*, 88 Wn.2d 718, 565 P.2d 812 (1977)).

While the father may be able to show sufficient state involvement if a trial court were to decline to approve his participation in an open adoption agreement in the future, no court has yet done so here. Nor has the father shown that reversing the termination of his parental rights will result in the outcome he seeks, given the multiple other variables that need

to occur for there to be a legally enforceable open adoption agreement. *See, e.g., Bouckaert v. Bd. of Land Comm'rs*, 84 Wash. 356, 359-60, 146 P. 848 (1915) (courts should decline to redress speculative injury). As a result, this court need not address whether RCW 26.33.295's restrictions are constitutional as applied because they have not been applied in this case, nor is it at all certain that they ever would be applied.

In sum, the decision that the court made here—to terminate the father's parental rights after a full trial—did not violate equal protection. Any speculation about whether a specific written open adoption agreement involving the father might be presented to the adoption court, and whether the adoption court would enter an order in accordance with such an agreement, is not properly before this court.

## VI. CONCLUSION

The fundamental right to parent does not include the right to relinquish all parental rights. The juvenile court determined the father to be incompetent in 2010, and appointed a guardian ad litem for the father. There was no appeal from this order. There is no evidence that the father wanted to relinquish his parental rights, even if he were competent to do so. The trial court properly declined to permit the guardians to waive the father's fundamental right to parent by relinquishing those parental rights. The trial

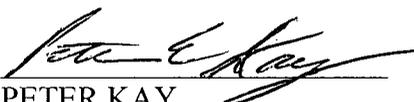
court's decision to proceed to a termination trial protected the father's fundamental right to parent his daughter.

Furthermore, the father was afforded equal protection under the law. Substantial evidence supports the trial courts findings in this case. The trial court's order terminating the father's parental right should be affirmed.

RESPECTFULLY SUBMITTED this 14<sup>th</sup> day of August, 2013.

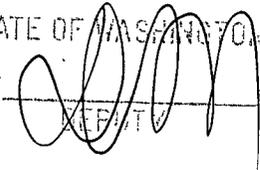
ROBERT FERGUSON  
Attorney General

  
STEPHANIE WHITE  
RULE 9 INTERN

  
PETER KAY  
Assistant Attorney General  
WSBA# 24331

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STATE OF WASHINGTON  
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NO. 44649-9-II

**COURT OF APPEALS FOR DIVISION II  
STATE OF WASHINGTON**

In Re the Welfare of

H.Q.,

Minor Child.

CERTIFICATE  
OF SERVICE

I, MICHELLE D. DAVIS, declare under penalty of perjury under the laws of the state of Washington that the following is true and correct:

On August 14, 2013, I caused a true and correct copy of the Respondent's Brief to be served as indicated below:

Original via Hand Delivery: Washington State Court of Appeals  
Division Two  
950 Broadway, Suite 300  
Tacoma, WA 98402-4454

Copy via US Mail: Maureen M. Cyr  
Attorney at Law  
1511 Third Ave Suite # 701  
Seattle, WA 98101

SIGNED in Tacoma, Washington, this 14th day of August, 2013.

A handwritten signature in cursive script that reads "Michelle D. Davis". The signature is written in black ink and is positioned above a horizontal line.

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MICHELLE D. DAVIS  
Legal Assistant to  
PETER E. KAY  
Assistant Attorney General  
PO Box 2317  
1250 Pacific Avenue, Suite # 105  
Tacoma, WA 98401  
(253) 593-5243