

No. 79440-5

THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE THE DEPENDENCY OF:

H.S.
(A minor child)
Respondent.

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COURT OF APPEALS DIV #1
STATE OF WASHINGTON
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ANSWER TO MOTION FOR DISCRETIONARY REVIEW

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A. IDENTITY OF RESPONDENT

Respondent, H.S., a minor child, asks the Court to deny discretionary review of the Court of Appeals opinion in this case.

B. DECISION BELOW

H.S.'s parents filed a dependency petition, which H.S. subsequently joined, alleging H.S. was dependent pursuant to RCW 13.34.030 due to his substantial mental health needs and his parents' present inability to meet those needs. The trial court granted the State's motion to dismiss pursuant to CR 43(b)(3) concluding as a matter of law H.S. was not dependent because (1) his parents were presently meeting his needs by reason of having placed him in a residential treatment facility; and (2) despite the threat of impending bankruptcy the family had sufficient assets which could be liquidated to continue paying for such treatment for several more months.

The Court of Appeals concluded the trial court erred in dismissing the dependency petition. The court found the evidence in the light most favorable to the nonmoving party established as a matter of law H.S. was dependent, specifically that H.S. had substantial mental health needs and his parents were unable to meet these needs. The Court of Appeals concluded the trial court

wrongly considered the parent's ability to liquidate their few remaining assets as proof of their ability to meet H.S.'s needs. Thus, the Court remanded the matter for a full hearing on the dependency petition.

Contrary to the State's representations in its Motion for Discretionary Review (MDR) the Court of Appeals did not hold that a finding of dependency could be made in the absence of a finding of present parental unfitness.

C. ISSUES PRESENTED

1. Pursuant to RCW 13.34.030(5)(c) a child is dependent where he "has no parent . . . capable of adequately caring ... such that child is in circumstances which constitutes a danger of substantial danger to child's psychological development." Where in the light most favorable to the nonmoving party the evidence established H.S. had serious mental health issues which his parents were unable to presently meet and that failure posed a danger to H.S., did the Court of Appeals correctly reverse the trial court's ruling granting a motion to dismiss pursuant to CR 43?

2. RCW 13.34.040(1) permits "any person" to file a dependency petition. Where a parent files a dependency petition and the evidence in the light most favorable to the parent

establishes the child is dependent, but the trial court nonetheless grants a motion to dismiss, does a Court of Appeals decision reversing the trial court and remanding the matter for a full hearing on the dependency petition create any issue of substantial public interest warranting review?

3. Where the State urged the Court of Appeals to apply a particular standard of review, and the court correctly applies that very standard of review, can the State now claim to this Court that the Court of Appeals applied the wrong standard of review?

D. SUMMARY OF CASE

Appellant H.S. is the 6' 1", 240 pound, 15 year-old son of Stephen and Margaret S. RP 9, 145, 156. The S.'s also have a daughter and a son, ages 9 and 5, respectively, at the time of the fact-finding hearing. RP 9.

In early 2003, H.S. began having physical and emotional problems, including night rages. RP 10. H.S. displayed significant signs of depression, including telling his parents that life was not worth living. RP 10, 13. It was later revealed that around this time, H.S. had engaged in self-mutilation, unbeknownst to his parents. RP 12. The S.'s sought psychiatric help and H.S. was put on medication, but his problems worsened. RP 11-12.

H.S. was hospitalized in May 2003, as he had suicidal thoughts and reported he heard voices. RP 12. H.S. was diagnosed with severe depression. RP 13. Upon his release, his parents were advised to lock up any dangerous items in their home, including medications and to reduce the stimuli around the house. RP 13. Nevertheless, H.S.'s mental health again deteriorated and he was rehospitalized in June 2003. RP 14.

When H.S. was in the family home between hospitalizations, the S.'s followed the treatment recommendations of those who had worked with him during his hospitalizations, as well as his therapist. RP 14, 109. This required they adjust their lives to revolve around H.S.'s needs, his medications, and his irregular sleep patterns. RP 15. The S.'s were forced to keep their younger children away from H.S. and sent them upstairs to shield them from H.S.'s rages. RP 15, 169. H.S. dictated the amount of light in the house, as well as the foods he and the family ate. RP 176. H.S. was verbally aggressive with his parents, and the voices he heard worsened, more frequently telling him to kill himself. RP 15. H.S. also threatened his siblings. RP 171. This required the S.'s never leave H.S. alone. RP 16. Ms. S. essentially stopped sleeping, so she could watch her son. RP 16, 171. Despite these efforts,

medications, and therapy, H.S.'s condition continued to deteriorate, resulting in his admission for another psychiatric hospitalization in September 2003. RP 18-19.

After this hospitalization, H.S.'s parents again tried to attend to his needs, both medical and physical, but again H.S.'s condition neither stabilized nor improved at home. RP 24-25. In January 2004, the S.'s sent H.S. to a residential care facility in Idaho. RP 24.

In March 2004, the S.'s five year-old son revealed that H.S. had exposed himself to the child. RP 25. H.S.'s treatment providers confronted him with this information and he acknowledged his actions. RP 25.

In May 2004, H.S. was moved to a facility in Utah for behavioral therapy in order to stabilize H.S. before he returned home. RP 26. During the course of H.S.'s treatment, his parents actively participated in weekly family therapy sessions by telephone and visited him approximately every six weeks. RP 27.

In January 2005, H.S. was found in a sexual encounter with a peer at his treatment facility. RP 30. H.S. revealed he had had sexual relations with a number of his peers at the facility. RP 30. The treatment providers concluded H.S. exhibited sexually

predatory behavior, including grooming. RP 31. Because the facility was not licensed to house sexually aggressive youth, H.S. was required to leave. RP 31. H.S. was moved to another facility in Utah, capable of treating sexually aggressive youths, where he remained at the time of the fact-finding hearing. RP 31, 145.

The professionals who worked with H.S. advised the S.'s it was not safe for H.S. to return home. RP 31-33. Moreover, Mr. S. believed he and his wife were unable to provide the constant monitoring by professionals to deal with his dangerous and destructive behavior if he returned home. RP 32. This view was reinforced by experience, as H.S.'s condition had repeatedly deteriorated at home. RP 33.

Ms. S. was the primary caretaker for the children and she was unable to attend to H.S.'s physical or emotional needs. RP 37, 77, 182. Mr. S., a professional musician, testified that he could not care for H.S. at home because he worked more than 40 hours per week outside the home. RP 33, 57-60, 84, 185; CP 8.

At one point during the course of his treatment, H.S. claimed that he had never heard voices and there had been no hallucinations. RP 65. These revelations did not comfort the S.'s, but made them more concerned about H.S. as he had fooled them

and so many treatment providers about the voices and hallucinations. RP 67, 71, 181. If there had never been hallucinations or voices, the S.'s wanted to know why H.S. created them, and whether this new information could pose a danger to the family if he returned home. RP 67.

In January 2005, the S.'s contacted the Department of Social and Health Services (DSHS) for assistance. RP 35. DSHS offered only the possibility of a door alarm and respite care if H.S. returned to the S.'s home. RP 36, 73.

In June 2005, the S.'s filed a dependency petition under RCW 13.34.040(1), stating they could not provide for H.S.'s continuing residential treatment or his mental or physical safety if he was returned to their home. CP 27-29. A fact-finding hearing occurred in September 2005. RP 1-211. H.S. joined his parents in the dependency petition. RP 94-95. After the S.'s and H.S. presented their case, the State moved to dismiss the dependency petition. RP 193. The court granted the motion to dismiss, finding H.S. had not been abandoned, nor did the evidence show he had no parent capable of adequately caring for him so as to present a danger of substantial damage to his physical or psychological development. RP 202-04; CP 11.

H.S. timely appealed the court's order dismissing the dependency petition. CP 3-5.

E. ARGUMENT

THE OPINION OF THE COURT OF APPEALS IS
CONSISTENT WITH THIS COURT'S OPINIONS
AND DOES NOT PRESENT ANY ISSUE OF
SUBSTANTIAL PUBLIC INTEREST WARRANTING
REVIEW

Importantly the question before the Court of Appeals was not whether H.S. is or is not dependent, but rather whether the trial court erred in dismissing H.S.'s parents' dependency petition as a matter of law pursuant to CR 43. The Court of Appeals concluded the trial court's legal conclusions were in error and thus simply reversed the CR 43 ruling, remanded the matter for reinstatement of the dependency petition, and to permit the trial court to conduct a full hearing on that petition. As such, It remains a distinct possibility that on remand the trial court, applying the correct legal standard, could once again determine H.S. is not dependent. Therefore, in determining whether to grant review, this Court must keep in mind that none of what the State alleges in its motion may come to pass.

Because of the interlocutory nature of this appeal even assuming the State's claimed conflicts and policy implication might be present, a point H.S. does not concede, they are in this case

merely theoretical. Thus, the State has not shown that review is warranted under any provision of RAP 13.4.

RCW 13.34.030(5)(c) provides a child is dependent where he “has no parent . . . capable of adequately caring . . . such that child is in circumstances which constitutes a danger of substantial danger to child’s psychological development.” Because this is an appeal of CR 43 ruling dismissing the petition, and because the trial court made its ruling as a matter of law, the question is whether the evidence in the light most favorable to H.S. allowed the trial court reach the legal conclusion it did. The Court of Appeals opinion that the trial court erred as a matter of law is consistent with and required by RCW 13.34.030(5)(c) and the caselaw interpreting. The Court of Appeals decision does not create any questions of public interest which have not already been addressed by the Legislature, and which remain within the Legislature’s prerogative to revisit at any point in the future.

The Court of Appeals found that in viewing the evidence in the light most favorable to H.S., his parents were unable to adequately care for H.S. in their Home. Opinion at 6. The Court concluded “[r]eading the evidence in the light most favorable to H.S., H.S.’s psychological problems were so acute that he had to

be placed in a residential treatment facility in order to keep him out of danger to from harming himself and others.” Opinion at 7.

Thus, reading the evidence in the light most favorable to the H.S., within two weeks of the hearing he was to be released from the residential care facility to be delivered into the care of his parents **who were unable to adequately meet his acute psychological needs.**

(Emphasis added) Opinion at 10. In sum the Court found H.S.’s substantial mental health needs, if unmet, posed a grave danger to him and others, and that he had no parent capable of meeting those needs. This is not inconsistent RCW 13.34.030(5), or any case interpreting that statute.

Faced with this reality the State’s motion seeks to create conflict where none exists. The State acknowledges this “the opinion . . . justifies dependency by pointing out H.S.’s serious mental health problems, **and the inability of his parents to meet his needs in the home.**” MDR at 10. Yet in the very next sentence the State simply ignores what is has just acknowledged, saying “this conflicts with statutes and case law holding that dependency may not be established based solely on the fact that H.S. suffered from serious mental illness.” But of course this ignores not only the preceding sentence of the State’s motion but

the actual conclusion of the court that “his parents . . . were unable to adequately meet his acute psychological needs. Opinion at 10.

In fact, the State does not disagree that H.S. requires substantial services to meet his needs. Further, the State seemingly acknowledges that such services are not as a practical matter readily available to those who cannot pay for them. MDR at 16. Yet, equating these inadequacies in meeting the mental health needs of a child with bureaucratic delays regarding water rights, the State offers

The decision to channel those children who have severe mental illness but **adequate** parents through the mental health system instead of a dependency proceeding is a function of legislative design which must be respected.

(Emphasis added.) MDR at 16-17

No matter how many time the State says otherwise, a parent is by definition not “adequate” if they cannot meet their child’s needs. If H.S. requires substantial mental health treatment which his parents cannot presently provide him, and that failure to provide for those needs poses a danger to H.S., H.S. is by definition dependent and his parents are by definition not “adequate”. RCW 13.34.030(5). This is not changed merely by the fact that the State repeatedly utters its mantra that the parents are “adequate” or “fit.”

At bottom the DSHS's argument seems to be that children are not dependent unless DSHS says they are.

The Legislature, however, has provided a definition of dependent child which does not require the DSHS's preapproval. RCW 13.34.030. And the Legislature has permitted any person not just DSHS to initiate a dependency action. RCW 13.34.040 In finding that the evidence in the light most favorable to H.S. and his parents established that H.S. was dependent, and in concluding that as a matter of law the trial court wrongly granted the motion to dismiss, the Court of Appeals simply examined the evidence within the context of RCW 13.34.030, and reached the conclusion that statute requires. While the Court of Appeals opinion may conflict with DSHS's view of the law should be, the opinion does not conflict with what the law is.

That conclusion in no way creates the parade of horrors which the State offers in its motion. MDR at 13 ("it is a small step from the decision . . .to parents ceding custody of their children based on inadequate health insurance. . . .") If these theoretical ominous circumstances will flow from such a straightforward application of the statute, the fault lies in the statute itself not in the Court's opinion. Thus, the supposed public policy woe which the

State now identifies and hopes to avoid should be addressed to the Legislature rather than this Court.

It bears repeating that because this case arises from a CR 43 ruling dismissing the case, the opinion does not require finding of dependency in H.S.'s case nor any other. Rather the opinion only requires that this matter be returned for a full hearing on the dependency petition.

Finally, the State's motion faults the Court of Appeals for applying the wrong standard of proof. But the Court of Appeals applied precisely the standard of review urged on it by the State. Brief of Respondent at 16. The State there contended "it is evident that the court ruled as a matter of law because it refused to assess the weight of evidence presented." *Id.* Yet now, the State reverses course and contends "the trial court however weighed the evidence and credibility of witnesses and made factual findings based on that evidence." MDR at 17. In further contradiction of its prior claim the State now asserts "the trial court did in fact weigh the evidence . . ." MDR at 17-18.

The doctrine of invited error precludes a party from complaining on appeal that a lower court "acceded to its request." In re the Personal Restraint Petition of Tortorelli, 149 Wn.2d 82, 94,

66 P.3d 606 (2003). Having argued to the Court of Appeals that the trial court's ruling was made as a matter of law, thus triggering de novo review, the State cannot now claim the court was wrong to do what the State asked of it.

F. CONCLUSION

For the reasons above, this Court should deny the State's Motion for Discretionary Review.

Respectfully submitted this 13th day of November, 2006.



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