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No. 79440-5

THE SUPREME COURT OF THE STATE OF WASHINGTON

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IN RE THE DEPENDENCY OF:

H.S.
(A minor child)
Respondent.

SUPPLEMENTAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

A. SUMMARY OF ARGUMENT 1

B ISSUE PRESENTED 2

C. SUMMARY OF CASE 2

D. ARGUMENT 3

1. THE COURT OF APPEALS PROPERLY CONDUCTED DE NOVO REVIEW OF THE CR 41 RULING 3

a. CR 41 allows a trial court to makes its ruling either as a matter of law or as a matter of fact 3

b. Because the trial court ruled as a matter of law the Court of Appeals properly reviewed the ruling de novo 4

2. THE COURT OF APPEALS PROPERLY FOUND THAT IN LIGHT MOST FAVORABLE TO THE PARENTS A REASONABLE TRIER OF FACT COULD FIND H.S. WAS DEPENDENT 7

3. CONCLUDING THAT A REASONABLE TRIER OF FACT COULD FIND H.S. DEPENDENT IN THIS CASE PRESENTS NO CONFLICT WITH EXISTING LAW NOR DOES IT CREATE ANY POLICY PROBLEMS 12

E. CONCLUSION 19

TABLE OF AUTHORITIES

Washington Supreme Court

Carrick v. Locke, 125 Wn.2d 129, 882 P.2d 173 (1994) 17

Cherry v. Municipality of Metro. Seattle, 116 Wn.2d 794, 808 P.2d 746 (1991) 15

N. Fiorito Co. v. Washington, 69 Wn.2d 616, 419 P.2d 586 (1966) 4, 6

State v. Chester, 133 Wn.2d 15, 940 P.2d 1374 (1997) 15

State v. Moreno, 147 Wn.2d. 500, 58 P.3d 265 (2002) 17

Zylstra v. Piva, 85 Wn.2d 743, 539 P.2d 823 (1975) 17

Washington Court of Appeals

In re the Dependency of H.S., 135 Wn.App. 223, 144 P.3d 353 (2006) 7

McLanahan v. Farmers Insurance Co., 66 Wn.App. 36. 831 P.2d 160, review denied, 120 Wn.2d 1006 (1992) 3

Nelson Construction Co. v. Port of Bremerton, 20 Wn.App. 321, 582 P.2d 511 (1978) 4

Seattle-First Nat'l Bank v. Hawk, 17 Wn.App. 251, 253, 562 P.2d 260 (1977) 4

State v. Osloond, 60 Wn.App. 584, 805 P.2d 263, review denied, 116 Wn.2d 1030 (1991) 17

United States Supreme Court

Meyer v. Nebraska, 262 U.S. 390, 67 L.Ed. 1042, 43 S.Ct. 625 (1923) 11

Santosky v. Kramer, 455 U.S. 745, 71 L.Ed.2d 599, 102 S.Ct. 1388 (1982) 11

Statutes

RCW 13.34.030 ..... passim

RCW 13.34.040 ..... 2, 13, 16

RCW 13.34.110 ..... 13, 14, 15, 16

Court Rules

CR 41 ..... 1, 2, 3, 12

Other Authorities

4 L. Orland, Washington Practice, Rules Practice (3d ed. 1983) 3

K. Tegland, Washington Practice, Rules Practice, (5th ed. 2006) 3

A. SUMMARY OF ARGUMENT

Respondent, H.S.'s parents (hereafter "the parents"), filed a dependency petition pursuant to RCW 13.34.030. The dependency petition, which H.S. subsequently joined, alleged H.S. was dependent pursuant to RCW 13.34.030(5)(c) 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 41(b)(3) concluding as a matter of law that in the light most favorable to the parents the evidence did not establish H.S. was dependent.

H.S. contends the Court of Appeals properly reversed the trial court's CR 41 ruling and remanded the matter for a full hearing on the dependency petition. The Court of Appeals properly found the evidence in the light most favorable to the parents established as a matter of law H.S. was dependent, specifically that H.S. had substantial mental health needs and his parents were presently unable to meet those needs. The Court of Appeals properly 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 of Appeals held nothing more than

that a finding of dependency could be made in the where there is evidence sufficient to establish a finding of present parental unfitness. H.S. further contends the opinion of the Court of Appeals does not violate any statutory or constitutional directive

B ISSUE PRESENTED

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 damage to child's psychological development." The statute does not require a petitioner establish the child's family is impoverished. RCW 13.34.040(1) permits "any person" to file a dependency petition and does not required DSHS's agreement to a finding of dependency. 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 41?

C. SUMMARY OF CASE

A statement of facts is contained in H.S.'s Answer and is not repeated here.

D. ARGUMENT

1. THE COURT OF APPEALS PROPERLY CONDUCTED DE NOVO REVIEW OF THE CR 41 RULING

DSHS argues the Court of Appeals applied the wrong standard of review in this matter because, DSHS contends, the trial court in granting the CR 41 motion weighed the evidence and entered findings. Because the record plainly establishes the trial court did not weigh the evidence, did not enter findings, and instead ruled as a matter of law, the Court of Appeals correctly reviewed the record de novo.

a. CR 41 allows a trial court to makes its ruling either as a matter of law or as a matter of fact. CR 41(b)(3) allows

> The trial court [to] pass upon a motion to dismiss at the close of plaintiff's case and grant the motion as a matter of law or fact. The trial court need not enter findings of fact if it decides as a matter of law that plaintiff has not made out a case.

McLanahan v. Farmers Insurance Co., 66 Wn.App. 36, 39. 831 P.2d 160, review denied, 120 Wn.2d 1006 (1992) (quoting 4 L. Orland, Washington Practice, Rules Practice § 5502, at 243-44 (3d ed. 1983)).[1] In ruling as a matter of fact, the court as fact finder weighs the plaintiff's evidence and enters its findings and

[1] Accord, K. Tegland, Washington Practice, Rules Practice, at 54-55 (5th ed. 2006).

conclusions accordingly. Seattle-First Nat'l Bank v. Hawk, 17 Wn.App. 251, 253, 562 P.2d 260 (1977). If, however, the court elects to rule as a matter of law, the court views the evidence in the light most favorable to the plaintiff and determines if it establishes a prima facie case. Id.

The appropriate standard of review is dictated by which alternative the court followed. If the trial court ruled as a matter of fact, then a reviewing court must ask whether the findings are supported by substantial evidence and if the findings then support the conclusions. Nelson Construction Co. v. Port of Bremerton, 20 Wn.App. 321, 327, 582 P.2d 511 (1978). Where, however, the court rules as a matter of law, appellate review is de novo taking the evidence in the light most favorable to the plaintiff. N. Fiorito Co. v. Washington, 69 Wn.2d 616, 619-20, 419 P.2d 586 (1966).

b. Because the trial court ruled as a matter of law the Court of Appeals properly reviewed the ruling de novo. Generally, the entry of findings is a strong indication that the court weighed the evidence and made a decision as the trier of facts. See, N. Fiorito Co, 69 Wn.2d at 619. While the trial court was presented with proposed findings in this case, it is clear the court did not enter Findings of Facts. Instead, the court entered an order in which the

trial court lined out every use of the term "finding of fact" or any inference that the order constituted findings. For instance the court lined out the term in the caption of the document. CP 6. The order further provides:

> ~~The court being fully advised makes the following;~~
> Viewed pursuant to the applicable legal standard, relevant ~~facts~~ are testimony and evidence is:
> ~~1. Findings of Fact~~

CP 10. The court lined out numerous proposed findings. CP 7-10. Ultimately the court's conclusions of law provide:

> ~~1.22~~ 1. *Even when viewing all the evidence in a light most favorable to the parents and considering it as being true*, there is no basis for a rational trier of fact to concluded [H.S.] has been abandoned under RCW 13.34.030(5)(a). The evidence is that he has not been abandoned. The parents [sic] testimony was inconsistent with a finding of intent to abandon.
>
> ~~1.23~~ 2. *Even when viewing all of the evidence in a light most favorable to the parents and considering it to be true*, there is no basis for a rational trier of fact to conclude [H.S.] has no parent capable of adequately caring for him, such that he is in circumstances which constitute a danger of substantial damage to his psychological or physical development under RCW 13.34.030(5)(C). The evidence is that the father as the necessary ability and capacity and [H.S.] is perfectly safe.

(Italics added) CP 11. The Conclusions of Law entered by the trial court reveal that the trial court ruled as a matter of law.

If there is any remaining ambiguity it is quickly resolved by a review of the oral record. The court stated:

> At this stage of the proceeding , the standard is accepting the truth of the testimony proffered by the petitioners; is there any evidence from which a rational trier of fact would conclude by a preponderance that the statutory requirements for a finding that [H.S.] is dependent have been met.

RP 201-02. Finally at the time the proposed findings were entered the court stated

> Okay I've seen the proposals. What I'm going to do is enter orders today utilizing the proposal submitted by the prevailing party, but it has numerous alterations. . . . In the case caption, I am crossing off the term "findings of facts" [sic] since we don't make findings of fact on a ruling under this court rule."

RP 207.[2]

The trial court plainly did not enter findings of facts, and was careful to avoid even the suggestion that it was ruling on the facts. Because the trial court made its ruling as a matter of law, the Court of Appeals properly applied a de novo standard of review. N. Fiorito Co., 69 Wn.2d at 619-20.[3]

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[2] Implicit in the trial court's ruling seems to be a misunderstanding that it was required to rule as a matter of law as opposed to a matter of fact. While such a view, if indeed held by the trial court, would be incorrect, the fact remains that regardless of it reason for doing so the court ruled as a matter of law

[3] As argued in H.S.' Answer, DSHS invited any error when it urged the Court of Appeals to review the trial court's ruling de novo, because, as DSHS contended "it is evident that the court ruled as a matter of law because it refused

2. THE COURT OF APPEALS PROPERLY FOUND THAT IN LIGHT MOST FAVORABLE TO THE PARENTS A REASONABLE TRIER OF FACT COULD FIND H.S. WAS DEPENDENT

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 concluding that a rational trier of fact could not find H.S. dependent even assuming the truth of the parents' evidence and viewing it in its best light.

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. In re the Dependency of H.S., 135 Wn.App. 223, 230, 144 P.3d 353 (2006). 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." Id.

The court continued that the evidence established [H.S.'s mother's] own mental health issues prevented her from adequately meeting H.S.'s developmental needs. Id. at 231. Further the evidence established [H.S.'s father] as the family's sole provider

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to assess the weight of evidence presented." Court of Appeals Brief of Respondent at 16

could not be present to monitor H.S. and meet his substantial needs. Id. Thus, the Court of Appeals concluded

> . . . 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.

135 Wn.App at 232.

The Court of Appeals's view of the facts is supported by the evidence viewed in the light most favorable to the parents. H.S.'s mother testified she was unable to attend to H.S.'s physical or emotional needs. RP 37, 77, 182. H.S.'s father testified that he could not provide the care and supervision H.S. required at home because as the family's sole provider he worked more than 40 hours per week outside the home. RP 33, 57-60, 84, 185. Even the trial court's order concluded the evidence established as much. See CP 10.

DSHS does not contend that the evidence in the light most favorable to the parents does not set forth a prima facie case of dependency. Instead, DSHS, contrary to the record and its own prior position, argues that the trial court weighed the evidence and entered findings. Thus, DSHS argues a reviewing court need not examine the evidence in the light most favorable to the parents. As

such, DSHS merely highlights evidence that suggests the parents could care for H.S.. See MDR 17-20. Certainly there might be evidence that would support a contrary conclusion, but as argued above, that is not the standard of review to be employed.

In sum, both the trial court and Court of Appeals 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. While the Court of Appeals concluded these facts would allow a rational trier of fact to find H.S. dependent under RCW 13.34.030(5), the trial court concluded it would not. The basis for this difference in outcome, is the trial court's legal conclusion that so long as H.S's parents had the financial resources to cause H.S. to be cared for by someone else, their inability to care for him could not establish dependency as a matter of law. See RP 38 (In response to parents' objection to the relevance of questions regarding the parents financial resources the Court stated "No, the issue is whether he has a parent who can, cause him to be cared for.").

Even DSHS conceded the parents' financial ability to care for H.S. is irrelevant to the legal question. Court of Appeals Brief of

Respondent at 21.[4] Yet DSHS has consistently failed to recognize that it is the trial court that made the parents' financial abilities the linchpin of its decision. If financial ability is irrelevant then DSHS must concede the trial court's ruling was erroneous.

But its argument suggests DSHS does not truly believe that finances are irrelevant, as despite its concession below, DSHS contends the dependency statutes "have never been interpreted as a tool for functioning parents to . . . protect the family from financial hardship." MDR at 7. Further, despite its concession, DSHS argued to the Court of Appeals that H.S. could not be dependent so long as his parents had the resources to cause him to be cared for. See, Court of Appeals Brief of Respondent at 17-18. At bottom, DSHS's argument, like the trial court's ruling, hinges on the belief that financial destitution is a prerequisite to a finding of dependency no matter how grave the child's needs or the parents' complete inability to meet them. There is no poverty requirement in RCW 13.34.030(5) nor any other statute.

Indeed to make poverty a prerequisite for dependency, which is primarily involuntary with respect to the parents, holds

[4] Despite its concession of the irrelevance of the parents financial abilities DSHS attached voluminous financial records as appendices to its brief to the Court of Appeals.

impoverished parents to a standard to which affluent parents, no matter how inadequate, will never be held. The dependency process entails a substantial impact on personal liberties of parents. Santosky v. Kramer, 455 U.S. 745, 753, 71 L.Ed.2d 599, 102 S.Ct. 1388 (1982); Meyer v. Nebraska, 262 U.S. 390, 399, 67 L.Ed. 1042, 43 S.Ct. 625 (1923). To hinge such an invasion of liberty on financial means seems patently unconstitutional. The constitutional infirmities of DSHS's proposed means test likely explains the absence of any such requirement within the dependency code.

The State's motion acknowledges "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. Indeed the opinion does, and it does so consistent with RCW 13.34.030(5). Assuming the truth of the parents' evidence and viewing it in the light most favorable to them, as a matter of law a reasonable trier of fact could have concluded H.S. was dependent.

3. CONCLUDING THAT A REASONABLE TRIER OF FACT COULD FIND H.S. DEPENDENT IN THIS CASE PRESENTS NO CONFLICT WITH EXISTING LAW NOR DOES IT CREATE ANY POLICY PROBLEMS

Aside from its desire to impose a poverty threshold to a finding of dependency, DSHS's argument seems to rest on the alternative footing that DSHS retains the ability to veto a finding of dependency. MDR at 14 (DSHS claims that where it is not the petitioner DSHS's agreement is required to any order requiring it to provide services following a finding of dependency). DSHS claims that by failing to recognize this claimed authority, the opinion creates privately enforceable rights to services. MDR at 13-14. DSHS continues that the opinion improperly requires it provide services beyond its mandate. MDR at 14

First, because the opinion merely reversed the trial court's CR 41 ruling, it does not require a finding of dependency much less detail which services must be provided. It is entirely possible that upon remand and upon hearing DSHS's evidence the trial court could conclude H.S. is not dependent. Thus, nothing in the opinion entitles H.S. or any other child to a single service provided by DSHS.

Second, DSHS's claim of veto power over the provision of services following a finding of dependency rests on incredibly expansive reading of RCW 13.34.110(2), is contrary to the provisions of RCW 13.34.040, and runs afoul of the Separation of Powers doctrine of the state and federal constitutions.

DSHS rests its claim on the last sentence of RCW 13.34.110(2)(a).[5] But by its very language this subsection is limited

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[5] RCW 13.34.110 provides in relevant part:

(1) The court shall hold a fact-finding hearing on the petition and, unless the court dismisses the petition, shall make written findings of fact, stating the reasons therefor. The rules of evidence shall apply at the fact-finding hearing and the parent, guardian, or legal custodian of the child shall have all of the rights provided in RCW 13.34.090(1). The petitioner shall have the burden of establishing by a preponderance of the evidence that the child is dependent within the meaning of RCW 13.34.030.

(2)(a) The parent, guardian, or legal custodian of the child may waive his or her right to a fact-finding hearing by stipulating or agreeing to the entry of an order of dependency establishing that the child is dependent within the meaning of RCW 13.34.030. The parent, guardian, or legal custodian may also stipulate or agree to an order of disposition pursuant to RCW 13.34.130 at the same time. Any stipulated or agreed order of dependency or disposition must be signed by the parent, guardian, or legal custodian and his or her attorney, unless the parent, guardian, or legal custodian has waived his or her right to an attorney in open court, and by the petitioner and the attorney, guardian ad litem, or court-appointed special advocate for the child, if any. If the department of social and health services is not the petitioner and is required by the order to supervise the placement of the child or provide services to any party, the department must also agree to and sign the order.

(b) Entry of any stipulated or agreed order of dependency or disposition is subject to approval by the court. The court shall receive and review a social study before entering a stipulated or agreed order and shall consider whether the order is consistent with the allegations of the dependency petition and the problems that necessitated the child's placement in out-of-home care. No social file or social study may be considered by the court in connection with the fact-finding hearing or prior to factual determination, except as otherwise

to stipulated or agreed dependencies. RCW 13.34.110(2)(a) provides:

> The parent, guardian, or legal custodian of the child may waive his or her right to a fact-finding hearing by stipulating or agreeing to the entry of an order of dependency establishing that the child is dependent within the meaning of RCW 13.34.030. The parent, guardian, or legal custodian may also stipulate or agree to an order of disposition pursuant to RCW 13.34.130 at the same time. Any stipulated or agreed order of dependency or disposition must be signed by the parent, guardian, or legal custodian and his or her attorney, unless the parent, guardian, or legal custodian has waived his or her right to an attorney in open court, and by the petitioner and the attorney, guardian ad litem, or court-appointed special advocate for the child, if any. If the department of

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admissible under the rules of evidence.

(c) Prior to the entry of any stipulated or agreed order of dependency, the parent, guardian, or legal custodian of the child and his or her attorney must appear before the court and the court within available resources must inquire and establish on the record that:

(i) The parent, guardian, or legal custodian understands the terms of the order or orders he or she has signed, including his or her responsibility to participate in remedial services as provided in any disposition order;

(ii) The parent, guardian, or legal custodian understands that entry of the order starts a process that could result in the filing of a petition to terminate his or her relationship with the child within the time frames required by state and federal law if he or she fails to comply with the terms of the dependency or disposition orders or fails to substantially remedy the problems that necessitated the child's placement in out-of-home care;

(iii) The parent, guardian, or legal custodian understands that the entry of the stipulated or agreed order of dependency is an admission that the child is dependent within the meaning of RCW 13.34.030 and shall have the same legal effect as a finding by the court that the child is dependent by at least a preponderance of the evidence, and that the parent, guardian, or legal custodian shall not have the right in any subsequent proceeding for termination of parental rights or dependency guardianship pursuant to this chapter or nonparental custody pursuant to chapter 26.10 RCW to challenge or dispute the fact that the child was found to be dependent; and

(iv) The parent, guardian, or legal custodian knowingly and willingly stipulated and agreed to and signed the order or orders, without duress, and without misrepresentation or fraud by any other party . . . .

> social and health services is not the petitioner and is required by the order to supervise the placement of the child or provide services to any party, the department must also agree to and sign the order.

Where a statute is unambiguous, its meaning must be taken from its plain language. State v. Chester, 133 Wn.2d 15, 21, 940 P.2d 1374 (1997) (citing Cherry v. Municipality of Metro. Seattle, 116 Wn.2d 794, 799, 808 P.2d 746 (1991)). The approval requirement exists only within the portion of the statute pertaining to stipulated or agreed dependencies. RCW 13.34.110(1), by contrast, addresses the procedural requirements of a dependency fact-finding hearing and does not include a requirement of DSHS's approval

The requirement that DSHS approve services makes tremendous sense in cases of agreed or stipulated dependency where DSHS is not the petitioner. The requirement ensures that private parties cannot by their private agreement create a legal obligation on the part of the state to provide something to them. Moreover, it ensures that any services agreed upon or stipulated to are actually available. In that context, the requirement serves to address DSHS's fear that services will become a privately enforceable entitlement. Additionally, the requirement of DSHS

approval along with the requirement of the court approval found in RCW 13.34.110(2)(b) ensures a child is truly dependent, thus addressing DSHS's fear of wholesale relinquishments of parental rights.

However, where there is a fact-finding, the trial court has made the requisite finding of dependency and in light of that finding is in a position to order the necessary services. In that scenario, DSHS will have had an opportunity, at the fact-finding and subsequent disposition hearings to be heard on both the issue of dependency as well as the services to be provided. The trial court can then determine what services are necessary.

DSHS's contention that it alone controls when a finding of dependency can be entered or what services it will provide following that finding is contrary to RCW 13.34.040 which specifically allows any party to file and prosecute a dependency petition, and does not first require DSHS approval. Additionally, the Legislature has provided a definition of a dependent child which does not hinge upon DSHS's agreement. RCW 13.34.030.

To allow DSHS to in essence veto the judicial findings of dependency and necessity of services is contrary to the Separation of Powers Doctrine.

> One of the fundamental principles of the American constitutional system is that the governmental powers are divided among three departments--the legislative, the executive, and the judicial--and that each is separate from the other.

Carrick v. Locke, 125 Wn.2d 129, 134-35, 882 P.2d 173 (1994). (citing State v. Osloond, 60 Wn.App. 584, 587, 805 P.2d 263, review denied, 116 Wn.2d 1030 (1991)). The fundamental principle of the separation of powers is that each branch wields only the power it is given. State v. Moreno, 147 Wn.2d. 500, 505, 58 P.3d 265 (2002). Thus, courts have announced the following test for determining whether an action violates the separation of power:

> The question to be asked is not whether two branches of government engage in coinciding activities, but rather whether the activity of one branch threatens the independence or integrity or invades the prerogatives of another.

Carrick, 125 Wn.2d at 135 (quoting Zylstra v. Piva, 85 Wn.2d 743, 750, 539 P.2d 823 (1975)).

If DSHS's contention is correct, its ability to in essence veto a finding of dependency undercuts the independence and integrity of the judiciary. Moreover, it undercuts the legislative directive that any party can petition for a finding of dependency.

In finding that the evidence in the light most favorable to H.S. and his parents established that H.S. was dependent, and in

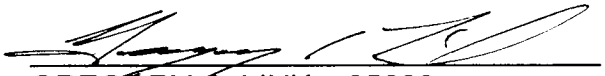
concluding that as a matter of law the trial court wrongly granted the motion to dismiss, the Court of Appeals simply examined the evidence within the context of RCW 13.34.030, and reached the conclusion that statute requires. The Court of Appeals plainly did not allow a finding of dependency in the absence of parental unfitness, (See MDR at 10-13), although it did allow for a finding of dependency where DSHS does not believe there is parental unfitness. As DSHS agreement is not a requirement for a finding of dependency there is no legal or policy flaw in the Court of Appeals's opinion.

The Court of Appeals opinion may conflict with DSHS's view of the law should be, but it does not conflict with what the law is. Assuming on remand and after a full fact-finding hearing H.S. is indeed found dependent within the meaning of RCW 13.34.030(5), the requirement that DSHS provide services would in no way be beyond its mandate and would not create a private entitlement to services.

E. CONCLUSION

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

Respectfully submitted this 16th day of March, 2007.



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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE H.S. A MINOR CHILD H.S., APPELLANT, v. DSHS - STATE OF WASHINGTON, RESPONDENT.	)))))))))))	NO. 79440-5

DECLARATION OF SERVICE

I, MARIA RILEY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 16TH DAY OF MARCH, 2007, I CAUSED A TRUE AND CORRECT COPY OF THE **APPELLANT'S OPENING BRIEF** TO BE SERVED ON THE PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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STATE OF WASHINGTON
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SIGNED IN SEATTLE, WASHINGTON, THIS 16TH DAY OF MARCH, 1007.

X_____