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NO. 79440-5

SUPREME COURT OF THE STATE OF WASHINGTON

IN RE THE DEPENDENCY OF:

H.S.,

A minor child.

SUPPLEMENTAL BRIEF OF DSHS

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ORIGINAL

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	STATEMENT OF THE CASE	2
III.	ARGUMENT	5
	A. The Purpose And Focus Of Washington’s Dependency Statute Is The Protection Of Children From Harm By Their Parents.	5
	B. The Legislature Intended RCW 13.34.030(5)(c) To Require Proof That The Child’s Parent Is Unfit Or Has A Parenting Deficiency That Puts the Child At Risk Of Harm.	8
	1. A Child’s Disability or Mental Illness, Alone, Cannot Justify A Finding of Dependency.	10
	2. Poverty Or Financial Insecurity Of The Family Cannot, On Its Own, Justify Finding Of Dependency.	12
	C. The Constitution Requires That Parents Be Unfit Or Otherwise Deficient In Parenting Skills Before The State Takes Custody Of A Child.....	13
	D. H.S. Is Not A Dependent Child Under RCW 13.34.030(5)(c).	14
	E. Washington Has a Comprehensive Mental Health System for Minors, Which the Schermers Chose Not to Utilize.....	16
	F. The Legislature Did Not Intend The Dependency Statute To Create Privately Enforceable Rights to Services.....	21
IV.	CONCLUSION	23
V.	APPENDIX	24

TABLE OF AUTHORITIES

Cases

<i>Camer v. Seattle School Dist. No. 1</i> , 52 Wn. App. 531, 762 P.2d 356 (1988).....	21
<i>City of Ellensburg v. State of Washington</i> , 118 Wn.2d 709, 826 P.2d 1081 (1991).....	21
<i>Cort v. Ash</i> , 422 U.S. 66, 95 S. Ct. 2080, 45 L. Ed. 2d 26 (1975).....	21
<i>Gongyin v. Dep't of Lab. & Indus.</i> , 154 Wn.2d 38, 109 P.3d 816 (2005).....	8
<i>Hillis v. Dep't of Ecology</i> , 131 Wn.2d 373, 932 P.2d 139 (1997).....	20
<i>In re Custody of Smith</i> , 137 Wn.2d. 1, 969 P.2d 21 (1998), <i>aff'd sub nom. Troxel v. Granville</i> , 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000).....	13
<i>In re Dependency of J.C.</i> , 130 Wn.2d 418, 924 P.2d 21 (1996).....	11
<i>In re Dependency of K.R.</i> , 128 Wn.2d 129, 904 P.2d 1132 (1995).....	11
<i>In re Dependency of T.J.B.</i> , 115 Wn. App. 182, 62 P.3d 891 (2002).....	11, 13
<i>In re Frank</i> , 41 Wn.2d 294, 248 P.2d 553 (1952).....	10
<i>In re Henderson</i> , 29 Wn. App. 748, 630 P.2d 944 (1981).....	7

<i>In re Hudson,</i> 13 Wn.2d 673, 126 P.2d 756 (1942).....	10, 13
<i>In re Mead,</i> 113 Wash. 504, 194 P. 807 (1920)	13
<i>In re Neff,</i> 20 Wash. 652, 56 P. 383 (1899)	13
<i>In re the Dependency of H.S.,</i> 135 Wn. App. 223, 144 P.3d 353 (2006).....	passim
<i>In re the Dependency of J.W.H.,</i> 147 Wn.2d 687, 57 P.3d 266 (2002).....	16
<i>In re the Welfare of Sumey,</i> 94 Wn.2d 757, 621 P.2d 108 (1980).....	6
<i>In re Walker,</i> 43 Wn.2d 710, 263 P.2d 21 (1953).....	13
<i>In re Warren,</i> 40 Wn.2d 342, 243 P.2d 632 (1952).....	12, 15
<i>In re Welfare of Baby Boy May,</i> 14 Wn. App. 765, 545 P.2d 25 (1976).....	13
<i>In re Welfare of J.H.,</i> 75 Wn. App. 887, 880 P.2d 1030 (1994).....	22
<i>In re Welfare of Key,</i> 119 Wn.2d 600, 839 P.2d 200 (1992).....	10, 11
<i>Lovell v. House of the Good Shepherd,</i> 9 Wash. 419, 37 P. 660 (1894)	13
<i>M.W. v. Dep't of Soc. & Health Svcs.,</i> 149 Wn.2d 589, 70 P.3d 954 (2003).....	6
<i>Pannell v. Thompson,</i> 91 Wn.2d 591, 589 P.2d 1235 (1979).....	21

<i>Quadrant Corp. v. Growth Mgmt. Hearings Bd.</i> , 154 Wn.2d 224, 110 P.3d 1132 (2005).....	8
<i>Santosky v. Kramer</i> , 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982).....	14
<i>Woodson v. State</i> , 95 Wn.2d 257, 623 P.2d 683 (1980).....	9, 14

Statutes

RCW 13.34	1, 5
RCW 13.34.020	6, 9
RCW 13.34.030(4)(d)	10
RCW 13.34.030(5)(a),(b), and (c)	6
RCW 13.34.030(5)(c)	passim
RCW 13.34.050(c)	23
RCW 13.34.110(2).....	22
RCW 13.34.110(2)(c)(ii)	6
RCW 13.34.130	7
RCW 13.34.130(1)(b)	7
RCW 13.34.138	7
RCW 13.34.138(1)(a)	7
RCW 13.34.138(1)(c)	7
RCW 13.34.145(1)(c)	7
RCW 13.34.180	6

RCW 13.34.350	22
RCW 26.44	6, 12
RCW 26.44.010	9
RCW 26.44.015	10
RCW 26.44.015(3).....	10
RCW 26.44.020(15).....	5, 12, 15
RCW 26.44.195(6).....	22
RCW 34.05.510	17
RCW 71.24.015(1).....	17
RCW 71.24.035(5).....	17
RCW 71.34.600	18
RCW 74.13.045	22
RCW 74.13.350	11
RCW 74.34	17

Other Authorities

Adria N. Bullock, <i>The Sacrifice Wrought By a Costly and Fragmented Mental Health Care System: Parents Forced To Relinquish Custody To Obtain Care For Their Children</i> , 24 DENV. MENTAL HEALTH L. 17 (2005)	19
Elizabeth A. Varney, <i>Trading Custody for Care: Why Parents Are Forced to Choose Between the Two and Why the Government Must Support the Keeping Families Together Act</i> , 39 NEW ENG. L. REV. 755, (2004-05).....	19, 20
Keeping Families Together Act, H.R. 823, 109 th Cong. § 2 (2005).....	19

Laws of 1997, ch. 132 § 1.....	12
Marvin Ventrell, <i>The History of Child Welfare Law, in CHILD WELFARE LAW AND PRACTICE: REPRESENTING CHILDREN, PARENTS, AND STATE AGENCIES IN ABUSE, NEGLECT, AND DEPENDENCY CASES</i> 114 (Marvin Ventrell and Donald N. Duquette eds. 2005)	5
U.S. Gen. Accounting Office, Report to Congressional Requesters, <i>Child Welfare and Juvenile Justice: Federal Agencies Could Play a Stronger Role in Helping States Reduce the Number of Children Placed Solely to Obtain Mental Health Services</i> (GAO 03-397, April 21, 2003).....	19
WAC 388-25-0020(6).....	21
WAC 388-865-0229(3).....	17
WAC 388-865-0230.....	17
WAC 388-865-0255(16).....	17

Rules

CR 41(b)(3).....	4
JuCR 3.8(e)	7

I. INTRODUCTION

The issue in this appeal is whether fit parents may use this state's juvenile dependency law, RCW 13.34, to commit a child to the custody of the state for the purpose of obtaining medical or mental health treatment at state expense in order to protect the parents from financial hardship.

The court of appeals interpreted our state's dependency law to authorize a finding of dependency under just such circumstances. *In re the Dependency of H.S.*, 135 Wn. App. 223, 144 P.3d 353 (2006). The decision is a substantial departure from established law, which has consistently required a finding that a child has been maltreated or that the parent is unfit, before the state may intervene into the life of a family. This requirement inheres both in the legislative intent underlying the statute and the fundamental constitutional principles upon which the statute rests.

Moreover, the decision is a departure from long standing law that has refused to recognize the dependency statute as creating a privately enforceable right to services. Fit parents have never been permitted to use the dependency statute to relinquish custody of their children solely to obtain services at public expense. Nor is there a need for such drastic

measures in Washington, which provides a wide array of programs and services for children, including children with mental health needs.¹

The court of appeals decision threatens the integrity of all families with mentally ill or special needs children, and has serious, unintended consequences for a system designed to protect and care for abused, neglected and abandoned children, as well as for parents and children involved in dependency proceedings.

II. STATEMENT OF THE CASE²

H.S., the subject of this dependency action and the respondent in this appeal, is 16 years old. He is the oldest of three children of Stephen and Margaret Schermer. H.S.'s siblings, ages nine and five, live with their parents. RP 12-13. H.S. has not lived with his family since he was 13.

Through no fault of his parents, H.S. has struggled with mental health and behavioral problems since his early teens. RP 14. In the three years before trial, his parents arranged care for H.S. in residential treatment facilities. At the time of trial, he was living in a residential treatment facility in Utah. His parents paid for his care with private insurance and out-of-pocket payments. Although Washington provides treatment and service options for mentally ill youth, the Schermers chose

¹ The parents in this case knew of these additional services, but refused to use them.

² In addition to specific cites to the record below, this Statement of Facts is supported by the comprehensive order entered by the trial court. Appendix A.

to send H.S. out of state for treatment, saying they were “terrified” of Washington’s mental health system and feared the waiting list was too long. RP 143, 218.

The parents own a home worth approximately \$400,000 as well as shares of Microsoft and Southern Bell stock. Both parents are educated and musically talented. RP 52, 213. Mr. Schermer works full time as a professional musician, holding a tenured faculty position at the University of Puget Sound, and he performs under contract on a regular basis. RP 52.

Although Mrs. Schermer previously worked when the family lived in Boston, the parents decided that she would stay at home to raise the children. RP 96-97. When H.S. had difficulty in public school, she used the Seattle Public School's home schooling network and successfully home schooled H.S. for a year, bringing him up to grade level. RP 211. She has actively parented her younger children. RP 212-13. There are no concerns about the Schermers’ parenting abilities and the younger children are doing well. RP 212, 213, 214.

Paying for H.S.’s out of state care strained the family’s financial security. On June 30, 2005, the parents filed a dependency petition alleging that H.S. was dependent as defined by RCW 13.34.030(5)(c). In substance, their petition alleged that his needs were too great to allow him to return home and they could no longer afford to pay for his residential

care. CP 27–30. At trial, both parents expressed on-going love and commitment for H.S., but neither believed that H.S. should return home. They did not feel they could continue paying for his care in Utah and feared they might have to declare bankruptcy. RP 39, 48. The father believed that if H.S. was declared dependent, the state would pay at least a portion of his care. RP 106.

Following presentation of the parents' evidence in support of their dependency petition, the trial court dismissed the action pursuant to CR 41(b)(3), finding no current parental unfitness or present inability on the part of the parents to exercise the duties of a parent. The trial court found that the parents had financial resources to keep H.S. in his current placement for at least another six months and that their decisions regarding H.S.'s care were appropriate and motivated by a desire to help him and address family stressors. Appendix A.

The parents did not appeal the trial court's ruling. However, H.S., through his court appointed attorney, appealed the dismissal, arguing that his parents' financial inability to continue paying for his care and their inability to have him return home qualified him as dependent within the meaning of the statute. The court of appeals reversed the trial court, concluding that the family's proffered evidence established a prima facie case for dependency because the father's full time employment prevented

H.S. from returning home, and the parents' inability to continue paying the cost of residential care created a 'clear and present' danger to H.S. *In re H.S.*, 135 Wn. App. at 233. The Department's petition for review was granted by this Court on January 30, 2007.

III. ARGUMENT

This Court should reverse the court of appeals and hold that this state's dependency statute requires that before a child can be found dependent, the juvenile court must determine that the child has been abandoned, neglected or abused, or that his parents are unfit to provide for the child's basic needs and the parents' deficiencies create a danger of substantial damage to the child's psychological or physical development.

A. **The Purpose And Focus Of Washington's Dependency Statute Is The Protection Of Children From Harm By Their Parents.**

Washington's dependency and termination statute sets out a comprehensive legal process for protecting children who are abandoned or who are victims of maltreatment.³ RCW 13.34. The paramount concern

³ RCW 26.44.020(15) (“[n]egligent treatment or maltreatment’ means an act or a failure to act, or the cumulative effects of a pattern of conduct, behavior, or inaction, that evidences a serious disregard of consequences of such magnitude as to constitute a clear and present danger to a child’s health, welfare or safety”). Generally, child maltreatment encompasses physical abuse, sexual abuse, neglect and emotional abuse. “These categories make up the jurisdiction of the modern juvenile dependency court.” Marvin Ventrell, *The History of Child Welfare Law*, in CHILD WELFARE LAW AND PRACTICE: REPRESENTING CHILDREN, PARENTS, AND STATE AGENCIES IN ABUSE, NEGLECT, AND DEPENDENCY CASES 114 (Marvin Ventrell and Donald N. Duquette eds. 2005).

of a dependency proceeding is the child's safety and well being. RCW 13.34.020. Additionally, the legislature has declared that families "should remain intact unless a child's right to conditions of basic nurture, health, or safety is jeopardized." RCW 13.34.020; *see also, M.W. v. Dep't of Soc. & Health Svcs.*, 149 Wn.2d 589, 599, 70 P.3d 954 (2003). The definition of "dependent child" reflects the legislative intent to promote the safety of the child when the child is at risk of harm from the parent or guardian.

Under Washington law, a "dependent child" is one who:

- (a) Has been abandoned;
- (b) Is abused or neglected as defined in chapter 26.44 RCW by a person legally responsible for the care of the child; or
- (c) Has no parent, guardian, or custodian capable of adequately caring for the child, such that the child is in circumstances which constitute a danger of substantial damage to the child's psychological or physical development.

RCW 13.34.030(5)(a),(b), and (c).⁴

A finding of dependency has serious consequences for parents and for children. The ultimate result of the process could be the termination of parental rights. *See* RCW 13.34.110(2)(c)(ii); RCW 13.34.180; *In re the Welfare of Sumey*, 94 Wn.2d 757, 763, 621 P.2d 108 (1980). When dependency is established, the child is made a ward of the court, and if the

⁴ Although it is only subsection (c) that is at issue in this case, the consequences of the dependency action are the same, regardless of the basis for the dependency finding.

child is placed in foster care, legal custody of the child is transferred to the Department or other supervising agency. JuCR 3.8(e); *In re Henderson*, 29 Wn. App. 748, 750, 630 P.2d 944 (1981). The parent no longer has the right to determine the child's welfare, placement, education, or the scope and nature of medical treatment. RCW 13.34.130(1)(b).

The statute presupposes that the danger to the child in the home is the result of a parent's deficiencies. Accordingly, parents of dependent children are offered services to help them correct the problems that resulted in the child's removal from the home. RCW 13.34.130 and RCW 13.34.138. The child may be returned home only when the parenting deficiencies have been corrected. RCW 13.34.138(1)(a). Parents are given only limited time to remedy their deficiencies. If the child is not returned home within 15 months, the juvenile court may order that the Department file a petition to terminate parental rights. RCW 13.34.138(1)(c); RCW 13.34.145(1)(c).

Thus, the dependent child is one who has suffered maltreatment or whose parent is unfit and has put the child at risk of harm, and the purpose of the dependency proceeding is to protect the child and assist the parents in overcoming their parental deficiencies.

B. The Legislature Intended RCW 13.34.030(5)(c) To Require Proof That The Child's Parent Is Unfit Or Has A Parenting Deficiency That Puts the Child At Risk Of Harm.

RCW 13.34.030(5)(c) defines a dependent child as one who:

Has no parent, guardian, or custodian capable of adequately caring for the child, such that the child is in circumstances which constitute a danger of substantial damage to the child's psychological or physical development.⁵

This statute requires proof of two interdependent circumstances.

The first is that the child has no parent who is "capable of adequately caring for the child." The second is that the parent's inability to adequately care for the child creates a substantial danger to the child's physical or psychological development. The question posed by this appeal concerns the meaning of this statute as it relates to fit parents.

The primary goal of statutory interpretation is to ascertain and give effect to the legislature's intent and purpose. *Gongyin v. Dep't of Lab. & Indus.*, 154 Wn.2d 38, 44, 109 P.3d 816 (2005). In determining the legislature's intent the Court looks to the statute as a whole, harmonizing its provisions by reading them in context with each other, as well as with related statutes. *Quadrant Corp. v. Growth Mgmt. Hearings Bd.*, 154 Wn.2d 224, 238-39, 110 P.3d 1132 (2005); *Gongyin*, 154 Wn.2d at 45. Case law also may be relevant in determining legislative intent as the

⁵ Prior to 1987, the statute also permitted a finding of dependency when the parent was not "willing" to care for the child. The word "willing" was deleted from the statute in 1987. See Former RCW 13.34.030(4)(c); Laws of 1987, ch. 524 § 3.

Legislature is presumed to know the existing state of the case law in areas in which it is legislating. *Woodson v. State*, 95 Wn.2d 257, 262, 623 P.2d 683 (1980).

Washington's statutes relating to dependency and foster care provide a clear expression of legislative intent. The statutes recognize the rights of parents and families to be free from interference by the state – unless the child needs to be protected from harm by his or her parents. See RCW 13.34.020 (“the legislature declares that the family unit should remain intact unless a child's right to conditions of basic nurture, health, or safety is jeopardized”); RCW 26.44.010 (recognizing that any intervention into the life of a child is also an intervention into the life of the parent; however, in instances of nonaccidental injury, neglect, death, sexual abuse and cruelty to children by their parents and in the instance where a child is deprived of his right to conditions of minimal nurture, health, and safety, state intervention is justified).

Invoking the dependency statute, which is the most intrusive intervention into the life of a family, requires a finding that the parent is maltreating the child or is unable to meet the child's basic needs and, consequently, is putting the child at risk of serious physical or psychological harm.

1. A Child's Disability or Mental Illness, Alone, Cannot Justify A Finding of Dependency.

The existence of a disability or special needs in a child is not enough to warrant state interference into the family. RCW 26.44.015. A dependency may not be established under RCW 13.34.030(5)(c) based solely on the fact that a child suffers from a serious mental illness or disability. Similarly, parents are not considered abusive or neglectful simply because their child has special needs or is handicapped. RCW 26.44.015(3) ("No parent may be deemed abusive or neglectful solely by reason of the parent's or child's blindness, deafness, developmental disability, or other handicap."). This statute is consistent with case law. *In re Frank*, 41 Wn.2d 294, 296, 248 P.2d 553 (1952) (father's failure to correct child's speech impediment not sufficient to establish dependency); *In re Hudson*, 13 Wn.2d 673, 681-84, 126 P.2d 756 (1942) (parent's failure to obtain surgery for child's deformed arm is not sufficient for dependency).

For a short time, the dependency statute included disabled children within the definition of "dependent child." Former RCW 13.34.030(4)(d). In her dissent to *In re Welfare of Key*, 119 Wn.2d 600, 839 P.2d 200 (1992), which upheld this statutory definition, Justice Durham staunchly criticized the majority's conclusion that fit and caring parents could be

subjected to the stigma of a dependency solely to obtain funding to help defray the cost of caring for their developmentally disabled children.

[T]he test proposed by the majority is far too vague. It would allow dependency to be declared every time a child might benefit – whatever that means – from placement outside the home. This is a careless measurement which is destined for abuse. . . . It runs contrary to public policy to punish those parents who provide for a child's care by seeking the help of others.

Key, 119 Wn.2d at 618 (Durham, J., dissenting).

The legislature agreed with Justice Durham and removed subsection (d) from the statute in 1997. At the same time, the legislature created an entirely separate statutory scheme that permits voluntary placements of developmentally disabled children with the DSHS Division of Developmental Disabilities. RCW 74.13.350.

The other definitions of dependent child, existing both before and after the 1997 amendment, have always required and continue to require proof of parental unfitness. *See, e.g., In re Dependency of K.R.*, 128 Wn.2d 129, 142, 904 P.2d 1132 (1995); *In re Dependency of J.C.*, 130 Wn.2d 418, 428, 924 P.2d 21 (1996); *In re Dependency of T.J.B.*, 115 Wn. App. 182, 188, 62 P.3d 891 (2002).

2. Poverty Or Financial Insecurity Of The Family Cannot, On Its Own, Justify Finding Of Dependency.

RCW 26.44 and case law also clearly prohibit a finding of dependency based solely on economic circumstances of the family. *See* RCW 26.44; Laws of 1997, ch. 132 § 1 (uncodified legislative finding) (the family living situation due to economic circumstances in and of itself is not sufficient to justify a finding of child abuse, negligent treatment, or maltreatment); RCW 26.44.020(15) (neither poverty nor homelessness constitutes negligent treatment or maltreatment in and of itself).

This legislation also is consistent with this court's opinions. For example, in *In re Warren*, 40 Wn.2d 342, 243 P.2d 632 (1952), this Court held that poverty of a parent does not make children dependent. The Court recognized that destitute parents are as deserving of protection as wealthy parents:

the tendrils of parental affection entwine around the offspring of the poor with as much strength as they do around the children of the rich; if, indeed, with not greater strength by reason ordinarily of more intimate relationships and sacrifices that have to be made and which tend to strengthen mutual love and affection.

Warren, 40 Wn.2d at 345.

C. The Constitution Requires That Parents Be Unfit Or Otherwise Deficient In Parenting Skills Before The State Takes Custody Of A Child.

The right of parents to the custody of their children is a fundamental right which cannot be interfered with by the state unless the parents are proved unfit. *In re Hudson*, 13 Wn.2d at 684-85 (citing the common law of England as adopted by the territorial law of 1863). This has been the law of this state since the earliest of published cases. *Lovell v. House of the Good Shepherd*, 9 Wash. 419, 37 P. 660 (1894); *In re Neff*, 20 Wash. 652, 56 P. 383 (1899); *In re Mead*, 113 Wash. 504, 194 P. 807 (1920); *In re Walker*, 43 Wn.2d 710, 263 P.2d 21 (1953); *In re Welfare of Baby Boy May*, 14 Wn. App. 765, 545 P.2d 25 (1976); *In re Dependency of T.J.B.*, 115 Wn. App. 182, 62 P.3d 891 (2002).

Following this principle, both the United States Supreme Court and this Court have invalidated statutes that interfere with custody absent a showing of parental unfitness. *In re Custody of Smith*, 137 Wn.2d. 1, 969 P.2d 21 (1998), *aff'd sub nom. Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000). These cases have focused on the *parents'* behavior and its effect on the child. Whether the parent is abusive, neglectful, has abandoned the child or is otherwise deficient, the law requires proof of *parental* deficiencies that harm the child or create a risk of harm. *See Santosky v. Kramer*, 455 U.S. 745, 102 S. Ct. 1388, 71 L.

Ed. 2d 599 (1982). Absent parental unfitness, the state has no right to intervene into the family's affairs and remove custody of a child from a parent.

RCW 13.34.030(5)(c) must be interpreted in light of these constitutional principles, as a construction of the statute which makes it vulnerable to constitutional challenge is disfavored. *Woodson*, 95 Wn.2d at 261.

The legislative intent and the constitutional principles that serve as the basis for the dependency statute require a finding that the parent is unfit, before a child may be determined to be dependent and made a ward of the court.

D. H.S. Is Not A Dependent Child Under RCW 13.34.030(5)(c).

The court of appeals concluded that Mr. and Mrs. Schermer were not capable of adequately caring for their son because Mrs. Schermer's own mental health issues prevented her from adequately meeting H.S.'s needs, and even though Mr. Schermer was capable of meeting the child's needs, he could not be present often enough to do so, as he had to work. *In re H.S.*, 135 Wn. App. at 231. The only parental deficit identified by either the parents or the court of appeals was financial. *Id.* at 231-32.

The court of appeals then determined that because of financial problems, H.S. "was in danger of being released" from the facility where

his parents had placed him, and this put him in circumstances which constituted a clear and present danger. *Id.* at 232-33.

However, a parent is not unfit simply because he or she is employed full time or because the parent lacks financial resources. RCW 26.44.020(15); *In re Warren*, 40 Wn.2d at 345. The decision below cannot be reconciled with this fundamental principle. Indeed, the decision offers contradictory explanations on the significance of the parents' financial resources to the finding of dependency. The court initially found that the parents' financial resources were irrelevant to the issue of dependency and rejected the trial court's findings that the parents had the resources to continue paying for H.S.'s residential care. *In re H.S.*, 135 Wn. App. at 231-32. The court then justified dependency based on its own finding that the parents could not continue paying for the residential care they had arranged for H.S. without selling their home.⁶ *Id.* at 232.

If one parent's full time employment and status as the sole breadwinner were sufficient to establish dependency, all parents who must enlist the help of others in caring for their children while they work full time would be vulnerable to a dependency petition being filed. Nor is the

⁶ The Court of Appeals cited the Homestead Act for the proposition that the parents should not have to sell their home or become destitute paying for their children. 135 Wn. App. at 232. However, the \$40,000 homestead exemption does not apply in the case of a child support debt or for benefits paid by the state for medical benefits RCW 6.13.080(4), (5). Thus, establishing dependency would not protect the Schermer's home or their current standard of living.

mother's inability to care for H.S. without the help of her spouse legally sufficient for dependency, since this Court has held that for dependency to be based on the "no parent capable" definition in RCW 13.34.030(5)(c), *all* parents and legal custodians must be incapable of parenting. *In re the Dependency of J.W.H.*, 147 Wn.2d 687, 698, 57 P.3d 266 (2002). Since Mr. Schermer can care for H.S. in the home, but for his full-time employment, there is no legal basis for dependency.

The opinion justifies dependency by focusing on the first phrase of the "no parent capable" definition and pointing out H.S.'s serious mental health problems and his need for residential care. *In re H.S.*, 135 Wn. App. at 230. The decision ignores the second phrase of the definition – requiring proof that the parental incapacity actually harms or threatens harm to the child. RCW 13.34.030(5)(c). There was no evidence that the parents presented a risk of harm to H.S. or would damage H.S.'s "psychological or physical development." Therefore, H.S. fails to meet the statutory definition of "dependent child."

E. Washington Has a Comprehensive Mental Health System for Minors, Which the Schermers Chose Not to Utilize.

Mr. and Mrs. Schermer had an appropriate option for obtaining mental health treatment for H.S. Through Washington's comprehensive system for providing mental health services to minors, children who are

acutely mentally ill, severely emotionally disturbed, or seriously disturbed have access to a variety of mental health services. RCW 71.24.015(1), RCW 71.24.035(5), RCW 74.34 *et seq.*, WAC 388-865-0105(1), WAC 388-865-0230. Children who need long-term inpatient mental health care can obtain treatment through the Children's Long Term Inpatient Program (CLIP). WAC 388-865-0229(3). If they are denied these services, they have the right to an administrative hearing and judicial review. RCW 34.05.510; WAC 388-865-0255(16). Services offered through Washington's mental health system do not deprive parents of legal custody of their children and are available without regard to parental fitness.

The court of appeals described H.S.'s situation as "a train headed toward the end of the track", suggesting that an emergency existed and that a dependency proceeding was the family's only hope to obtain mental health treatment for H.S. 135 Wn. App. at 233. Neither the record nor the law supports the Court's conclusion because this family declined to pursue mental health treatment options that were available.

It is undisputed that the Schermers chose not to apply for a CLIP placement for H.S. or to otherwise seek publicly subsidized mental health services in Washington. The mother testified that she and her husband sent H.S. out of state for treatment instead of accessing the state's mental

health system because they were “terrified” of Washington’s system. RP 218. When specifically asked about pursuing a CLIP placement, the Nurse Practitioner who testified on behalf of the parents explained that they chose not to pursue a CLIP placement for H.S. in part because the parents felt the waiting list was too long. RP 143.

The court of appeals characterized H.S.’s psychological problems as being so acute that he required residential treatment to prevent him “from harming himself and others.” *In re H.S.*, 135 Wn. App. at 230. If true, H.S. would have qualified for a CLIP placement if he or his parents had chosen to apply. RCW 71.34.600.

While the parents clearly have the right *not* to seek help for their son through Washington’s mental health system, their decision to forego this option does not justify a creative interpretation of the dependency statute whereby they are allowed to relinquish custody and responsibility for H.S. to the state foster care system. Indeed, such a practice has received national criticism in recent years from child advocates, parent advocates and mental health professionals alike who deplore the notion that mentally ill children should be given up to the foster care system solely to receive mental health treatment. *See* U.S. Gen. Accounting Office, Report to Congressional Requesters, *Child Welfare and Juvenile Justice: Federal Agencies Could Play a Stronger Role in Helping States*

Reduce the Number of Children Placed Solely to Obtain Mental Health Services (GAO 03-397, April 21, 2003);⁷ Elizabeth A. Varney, *Trading Custody for Care: Why Parents Are Forced to Choose Between the Two and Why the Government Must Support the Keeping Families Together Act*, 39 NEW ENG. L. REV. 755, (2004-05); Adria N. Bullock, *The Sacrifice Wrought By a Costly and Fragmented Mental Health Care System: Parents Forced To Relinquish Custody To Obtain Care For Their Children*, 24 DENV. MENTAL HEALTH L. 17 (2005).

These scholars opine that the practice not only damages the parent-child relationship but is actually harmful to the mentally ill children themselves. They also criticize the practice because it results in children being placed in the child welfare system, which was never “designed to serve children who have not been abused or neglected.” GAO Report at 1.

This practice has also received Congressional attention in recent years, with legislation proposed specifically to “assist States in eliminating the practice of parents giving custody of their seriously emotionally disturbed children to State agencies for the purpose of securing mental health care for these children.” Keeping Families Together Act, H.R. 823, 109th Cong. § 2 (2005). While these scholars and legislators point to a lack of affordable mental health treatment as the reason why parents might

⁷ Available at <http://www.gao.gov/new.items/d03397.pdf>.

resort to such extraordinary measures, they unanimously suggest that the remedy for this problem come from the legislature, and they decry the practice of channeling mentally ill children into the foster care system as “unthinkable,” “barbaric” and “heartbreaking.” Varney, 39 NEW ENGLAND L. REV. at 758-59.

While lack of affordable mental health care may have been a motive of the Schermers in pursuing a dependency, and a reason the court of appeals found that action justified, the resolution of such problem is the province of the legislature. *Hillis v. Dep’t of Ecology*, 131 Wn.2d 373, 390, 932 P.2d 139 (1997) (court might find the waiting period for processing water rights applications intolerable, but it is even more intolerable for the judicial branch to invade the power of the legislative branch). A strained interpretation of the dependency statute will only result in additional “inappropriate” placements of mentally ill or special needs children in foster care.

Prior to this decision, no published dependency case sanctioned the use of a dependency proceeding solely to obtain mental health treatment for children. Consistent with the policy sentiments expressed in the articles cited above, the Department’s rules provide that children who have a mental illness serious enough that they are a danger to themselves

or others, should *not* be placed in the state's foster care system.
WAC 388-25-0020(6).

F. The Legislature Did Not Intend The Dependency Statute To Create Privately Enforceable Rights to Services.

The dependency statute does not create privately enforceable rights to services. The court of appeals implicitly recognized a private right of action under the dependency statute allowing parents to affirmatively seek state subsidized mental health services for their children. Such a right of action is contrary to settled law.

For a dependency action to be used as a mechanism to force the state to provide services, there must be a constitutional or statutory entitlement to such services. *Cort v. Ash*, 422 U.S. 66, 95 S. Ct. 2080, 45 L. Ed. 2d 26 (1975); *Camer v. Seattle School Dist. No. 1*, 52 Wn. App. 531, 762 P.2d 356 (1988). A court cannot order the provision of services by state agencies beyond the legislature's provisions, unless services are mandated by a constitutional provision. *City of Ellensburg v. State of Washington*, 118 Wn.2d 709, 715, 826 P.2d 1081 (1991) (quoting *Pannell v. Thompson*, 91 Wn.2d 591, 599, 589 P.2d 1235 (1979)). Both case law and the statutes indicate the legislature never intended dependency proceedings to be used for this purpose.

The court of appeals has previously held that the child welfare statutes do not provide privately enforceable rights to services in a dependency proceeding. *In re Welfare of J.H.*, 75 Wn. App. 887, 891, 880 P.2d 1030 (1994) (the child welfare statutes do not provide a privately enforceable right to housing assistance in a dependency proceeding). The legislature has also made it clear that the dependency statutes are not intended as a vehicle by which parents can affirmatively assert an entitlement to services by the state. RCW 13.34.110(2) provides that where the Department is not the petitioner, it must *agree* to any order requiring it to supervise placement or provide services to a dependent child. RCW 13.34.350 reinforces that concept by providing “[n]othing in this act shall be construed to create a private right of action against the Department on the part of any individual or organization.”

Other child welfare statutes evidence the same legislative intent. RCW 74.13.045 (nothing in section may be construed to create substantive or procedural rights in any person); RCW 26.44.195(6) (statute creates no entitlement to services or financial assistance in paying for services, and the court does not have the authority to order such services).

All of these statutory provisions expressing the clear legislative intent that the dependency statute may not be used claim an entitlement to services

would have to be ignored in order for the Court to affirm the court of appeals decision.

IV. CONCLUSION

For the reasons stated above, the Department respectfully requests that this Court reverse the Court of Appeals and hold that RCW 13.34.050(c) requires a showing of parental unfitness or serious parental deficiency that causes harm or a risk of harm to the child.

RESPECTFULLY SUBMITTED this 16th day of March 2007.

ROBERT M. MCKENNA
Attorney General



TRISHA L. McARDLE, WSNB 1637
CHRIS A. WILLIAMS, WSNB 34521
SHEILA M. HUBER, WSNB 8244

Attorneys for DSHS

Appendix A

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**SUPERIOR COURT OF WASHINGTON FOR SNOHOMISH COUNTY
JUVENILE DIVISION**

IN RE THE DEPENDENCY OF:

SCHERMER, Henry
D.O.B.: 02/07/1990

No. 05-7-00744-0

**FINDINGS OF FACT; CONCLUSIONS
OF LAW, AND ORDER OF DISMISSAL
ON PETITION FOR DEPENDENCY**

THIS MATTER came before the Honorable Stephen J. Dwyer on September 8, 2005, for a trial on the Petition for Dependency filed on June 30, 2005. The Department of Social and Health Services (the Department) appeared through James Kairoff and Sarah Sheppard, Social Workers; and Chris Williams, Assistant Attorney General. The child's parents, Margaret and Stephen Schermer, appeared and were represented by Rachel Levy. The child, Henry Schermer, appeared by telephone and was represented by Jennifer Coombs. The parents filed the petition for dependency. However after the father had testified, the child, through counsel, moved to join as a petitioner and was allowed by order of the court to amend the pleadings to include the allegation that he is dependent under RCW 13.34.030(5)(a) in addition to RCW 13.34.030(5)(c).

The court heard testimony from Stephen Schermer, Margaret Schermer, Vicki Britt, Henry Schermer, and James Kairoff, as well as argument from all parties. The court also

CP6

1 himself. The parents believed that Henry was being told to harm them and their other children
2 as well. (AW)

3
4 1.6 The parents have made arrangements for Henry's placement over the past 3 years
5 in a series of mental health and behavior modification facilities. Such placements included Fairfax
6 Hospital in Washington State, followed by Intermountain Hospital in Idaho, then Red Rock
7 Canyon School in Utah. Henry has currently been residing in Bird's Eye Boys Ranch in Utah for
8 the past 8 months.

9 1.7 The parents facilitated placement of Henry at Intermountain Hospital in Idaho in
10 January of 2004. Henry has not returned to the family home since that time.

11 1.8 Henry's care has been paid for through a combination of private insurance and
12 out-of-pocket expenses to the family. ~~Until the insurance began to "run out" in July of 2005, the~~
13 ~~month in which the parents filed this dependency petition, the direct expenses to the family~~
14 ~~consisted primarily of travel expenses to visit with Henry in his out-of-state placements and co-~~
15 ~~payments required by their insurance coverage.~~

16 1.9 The father is a professional musician who works with the Pacific Northwest Ballet
17 Orchestra, the Seattle Symphony, and the Seattle Opera. He holds a tenured position as an affiliate
18 faculty member at the University of Puget Sound School of Music. He also earns money through
19 self-employment providing private music lessons. The father had a hard time testifying to the
20 amount of money ~~that the family has earned over the past five years, however he is capable of~~
21 ~~increasing his earnings through his own efforts. Despite being capable, the father has chosen not~~
22 ~~to work more to increase his earnings in order to continue providing the level of care Henry has~~
23 ~~been receiving over the past two years.~~ (AW)

1 1.10 The family believes that they cannot continue to pay for Henry's treatment at the
2 level of care he is in based on the fact that they believe their insurance policy is reaching its
3 coverage limit.

4 1.11 There are resources within this family that would allow the parents to keep Henry
5 in his current placement for at least another six months. Sale of the family home alone, which was
6 last appraised as being worth approximately \$400,000, could free up equity that would provide for
7 six more months of care at Henry's present placement. There are also shares of Microsoft stock
8 that the family could sell. Furthermore, there is the ability to rely on extended family members for
9 support as evidenced by the \$21,000 loan that the parents were recently granted by the mother's
10 parents on July 20, 2005. *As of the date of the hearing, the uncontroverted testimony was that the parents have sufficient financial resources to care for the child.*

11 1.12 The mother does not work outside of the home, however she has held jobs of a
12 secretarial type nature and as a child care provider in the past.

13 1.13 There are a variety of extended family members who are concerned about what
14 happens to Henry.

15 1.14 While in his placement at Intermountain Hospital in Idaho, Henry suffered from
16 severe anxiety throughout the course of his treatment, however he had not presented a behavior
17 management problem for that facility to deal with. His therapists told the family that he was not
18 aggressive towards others while in care.

19 1.15 In March of 2004, during his placement at Intermountain Hospital in Idaho, Henry
20 recanted his story that he had been having hallucinations and was hearing voices which told him
21 to harm himself and others. As his treatment progressed, allegations were revealed that Henry had
22 been sexually inappropriate with a number of other children over the course of his lifetime and
23 was having significant problems coping with his sexual identity and boundaries. There were
24 allegations that Henry had had sexual contact with a 4 year old child when Henry was 12, a child
25 who was 7 or 8 when Henry was 13, and a child who was 11 when Henry was 13. Referrals were

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Pro Henry

(Signature)

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CP9

1 | made to the Brier Police Department once these allegations were revealed, but none of the alleged
2 | victims, which included Henry's younger brother, were brought to the police for questioning by
3 | their parents and no further action was taken by law enforcement.

4 | 1.16 The parents had been engaged in family therapy with Henry extensively, although
5 | not in the last 8 months. They have maintained regular contact with him, outside of family therapy
6 | sessions, up to the date of trial, however.

7 | 1.17 The father believes he is doing everything he can to provide for Henry but that he
8 | is not capable of caring for Henry in the family home. He does not intend to end contact with
9 | Henry, sever the relationship, or otherwise abandon him. He does plan on supporting Henry in the
10 | future in any way he can except for caring for Henry in the family home.

11 | 1.18 The mother suffers from severe anxiety as a result of Henry's needs, but does not
12 | intend to end contact with Henry, sever the relationship, or otherwise abandon him. She feels that
13 | there is no way to safely return Henry to the family home, however, it is unclear how realistic her
14 | view of Henry is according to her therapist, Vicki Britt.

15 | 1.19 Henry feels safe in his current placement at Bird's Eye Boys Ranch in Utah and
16 | does not believe that he is a danger to anyone there. He is engaged in therapy to address issues of
17 | sexuality and appropriate sexual boundaries and is progressing academically and doing the
18 | equivalent of 9th grade work in school.

19 | 1.20 The parents other children, Henry's younger siblings, appear to be well taken care
20 | of by the parents.

21 | 1.21 No current parental unfitness or present inability to exercise the duties of a parent
22 | exists. The parents have made decisions regarding Henry's needs and care that were appropriate
23 | under the circumstances and motivated by a desire to help him and address family stressors.

24 |

25 |

Conclusions of Law

(AW)

1 ~~122~~ Even when viewing all of the evidence in a light most favorable to the parents and
 2 considering it as being true, there is no basis for a rational trier of fact to conclude that Henry
 3 Schermer has been abandoned under RCW 13.34.030(5)(a). *The evidence is that he has not*
 4 *been abandoned. The parent testimony was inconsistent with a finding that he was abandoned.*
 5 Even when viewing all of the evidence in a light most favorable to the parents and
 6 considering it as being true, there is no basis for a rational trier of fact to conclude that Henry
 7 Schermer has no parent capable of adequately caring for him, such that he is in circumstances
 8 which constitute a danger of substantial damage to his psychological or physical development
 9 under RCW 13.34.030(5)(c). *The evidence is that the father has the necessary and*
capacity necessary and that Henry is presently safe.
 10 Conclusions of Law

(AW)

(AW)

(AW)

10 ~~2~~ ³ The court has jurisdiction over the subject matter, the parents, the child, and the
 11 Department.

(AW)

12 ~~22~~ ⁴ The child is not dependent under RCW 13.34.030(5)(a).

13 ~~23~~ ⁵ The child is not dependent under RCW 13.34.030(5)(c).

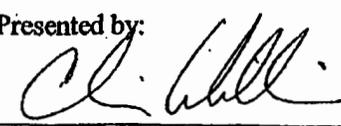
(AW)

Order

15 IT IS HEREBY ORDERED that the petition for dependency is hereby DISMISSED,
 16 pursuant to CR 41(b)(3) as the petitioners have shown no right to relief.

18 DATED THIS 9th day of September, 2005.

20 JUDGE 

21 Presented by:
 22 
 23 _____
 24 CHRIS WILLIAMS, WSBA #34521
 25 Assistant Attorney General

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as to Form!
 Approved for Entry:

MARGARET SCHERMER
 Mother

Rachel Levy
RACHEL LEVY, WSBA #11100
 Attorney for Mother

STEPHEN SCHERMER
 Father

Rachel Levy
RACHEL LEVY, WSBA #11100
 Attorney for Father

HENRY SCHERMER
 Child

Jennifer Coombs
JENNIFER COOMBS, WSBA #
 Attorney for child

SARAH SHEPPARD
 DSHS Social Worker

Other

CP12

Appendix B

STATUTES

RCW 13.34.020 – Legislative declaration of family unit as resource to be nurtured — Rights of child.

The legislature declares that the family unit is a fundamental resource of American life which should be nurtured. Toward the continuance of this principle, the legislature declares that the family unit should remain intact unless a child's right to conditions of basic nurture, health, or safety is jeopardized. When the rights of basic nurture, physical and mental health, and safety of the child and the legal rights of the parents are in conflict, the rights and safety of the child should prevail. In making reasonable efforts under this chapter, the child's health and safety shall be the paramount concern. The right of a child to basic nurturing includes the right to a safe, stable, and permanent home and a speedy resolution of any proceeding under this chapter.

RCW 13.34.030 – Definitions.

For purposes of this chapter: . . .

(5) "Dependent child" means any child who:

- (a) Has been abandoned;
- (b) Is abused or neglected as defined in chapter 26.44 RCW by a person legally responsible for the care of the child; or
- (c) Has no parent, guardian, or custodian capable of adequately caring for the child, such that the child is in circumstances which constitute a danger of substantial damage to the child's psychological or physical development.

RCW 26.44.015 – Limitations of chapter. . . .

(3) No parent or guardian may be deemed abusive or neglectful solely by reason of the parent's or child's blindness, deafness, developmental disability, or other handicap.

RCW 26.44 – Uncodified legislative finding. (Laws of 1997 ch 132 § 1.)

The legislature finds that housing is frequently influenced by the economic situation faced by the family. This may include siblings sharing a bedroom. The legislature also finds that the family living situation due to economic circumstances in and of itself is not sufficient to justify a finding of child abuse, negligent treatment, or maltreatment.

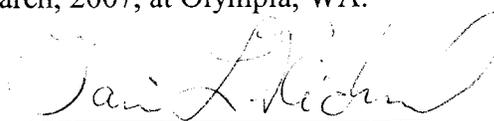
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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 16th day of March, 2007, at Olympia, WA.



TAMI L. RICHMOND
Legal Assistant