

81714-6
No. 59275-2-1

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

KENT DUCOTE,
Appellant,

vs.

STATE OF WASHINGTON DEPARTMENT OF SOCIAL &
HEALTH SERVICES,
Respondents.

APPEAL FROM THE SUPERIOR COURT
FOR SAN JUAN COUNTY
THE HONORABLE VICKIE I. CHURCHILL

BRIEF OF APPELLANT

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I. INTRODUCTION

This is an appeal from a summary judgment dismissing a claim for negligent investigation of an allegation of sexual abuse by the Department of Social and Health Services on the grounds that the plaintiff step-father, who had lived with the children and their mother as a family for over six years before being excluded from the family home as a result of the Department's actions, is not within the class of individuals who are protected from negligence by the Department in fulfilling its statutory obligations "to protect children and to preserve the integrity of the family." *Roberson v. Perez*, 156 Wn.2d 33, 45, 123 P.3d 844 (2005). This court should reverse and remand for trial on plaintiff's claims.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in entering its Order Granting DSHS's Motion for Summary Judgment. (CP 114-16)
2. The trial court erred in entering its Order Denying Plaintiff's Motion for Reconsideration. (CP 117-118)

III. ISSUES RELATED TO ASSIGNMENTS OF ERROR

Whether a step-parent, who as a result of a negligent investigation of an allegation of sexual abuse by his teenage step-daughter is excluded from the family home and ordered to refrain

from contacting any of his three step-children, is within the class of individuals who can have a cause of action against the Department of Social and Health Services?

IV. STATEMENT OF THE CASE

A. Statement Of Facts.

Most of the relevant facts are undisputed, and the legal question whether a step-parent can ever have standing to bring a claim for negligent investigation against the Department is not dependent upon them. Some of the facts set forth below were contained in declarations filed on reconsideration, after the court had entered its preliminary summary judgment order. (CP 101-11) The court did not strike, and considered these pleadings, before denying reconsideration. (CP 117-118; see 1/18/07 RP 1) As this matter was decided on summary judgment, and the facts should be considered in a light most favorable to the appellant, *Lesley v. State*, 83 Wn. App. 263, 266, 921 P.2d 1066 (1996), *rev. denied*, 131 Wn.2d 1026 (1997), they are included below. To avoid any argument that they are not properly considered, however, the facts supported by the reconsideration declarations are set out in italics.

1. Kent Ducote Undertook The Role Of Father To Dixie Ducote's Three Minor Children.

Appellant Kent Ducote is the step-father of Brittney Ducote (born January 21, 1986), Cole Ducote (born March 18, 1991), and Morgan Ducote (born November 27, 1992), the children of his wife Dixie. (CP 21, 24, 26, 33, 62) Until the Department obtained restraining orders against him, Kent lived with Dixie and her children in the family home. (CP 132)

Each of Dixie's three children has a different biological father. None of the biological fathers had any substantial contact with his child, involvement in their lives, or paid any significant child support. (See CP 21, 131, 137) *Brittney has seen her biological father twice in 20 years and Cole has never seen his biological father. Morgan's biological father moved to Arizona when Dixie was one month pregnant. (CP 108-09) After Morgan's birth, Morgan's biological father saw her a few times before agreeing to termination of his parental rights. (CP 101-02)*

Kent and Dixie lived in the same neighborhood in Friday Harbor when they began seeing each other in 1992. Dixie was pregnant with Morgan. Cole was 14 months old, and Brittney was six years old. Kent helped Dixie care for the children on a nightly basis, playing with Brittney and Cole while Dixie made dinner. After

Morgan was born, Kent cared for and fed the two older children while Dixie nursed. (CP 108-10) When both Dixie and Cole became quite ill shortly after Morgan's birth, Kent cared for both Dixie and the children, preparing their meals, picking up medication, taking the children to school and day care, and washing by hand the diapers that had accumulated during Dixie's illness. (CP 109-10)

Kent's involvement in the lives of the children continued after Dixie recuperated. He helped bathe the children, prepare them for bed, tuck them in and say prayers with them. He picked Brittney up from school, and the younger children from their day care. (CP 109-10) He took the children with him on errands and to job sites. (CP 102) Within several months, Dixie's children began calling Kent "daddy." Indeed, Kent was the only father the children knew. (CP 109)

Kent and Dixie began living together in August 1994 and married on September 30, 1994. (CP 65, 110) Kent provided financial support for Dixie and her three children. He paid for the children's medical, eye and dental care, clothes and school supplies, after school activities and vacations. (CP 102) When Cole and Morgan began attending private school, Kent paid their

tuition. (CP 102) Kent attended parent-teacher conferences, school concerts and sporting events. (CP 102) Kent's parents consider the three children as grandchildren and they are, in turn, called "grandma" and "grandpa" by the children. The children consider Kent's siblings their aunts and uncles (CP 110) and Kent's son from a previous relationship a brother. (CP 102)

2. The Department Obtained Orders Excluding Kent From The Family Home And Limiting His Contact With His Step-Children After Making A Perfunctory And Inadequate Investigation Of Teenager Brittney's Allegations Of Abuse.

Kent's relationship with Dixie and her children was at times stressed. DSHS had provided home support services to Dixie and the children at various times since 1989, including counseling. (CP 65) In 1998, Dixie's counselor reported to DSHS that Kent was expressing anger toward Dixie and the children, but these allegations did not involve threats of violence. (CP 65) Also in 1998, Dixie reported that Kent had spanked Cole with a wooden spoon, leaving a mark. DSHS found that Kent was cooperative in resolving his differences with Dixie and the children. (CP 66)

Kent's relationship with Brittney deteriorated as she grew into adolescence. Brittney was jealous of Kent's close relationship with Morgan, and resented having to pick Morgan up from day care.

(CP 71-72) She believed that Kent and Dixie were unduly strict, and wanted her mother to leave Kent. (CP 72) Brittney told her friends that she wanted to run away from home. (CP 72)

In March 2000, Brittney met with a middle school counselor and reported that Kent had struck Cole, that Cole had put a knife to his own throat, and that Kent had barged into the bathroom while Brittney was using it. (CP 66-67) Brittney also told the counselor that Kent had made her sit on his lap and touched her buttocks, and alleged that Kent had masturbated in her presence. (CP 67)

When the counselor referred the matter to DSHS, caseworker David Parks interviewed Brittney and reported that Brittney had alleged that Kent stood outside her bedroom window watching her disrobe. (CP 67) Based on Brittney's statements, the Department filed a dependency petition as to Brittney and had the San Juan County Sheriff remove Brittney from Kent and Dixie's home on April 7, 2000. (CP 131-33, 149, 151-52) After giving notice to both Kent and Dixie, the Department on April 10, 2000, then obtained a disputed Shelter Care Order placing Britney in the custody of the Department over Kent and Dixie's objection. (CP 134-36)

The Department did not conduct any further investigation regarding Brittney's statements. The Department caseworker David Parks claimed that, "I have never had an adolescent boy or girl making allegations of sexual misconduct by their parent that did not have some truth in it." (CP 148) Mr. Parks did not discuss Brittney's allegations with Dixie, or examine whether there was any history of conflict between Brittney, then age 16, and her mother or step-father. Mr. Parks did not do any further investigation save for one other interview with Brittney and a conversation with the San Juan County Sheriff. (CP 149-52)

Based solely on Brittney's statements, and because Dixie had taken the younger children to visit their grandmother over their spring school vacation, the Department filed dependency petitions as to Cole and Morgan on April 13, 2000. (CP 137-43) The Department obtained ex parte temporary restraining orders based on allegations that "the children are at risk of imminent harm if Kent Ducote is not removed from the home and if Dixie Ducote is not prohibited from removing children from jurisdiction . . ." (CP 142) The orders barred Kent from having any contact with Cole or Morgan. (CP 24, 28)

Relying on Mr. Parks' complaint to the San Juan County Sheriff, Kent was charged with one count of felony voyeurism on June 20, 2000. (CP 152-54) The Sheriff's search warrant on the Ducote household based on Mr. Parks' complaint failed to produce any evidence indicating that Kent had an interest in child pornography, or any evidence of lewd or sexually inappropriate materials. (CP 72)

3. The Superior Court Dismissed The Department's Dependency Petitions And Lifted The Restraints Against Kent Eight Months Later, Finding That The Allegations Against Kent Were False And That The Children Were Not At Risk.

San Juan County Superior Court Judge Alan Hancock heard 14 days of testimony on the State's dependency allegations in October and November 2000. (CP 36-38) Before taking the matter under advisement, the court announced immediately at the conclusion of the trial that the Department had failed to meet its burden of proving that Kent posed any threat of danger to Cole and Morgan, and therefore authorized Kent to immediately return to the family home. (CP 34) It had been eight months and 17 days since Kent had been allowed into the family home or permitted any contact with the children, ages 14, 9, and 6, that he had raised for six years.

On November 30, 2000, Judge Hancock issued his oral decision finding that the allegations of Ken's physical and verbal abuse were "overblown," that the alleged voyeurism did not occur, and that the children are not at risk. (CP 59-62) Judge Hancock found instead that Brittney did not get along with Kent and wanted her mother to leave Kent because he was too strict. (CP 61) Judge Hancock concluded that the Department had failed to prove the allegations in the dependency petitions and dismissed all three petitions. (CP 62)

The Department did not appeal the dismissal of its dependency petition. The State dismissed its criminal charges against Kent on Jan. 29, 2002. (CP 155-59)

B. Procedural History.

Kent brought this action against the Department for negligent investigation on April 2, 2003, in San Juan County Superior Court. Kent alleged that that he suffered emotional distress, loss of reputation, and economic harm as a result of defending himself in the dependency action and felony charges. (CP 122-24)

The Department sought summary judgment in 2004 arguing that Kent had not alleged a harmful placement decision, but only alleged "damages for defending himself against allegations made

against him by Brittney that were required to be investigated by DSHS.” (CP 205) Superior Court Judge Vickie Churchill (“the trial court”) denied the motion, holding that “DSHS owed a duty to Ducote under the facts of this case.” (CP 177) Because Kent was “removed from the family home and allowed only limited contact with the children who remained in the family home,” he alleged the type of harm cognizable under the tort of negligent investigation of child abuse. (CP 176)

The Department filed a second motion for summary judgment in 2006, again arguing that it owed no duty of care to Kent. (CP 1-15) This time, the Department contended that as a step-father, Kent did not fall within the class of persons entitled to sue for negligent investigation. (CP 6) The trial court granted the motion, dismissed Kent’s complaint, and denied Kent’s timely motion for reconsideration. (CP 114-18)

Kent timely appealed. (CP 113)

V. ARGUMENT

A. **The State Owes A Step-Parent Living In The Family Home A Duty To Competently Investigate Allegations Of Child Abuse.**

The tort of negligent investigation protects children and those acting as parents from the State's unwarranted disruption of the family relationship. In holding that a step-parent who is forced from the family home lacks standing to sue, the trial court improperly limited the tort of negligent investigation to birth or adoptive parents. This limitation is not supported by the statutes upon which the cause of action is based, nor on recent case law recognizing that a parental relationship encompasses those who live and act in a parental role. This court should reverse and remand for trial on plaintiff's claims.

1. **This Court Reviews The Trial Court's Ruling On Summary Judgment That No Duty Exists De Novo.**

This court's review of the trial court's dismissal is de novo for two reasons. First, the trial court dismissed Kent's complaint on summary judgment. This court thus gives no deference to the trial court's decision, reviewing the record below to determine whether there is an issue of fact for trial. *Lesley v. State*, 83 Wn. App. 263, 266, 921 P.2d 1066 (1996).

Second, the Department's motion and the trial court's decision were based on the legal conclusion that the Department did not owe Kent a duty of care because he is a step-parent. Whether a duty of care exists is a matter of law, which this court also decides de novo. ***Schooley v. Pinch's Deli, Inc.***, 134 Wn.2d 468, 474-75, 951 P.2d 749 (1998) (whether individual falls within protected class of statute for purposes of establishing a duty of care is question of law).

2. The Department Has A Statutory Duty To Competently Investigate Allegations Of Child Abuse In Order To Protect and Maintain The Integrity Of The Family.

The statutory duty to investigate child abuse imposes a duty upon the Department to do so reasonably and competently in order to protect children and maintain the integrity of the family. The Legislature created a duty to investigate child abuse under RCW 26.44.050:

Upon the receipt of a report concerning the possible occurrence of abuse or neglect, the law enforcement agency or the department of social and health services must investigate and provide the protective services section with a report in accordance with chapter 74.13 RCW, and where necessary to refer such report to the court.

In ***Tyner v. Department of Soc. & Health Servs.***, 141 Wn.2d 68, 79-81, 1 P.3d 1148 (2000), the Supreme Court held that "[d]uring

its investigation [of child abuse] the State has the duty to act reasonably in relation to all members of the family.” 141 Wn.2d at 79. This statutory duty has a dual purpose: to protect children and to preserve the integrity of the family.

[C]hildren are protected from potential abuse and needless separation from their families and family members are protected from unwarranted separation from their children.

Tyner, 141 Wn.2d at 79. *Accord*, ***M.W. v. Department of Social and Health Servs.***, 149 Wn.2d 589, 602, 70 P.3d 954 (2003) (“The harm addressed by the statute here is the abuse of children within the home and unnecessary interference with the integrity of the family.”); ***Roberson v. Perez***, 156 Wn.2d 33, 45, 123 P.3d 844 (2005) (“the statute has two central purposes – to protect children and to preserve the integrity of the family.”).

RCW ch. 74.13, to which RCW 26.44.050 refers, confirms that the Department’s duty is to not just to biological or adoptive parents, as the trial court held here, but to protect the family unit:

The department shall have the duty to provide child welfare services and shall:

...

(3) Investigate complaints of any recent act or failure to act on the part of a parent **or caretaker** that results in death, serious physical or emotional harm, or sexual abuse or exploitation, or that presents an

imminent risk of serious harm, and on the basis of the findings of such investigation, offer child welfare services in relation to the problem to such parents, legal custodians, **or persons serving in loco parentis**, and/or bring the situation to the attention of an appropriate court, or another community agency: PROVIDED, That an investigation is not required of nonaccidental injuries which are clearly not the result of a lack of care or supervision by the child's parents, legal custodians, **or persons serving in loco parentis**.

RCW 74.13.031(3) (emphasis added). Further, the dependency statute under which the Department proceeded in excluding Kent from the family home maintains as its legislative purpose the protection of "the family unit." RCW 13.34.020 ("the family unit is a fundamental resource of American life which should be nurtured").

The trial court erred in holding that the statutory duty of competent investigation does not impose a duty of reasonable care on the Department with respect to step-parents living in the family home. The trial court's decision is contrary to several cases that impose liability under the tort of negligent investigation of child abuse, without limiting the scope of the duty to biological or adoptive parents. In holding that the statutory duty of investigation protects the "family unit," "both children and family members," 141 Wn.2d at 79, for instance, the *Tyner* Court relied on the Court's earlier decision in *Babcock v. State*, 116 Wn.2d 596, 809 P.2d 143

(1991). In *Babcock*, the Court rejected the State's attempt to assert a defense of immunity to a claim of negligent investigation. 116 Wn.2d at 610. The *Babcock* Court remanded for trial the negligent investigation claims brought not only by the father, but also by the paternal grandparents, of children who claimed that they were negligently placed with a foster parent who had raped them. 116 Wn.2d at 612.

The Court's most recent cases limiting negligent investigation claims against the Department undermine, rather than support, the trial court's holding that the Department's duty of investigation does not provide standing to a step-parent who is the victim of a negligent investigation. The Court rejected a negligent investigation claim by a child who alleged post-traumatic stress disorder after undergoing a vaginal examination by untrained DSHS caseworkers investigating an allegation of child abuse in *M.W. v. Department of Social and Health Servs.*, 149 Wn.2d 589, 592, 70 P.3d 954 (2003). The Court held a negligent investigation claim is not available unless the plaintiff can establish that "DSHS conduct[ed] a biased or faulty investigation that leads to a harmful placement decision. . . ." *M.W.*, 149 Wn.2d at 591.

In *Roberson v. Perez*, 156 Wn.2d 33, 123 P.2d 844 (2005), the Court then relied upon *M.W.* to hold that a mother who was not alleged to have nor investigated for abusing her son had no claim for negligent investigation of child abuse where the mother and step-father voluntarily sent her son to live with his grandparents while the investigation was pending:

Our interpretation of the statute in *M.W.* unequivocally requires that the negligent investigation to be actionable must lead to a “harmful placement decision.”

Roberson, 156 Wn.2d at 46.

Neither of these cases limit the claim in this case. Neither case involve a harmful placement decision. Nor does either case involve investigation of a claim made against plaintiff in a parental role. In *M.W.*, the plaintiffs were compensated foster parents when the alleged negligence took place. In *Roberson*, there was no claim that plaintiffs had abused their son,¹ nor was there any placement decision implemented as to him.

¹ Indeed, there is no indication that the claims of Honnah Sims’ husband Jonathan, the step-father of Honnah’s son, would have been subject to dismissal on that basis had there been a harmful placement decision in *Roberson v. Perez*, 156 Wn.2d 33, 123 P.3d 844 (2005).

In this case, to the contrary, the Department owed Kent Ducote and his family a duty of care in investigating intra-family allegations of abuse. Prohibiting a family member from living with the children is no less a “placement decision” than removing the children from the home; the critical distinction is that the State, not the family, decides with whom the children may have contact. Kent had standing to sue the Department for its negligent investigation of his step-daughter’s claims, which directly resulted in his exclusion from the family home and prevented him from contacting any of the children for over eight months.

Neither of the Department’s two summary judgment motions challenged Kent’s allegation that the Department’s investigation of Brittney’s allegations of voyeurism and other sexual abuse by Kent were incomplete and that the Department violated the standard of reasonable care. (See CP 176 (“there is an issue of fact as to whether the caseworker acted reasonably in failing to verify the allegations made by the older child.”); 9/29/06 RP 48 (issue is “whether [Ducote is] the proper person to bring this action.”)) The Department’s negligent investigation was directed toward the children’s step-father, clearly a member of their family and household, and it resulted in a harmful placement decision.

Kent, like the father in *Tyner*, was removed from the family home and was not allowed contact with the children who remained in the family home. He was a party to the Department's intervention in the family and was directly restrained by orders in the dependency action from any contact with his step-children. (CP 24-25, 28-29) The trial court erred in dismissing Kent's claim for negligent investigation of child abuse.

3. A Step-Parent Living In The Family Residence Has Standing To Challenge The Department's Negligent Investigation of Child Abuse.

Kent's standing to pursue this claim properly rests solely upon the indisputable fact that the orders obtained by the Department directly restrained him from contacting other members of his family, or from living in the family home. But Kent's standing is confirmed by his statutory obligations as a step-parent, and by his status as a "de facto," psychological, or "in loco" parent to Dixie's children.

The step-parent relationship, established by marriage to a child's parent, creates rights and obligations that support Kent's claim in this case. Step-parents have a statutory duty to support that is based upon the Legislature's intent to foster the family relationship. RCW 26.16.205; *Harmon v. Department of Social*

and Health Servs., 134 Wn.2d 523, 951 P.2d 770 (1998); *Washington Statewide Organization of Stepparents v. Smith*, 85 Wn.2d 564, 536 P.2d 1202 (1975). Prior to creation of this statutory obligation, however, the relationship was recognized at common law as a basis for a claim for damages for wrongfully depriving a step-father of his relationship with a step-child:

[W]here the stepfather has received the child into his home and has supported her . . . [i]n short, when he assumes the duties of a parent, the corresponding benefits follow and the rights of the mother and the stepfather in respect to the child are then equal before the law . . .

Magnuson v. O'Dea, 75 Wash. 574, 578-79, 135 Pac. 640 (1913).

Most recently, the Supreme Court has recognized the importance of parenting, rather than biological parentage, the establishment of familial rights and obligations, in cases such as *Custody of Shields*, 157 Wn.2d 126, 136 P.3d 117 (2006) and *Parentage of L.B.*, 155 Wn.2d 679, 122 P.3d 161 (2004), *cert. denied*, 126 S. Ct. 2021 (2006).

In this case, the evidence on summary judgment is that Kent meets all the criteria set out in *L.B.* to establish a de facto parentage claim. The natural parents consented to and fostered the parent-like relationship, Kent lived with the children in the same household and assumed the obligations of parenthood

without expectation of financial compensation, and he had been in the parental role for a length of time sufficient to establish a bonded, dependent relationship. Kent had “undertaken a permanent, unequivocal, committed and responsible parental role” in the life of Dixie’s children. **L.B.**, 155 Wn.2d at 708.

As Justice Bridge noted in her concurring decision in

Shields:

[F]amilial bonds stem not just from biology, but also from the intimacies of daily association. . . [I]t logically follows that a child has a constitutionally protected interest in whatever relationships comprise his or her family unit.

Shields, 157 Wn.2d at 152-53 (Bridge, J. concurring); *See also Marriage of Allen*, 28 Wn. App. 637, 644, 626 P.2d 16 (1981) (“A person establishes a relationship in loco parentis when he proves that he intends to assume toward a child the status of a parent.”). As a step-parent living in the family residence, Kent had standing to challenge the Department’s negligent investigation of child abuse. This court should reverse the summary judgment of dismissal and remand Kent’s claims for trial.

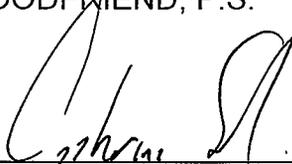
VI. CONCLUSION

This court should reverse and remand for trial of Kent Ducote’s claims against the Department.

Dated this 16th day of April, 2007.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on April 16, 2007, I arranged for service of the foregoing Brief of Appellant to the court and to the parties to this action as follows:

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DATED at Seattle, Washington this 16th day of April, 2007.


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