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NO. 59275-1-I

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

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KENT DUCOTE,

Appellant,

v.

STATE OF WASHINGTON DEPARTMENT OF SOCIAL & HEALTH  
SERVICES,

Respondent.

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**RESPONDENT'S BRIEF**

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## **I. COUNTERSTATEMENT OF THE ISSUE**

Did the trial court correctly dismiss Kent Ducote's claim for negligent investigation against the Department of Health and Social Services (DSHS or the Department) where Mr. Ducote--as a stepparent who chose not to adopt his stepchildren or to accept the responsibilities of being a legal "custodian" or "guardian"--was not a member of the particular, circumscribed class to which DSHS owes a duty under RCW 26.44, *et seq.* and, consequently, did not have standing to pursue a negligent investigation claim against the Department?

## **II. COUNTERSTATEMENT OF THE CASE**

### **A. Counterstatement of Facts**

Kent and Dixie Ducote were married in 1994. CP 65. At the time of her marriage to Kent, Dixie had three children: Brittney L. Maxey (1/21/86), Cole Maxey (3/18/91) and Morgan Maxey (11/27/92). CP 65.

DSHS began providing home support services to Dixie and her children beginning in 1989. CP 65. After Dixie's marriage to Kent, DSHS received at least nine referrals regarding Kent and Dixie Ducote and their relationship with her children. CP 127. A number of those referrals were made by Dixie Ducote and then recanted or minimized. CP 126. Prior to the dependency proceedings at issue in this case, the

following allegations were reported to DSHS and the San Juan County

Sherriff's Office:

1. In March 1998, DSHS received two referrals (one from Dixie and one from her counselor) regarding Kent's anger toward her and her children.
2. In November 1998, DSHS provided follow-up investigation and counseling after Dixie reported to the police that Kent had spanked her son Cole with a wooden spoon, leaving a mark.
3. In November 1998, Dixie expressed concern and resentment to DSHS investigators that Kent favored Morgan over her and her other children and reported that he cuddled and slept with Morgan in the nude.
4. In August 1999, Brittney wrote a note expressing either suicidal ideation or concern that Kent might harm her.
5. In September 1999, Dixie reported that Kent "cuddles" Morgan in bed while watching "R" rated movies.
6. In September 1999, Brittney alleged that Kent barged into the bathroom while she was on the toilet.
7. In October 1999, DSHS investigated a referral alleging that Mr. Ducote had pulled Cole Maxey out of a car by the scruff of his neck.

8. In December 1999, DSHS received additional referrals alleging that Cole Maxey was being verbally abused by Mr. Ducote and that Dixie Ducote was unable to protect him.
9. The December 1999 referrals to DSHS also included mention of Brittney's August 1999 note, Brittney's desire to have Dixie leave Kent, and of the alleged September 1999 bathroom incident.
10. During the same period of time, Dixie was receiving support from Anita Castle of the local domestic violence support agency.
11. In February 2000, Brittney alleged that Cole had placed a knife to his own throat. Dixie Ducote subsequently testified the knife Cole used had been a butter knife.
12. On March 28, 2000, Brittney told her middle school counselor, Gail Leschine, about several of the incidents listed above, including the allegation that Kent had struck Cole, that Cole had held a knife to his own throat, and that Kent had walked in on Brittney in the bathroom, as well as a new allegation that Kent had made her sit on his lap and had touched her buttocks. Brittney's counselor referred the matter to David Parks of the DSHS Division of Children and Family Services.

CP 59-60, 65-67, 69-71, 126-27.

It was against this background of continuing referrals to DSHS and the San Juan County Sheriff that, on April 5, 2000, Brittney L. Maxey, then age 14, was taken into protective custody by the San Juan County Sheriff's Office as the result of her report to her middle school counselor. CP 19. The Sheriff's Office transferred Brittney to DSHS custody. CP 19. DSHS Social Worker David Parks placed Brittney in emergency temporary shelter care. CP 19.

In Mr. Parks interview with Brittney on April 6, 2000, she repeated what she had told her middle school counselor, and also told Mr. Parks that Mr. Ducote's sexual attention made her "uncomfortable and frightened" and that she did not "feel safe in her home because her mother cannot protect her and she fears for her safety when her parents learn of this disclosure. She is also concerned about the safety of her younger siblings." CP 69-71, 118 (4/25/07).<sup>1</sup>

On April 7, 2000, DSHS filed a Dependency Petition requesting that the court find Brittney dependent because she had been "abused or neglected as defined in Chapter 26.44 RCW" and because she "has no

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<sup>1</sup> San Juan County erred in numbering the Clerk's Papers for this case. The numbers CP 105-118 were used in numbering the Clerk's Papers (filed on 3/26/07) and repeated in numbering the Supplemental Clerk's Papers (filed on 4/25/07). The Index produced by the San Juan County Superior Court does not correspond to the actual numbers stamped on the Clerk's Papers. For clarity, respondent will identify the date of filing for those repeated numbers.

parent, guardian, or custodian capable of caring for [her].” CP 117-119 (4/25/07).

On April 10, 2000, after a shelter care hearing at which Kent and Dixie Ducote were both present and represented by attorney Carla J. Higginson, Brittney was placed in licensed foster care by court order.<sup>2</sup> CP 19, 21-23, 67.

On April 13, 2000, a San Juan County Juvenile Court Commissioner entered an “Order on Motion for TRO and Other Relief” regarding both Cole and Morgan Maxey. CP 24-29. These Orders were based upon Dependency Petitions filed at the same time. CP 123-127. Kent and Dixie Ducote were both present at the hearing at which the petitions and TRO’s were considered, again represented by Ms. Higginson. CP 24-29. Following consideration of the evidence presented by all parties, the Court made the following findings regarding Cole and Morgan Maxey:

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<sup>2</sup> The Sheriff’s Office conducted an independent criminal investigation separate from that conducted by DSHS. As a result of the Sherriff’s Office investigation, the San Juan County Prosecutor’s Office filed a felony voyeurism case against Ducote. That case was dismissed without prejudice on January 29, 2001. CP 109 (4/25/07); 139-45. At the time of dismissal, Deputy Prosecutor Silverman stated, in a sworn affidavit, that the dismissal was required because the “pressure” Dixie Ducote had placed on Brittney—which included isolating her from her siblings, shipping her to California “to live with a grandmother who has openly stated she does not believe or support the child” and testifying against her in the dependency proceeding--had “taken [its] toll on Brittney and had led her to file a statement (witnessed by her grandmother) indicating she may have been mistaken when she said she saw Kent Ducote’s face looking through her bedroom window. CP 141-45.

- 2.1 A petition has been filed with the Court alleging that the child is dependent.
- 2.2 There are reasonable grounds to believe that:
  - (a) the child is dependent; and
  - (b) the child's health safety and welfare will be seriously endangered if Kent Ducote is not removed from the home and if Dixie Ducote is not prohibited from removing the children from the home.
- 2.3 Based on the allegations in [the] Dependency Petitions and Motion there are reasonable grounds to believe that an incident of sexual abuse has occurred with regard to this child and that irreparable injury in the form of sexual abuse, or the ability to adequately investigate the allegations, would result if the Department's Motion is not granted.

Based on its findings, the Court Ordered:

1. Dixie Ducote is prohibited from removing the child from San Juan County pending further Court order.
2. Kent Ducote is restrained from molesting or disturbing the peace of the child.
3. Kent Ducote is restrained from entering the family home of the child except as specifically authorized by the court.
4. Kent Ducote is restrained from having any contact with the alleged victim, except as specifically authorized by the Court.

Attorney Higginson signed the Orders under her interlineations:

"Approved as to form." CP 24, 28. Neither Kent nor Dixie Ducote

moved to revise the Commissioner's Orders, which would have been possible under RCW 2.24.050.

Between October 17 and November 8, 2000, the Honorable Alan R. Hancock conducted a dependency fact-finding hearing in San Juan County Superior Court. CP 31-34, 36-38, 64-77. Throughout the fourteen-day hearing, Kent and Dixie Ducote were present and represented by Attorney Higginson. CP 31-34, 64-77. The only discussion about whether the Court had jurisdiction over Kent Ducote was held on November 6, 2000, when the following exchange occurred:<sup>3</sup>

Court: Question among many: Foster parent legally responsible for the step children?

Ms. Higginson: I didn't find anything in the dependency statute that a step parent in the shoes of the parent.

Ms. Blaine<sup>4</sup>: The step parent doesn't have rights of the parent. Not a right to be involved unless court exercises discretion to do so. Court can make any party they deem appropriate. Court's discretion to allow Mr. Ducote to be part of this.

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Court: ... I don't know. Not asking for briefing unless you'd like to submit.

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<sup>3</sup> The colloquy is taken exactly as it appears in the November 6, 2000 Minute Entry, including the grammatical errors. CP 33.

<sup>4</sup> Katherine B. Blaine, as a Special Assistant Attorney General, represented DSHS.

CP 33. Thirty lay and expert witnesses—including three detectives from the San Juan County Sherriff's Office-- testified at the Ducote dependency fact-finding hearing; forty documents were admitted. CP 36-55.

The expert testimony presented at the fact-finding hearing differed dramatically. Elizabeth Nyblade, Ph.D. testified regarding the psychological testing she had performed on Kent and Dixie Ducote. CP 67. Dr. Nyblade diagnosed Kent Ducote as having a Personality Order Not Otherwise Specified with antisocial features under Axis II of the Diagnostic and Statistical Manual, Fourth Edition (DSM-IV). CP 67. She diagnosed Dixie Ducote as having Major Affective Disorder, recurrent major depression on Axis I of the DSM-IV and diagnosed her as having Borderline Personality Disorder on Axis II. CP 68.

Dr. David Eden reviewed the same raw test data analyzed by Dr. Nyblade but disagreed with her diagnoses and conclusions. Dr. Eden diagnosed Kent Ducote with a generalized anxiety disorder and testified that Dixie Ducote was suffering from depression, but that it was not a Major Affective Disorder under Axis I; he also testified that Dixie "perhaps" had a histrionic disorder under Axis II. CP 68-69.

At the conclusion of the fact-finding hearing, the Court began its ruling by indicating that the case had been "most challenging" and the Court had "spent a great deal of time balancing and weigh[ing] the

evidence.” CP 58-62. The Court’s findings<sup>5</sup> describe Brittney’s detailed allegations, and yet the Court’s ultimate resolution of the conflicting evidence presented was that Brittney had misinterpreted Kent Ducote’s various behaviors. See the Court’s Findings of Fact and Conclusions of Law. Appendix A (CP 64-77).

Appropriately, Judge Hancock focused on the children’s only parent in concluding, as a matter of law, that they were not dependent children under RCW 13.34.050(b) or (c):

Dixie is capable of adequately to care for [sic] three children. ... Dixie has shown she is capable of seeking help when she needs to and taken action to protect her children.

CP 62, 77.

While ultimately dismissing the dependency petitions, the Court also concluded that DSHS had “established a prima facie case in its case in chief.” CP 77. In his oral ruling, the dependency judge said:

As to voyeurism: certainly on its face quite plausible; State had made prima facia [sic] case. Quite understandable and thought Brittany [sic] on the face of it quite believable and only when looking at the evidence as a whole there is reason for doubt.

CP 60. Even though there would be no further court intervention and Mr. Ducote would no longer be restrained from returning to the family

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<sup>5</sup> The Findings of Fact and Conclusions of Law in the dependency fact-finding hearing were presented by Attorney Higginson and signed by Judge Hancock on January 25, 2001. CP 77. Special Assistant Attorney General Katherine B. Blaine did not sign the findings and conclusions. CP 77.

home (CP 132-33), the Court concluded its oral ruling by suggesting, “Court would hope that Brittany [sic] would stay in voluntary foster care or that she be in another placement until she is able to return to the family home.” CP 62. Neither party appealed Judge Hancock’s findings and conclusions.

On April 2, 2003, Attorney Higginson, on behalf of Kent Ducote, filed suit against DSHS claiming the dependency and criminal proceedings, his removal from home, and disruption of his relationships with his stepchildren arose because DSHS conducted a negligent investigation and failed to properly supervise its employees. Mr. Ducote seeks reimbursement of the attorney’s fees he incurred in defending against the dependency actions and felony charges, and damages for emotional distress and loss of reputation. CP 110 (4/25/07).

DSHS respectfully requests that this court disregard the untimely Declarations of Kent and Dixie Ducote and those portions of appellant’s statement of facts and argument which rely upon them. Br. Of Appellant, pp. 3-5 (italicized material) and pp. 19-20 (*de facto* parentage argument). See Section III.B, below, and DSHS’s Motion to Strike, filed separately.

#### **B. Procedural History**

On May 24, 2004, DSHS moved for summary judgment in this case on two theories: (1) there was no cause of action against DSHS for

negligent investigation, under the reasoning of *Tyner v. Department of Social and Health Services*, 141 Wn.2d 68, 1 P.3d 1148 (2000) and *M.W. v. Department of Social and Health Services*, 149 Wn.2d 589, 70 P.3d 954 (2003), because Ducote did not allege a harmful placement decision involving Brittney (the only one of the children who had actually been removed from the Ducote home); and (2) the shelter care and restraining Orders of the San Juan Juvenile Court Commissioner entered in April 2000 were superseding, intervening causes that broke the any causal connection between the DSHS investigation and Mr. Ducote's separation from his stepchildren. CP 160-64. The trial court denied the Department's motion by letter opinion in August 2004. CP 160-64.

This court decided *Blackwell v. Department of Social and Health Services*, 131 Wn. App. 372, 127 P.3d 752 on January 30, 2006. On July 18, 2006, DSHS moved for summary judgment a second time in this case, arguing, under the clarification articulated in *Blackwell*, that, as a *stepparent* who had chosen not to adopt his stepchildren or to accept the legal responsibilities of a "custodian" or "guardian," Mr. Ducote was not a member of the particular, circumscribed class to which DSHS owes a duty under RCW 26.44, *et seq.* and, consequently, did not have standing to pursue a negligent investigation claim against the Department. CP 6-8, 90-91. DSHS also renewed and clarified its argument, under *Petcu v.*

*State*, 121 Wn. App. 36, 86 P.3d 1234 (2004), that, where a court is aware of all material information and reasonable minds could not differ on the issue, a court order entered in a dependency action is a superseding, intervening cause that breaks the causal connection between an allegedly negligent DSHS investigation and the harm that may be claimed by a parent or child. CP 9-11.

Although DSHS identified the *Blackwell* decision in its opening brief as a basis for its argument that it did not owe a duty to Mr. Ducote because he was not a parent, guardian, or custodian, and, consequently, that he did not have standing to sue DSHS for negligent investigation (CP 6-8), Mr. Ducote did not respond to the *Blackwell* decision in his opposition memorandum. CP 78-86. He did not provide declarations with additional facts regarding his own or his wife's relationship with her children, nor did he argue that he should be classified as a *de facto* or psychological parent as those terms are employed in the *Blackwell* decision. CP 78-86. The first time that Mr. Ducote's counsel mentioned that he might be considered a psychological or *de facto* parent under *Blackwell* was during oral argument. RP (9/29/06) 42-43. No evidence in the record supported Mr. Ducote's claim at the time the trial court ruled on summary judgment. Instead, Mr. Ducote simply argued that his status as a psychological or *de facto* parent was "implicit" in the record:

[W]e did not want to burden the Court with something additional and we didn't support - submit it. Nevertheless, it is there. It's implicit in the fact that he was--It's clear he was in the family home. It's clear he was married to the mother. It's clear he had the bond with the kids. And so we believe that he could meet all of those tests and Judge Hancock did find he was a psychological parent.<sup>6</sup>

RP (9/29/06) 43.

At the close of the September 29, 2006 hearing, the trial court granted summary judgment to DSHS. RP (9/29/06) 48-51.

The Order granting DSHS's motion was entered on November 3, 2006. CP 97-99, 181. Mr. Ducote did not provide the trial court with additional evidence prior to entry of the written summary judgment order.

On November 7, 2006, Mr. Ducote moved for reconsideration of the trial court's award of summary judgment. CP 100-116, 165-79. Mr. Ducote's motion does not state a legal basis for his motion, either under CR 59 or any other rule. CP 165-79. All of the legal arguments, Mr. Ducote makes on reconsideration would have been available to him prior to the September 29, 2006 hearing and prior to the trial court's entry of a written summary judgment order. CP 165-79. Ducote identifies no recent change in the law that might warrant filing a supplemental memorandum. CP 165-79. His motion is supported by declarations from Kent and Dixie Ducote. CP 100-116. The information contained in Kent

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<sup>6</sup> The Findings of Fact and Conclusions of Law entered in the dependency proceeding do not include such a finding. Appendix A.

and Dixie Ducote's declarations was available long before September 29, 2006. CP 100-116. The documents appended to those declarations were also available long before the trial court entered judgment on DSHS's second motion for summary judgment. CP 100-116.

On November 21, 2006, DSHS filed a memorandum in opposition to Mr. Ducote's motion for reconsideration. CP 180-86. DSHS objected to Mr. Ducote's attempt to alter the record on appeal on both procedural and substantive grounds:

Although not encouraged, a party may submit additional evidence after a decision on summary judgment has been rendered, but before a formal order has been entered. *Meridian Minerals Company v. King County*, 61 Wn. App. 195, 202-203, 810 P.2d 31 (1991), *citing Felsman v. Kessler*, 2 Wn. App. 493, 498, 468, P.2d 691, *review denied*, 78 Wn.2d 994 (1970). Thereafter, if the aggrieved party moves for reconsideration under CR 59, the court must base its decision on evidence heard at the summary judgment hearing, unless the evidence was unavailable at the time of the summary judgment hearing. *Holiday v. Merceri*, 49 Wn. App. 321, 330, 742 P.2d 127, *review denied*, 108 Wn.2d 1035 (1987); *see also, Meridian, supra*. 'Newly discovered evidence' is not simply any new evidence the moving party happens upon, or failed to produce at the hearing. Rather, CR 59(a) requires the party moving for reconsideration to make an adequate showing of why he did not previously offer the evidence. *In re the Custody of A.C. and M.C.*, 124 Wn. App. 846, 103 P.3d 226 (2004); *Morinaga v. Vue*, 85 Wn. App. 822, 831, 935 P.2d 637, *reviewed denied*, 133 Wn.2d 1012, 946 P.2d 401 (1997).

Ducote's Motion for Reconsideration must be denied. Ducote did not cite any ground on which his

motion for reconsideration is based. In fact, Ducote cited no authority whatsoever in his motion. The summary judgment order has been entered. Accordingly, it is entirely inappropriate for Ducote to accompany his motion to reconsider with declarations and documents he did not offer at the September 29 summary judgment hearing, or at the dependency fact-finding hearing. Ducote is not permitted, under the guise of a motion for reconsideration, to propose new theories he could have raised, and make new arguments he could have made, before the court entered the summary judgment order and dismissed this lawsuit. *See, Adams v. W. Host, Inc.*, 55 Wn. App. 601, 608, 779 P.2d 281 (1989) (reconsideration properly denied where evidence submitted in declaration submitted in support of reconsideration was available to plaintiff before court's initial decision).

Reconsideration based on lack of substantial justice is rare, given the other broad grounds available under CR 59(a). *See, Kohfeld, supra at 41; See also, Lian v. Stalick*, 106 Wn. App. 811, 824, 25 P.3d 467 (2001). This is particularly true here, where Ducote is seeking to have information brought before the court that he was aware of years before the summary judgment hearing. If anything, 'substantial justice' supports DSHS' request that the summary judgment decision remain undisturbed.

CP 183-84; RP (1/18/07) 6-8.

On January 18, 2007, the trial court denied Mr. Ducote's motion for reconsideration:

At the - the time of the Motion for Summary Judgment the information that the - Mr. Ducote was a psychological parent or de facto parent, or that he had adopted one child, or that the accused - accuser had taken his name were not before the Court. The issue before the Court was whether a stepparent had standing under the statute....

At any rate, there are no newly discovered grounds. This has not been brought under the newly discovered grounds theory of CR 59. Rather it's being brought under "substantial justice has not been done," which is a pretty catchall phrase.

But at the time of the summary judgment the Court's information certainly justified the Motion for Summary Judgment. I see no reason to change that decision.

CP (1/18/07) 10-11.

The trial court entered a written order denying reconsideration on January 29, 2007. CP 117-18 (3/26/07).

By separate motion, DSHS requests that this court strike those portions of Mr. Ducote's appellate brief that depend upon facts and arguments raised in his groundless motion for reconsideration and supporting declarations.<sup>7</sup>

### III. SUMMARY OF ARGUMENT

Kent Ducote, a stepfather who chose not to adopt or seek legal custody of his stepchildren, does not have standing to pursue a claim for negligent investigation against the Department because he is not a member

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<sup>7</sup> Because DSHS prevailed both on summary judgment and on reconsideration and seeks no further affirmative relief from the appellate court, it was not required to cross-appeal the trial court's denial of its motion to strike the Declarations of Kent and Dixie Lee Ducote. CP 117-18 (3/26/07), 180-84; RAP 2.4(a); RAP 5.1(d); *McGowan v. State*, 148 Wn. 2d 278, 60 P.3d 67 (2002); *State v. Bobic*, 140 Wn.2d 250, 257-58, 996 P.2d 610 (2000).

of the particular, circumscribed class to which DSHS owes a duty under RCW 26.44, *et seq.*

#### IV. ARGUMENT

##### A. Standard of Review

This court reviews summary judgment orders *de novo* and generally performs the same inquiry as the trial court. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004). It examines the pleadings, affidavits, and depositions before the trial court and "take[s] the position of the trial court and assume[s] facts [and reasonable inferences] most favorable to the nonmoving party." *Ruff v. King County*, 125 Wn.2d 697, 703, 887 P.2d 886 (1995) (citing *Hartley v. State*, 103 Wn.2d 768, 774, 698 P.2d 77 (1985)). Affirming the trial court's award of summary judgment is proper if the record before the trial court establishes "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c).

##### B. Absent Specific Statutory Authorization, A Claim for Negligent Investigation Violates Well Established Public Policy

There is no common law cause of action for negligent investigation in Washington. In *Dever v. Fowler*, 63 Wn. App. 35, 44, 816 P.2d 1237 (1992), this court noted that: "No Washington court has ever recognized a

separate and distinct cause of action for negligent investigation.” The public policy underpinning this general position is clear:

The reason courts have refused to create a cause of action for negligent investigation is that holding investigators liable for their negligent acts would impair vigorous prosecution and have a chilling effect upon law enforcement.

*Dever*, 63 Wn. App. at 46 (citing *Smith v. State*, 324 N.W.2d 299, 302 (Iowa 1982) and *Gisoni v. Harrison*, 120 A.D.2d 48, 507 N.Y.S.2d 419, 423 (N.Y.App.Div.1986).

As this court noted in *Pettis v. State*, 98 Wn. App. 553, 558, 990 P.2d 453 (1999): “In general, a claim for negligent investigation does not exist under the common law of Washington. That rule recognizes the chilling effect such claims would have on investigations.” *See also, Blackwell v. Department of Social and Health Services*, 131 Wn. App. at 375.

Kent Ducote errs throughout his brief in assuming that “the tort of negligent investigation protects children and *those acting as parents* from the State’s unwarranted interruption of the family relationship.” Br. of Appellant, p. 11. Neither DSHS, nor any other investigative body, has the broad, generic duty presumed by Mr. Ducote. Unless Mr. Ducote’s negligent investigation claim is specifically authorized by statute, and a

stepparent has standing to assert that statutory claim, it must be dismissed as a matter of law.

**C. Mr. Ducote Does Not Fall Within the “Particular, Circumscribed” Class of Persons Protected By RCW 26.44, et seq.**

**1. RCW 26.44, et seq. Authorizes a Statutory Claim for Negligent Investigation That Is Limited, By the Terms of the Statute and Interpreting Case Law, to Children and Their Parents**

Although *Dever*, and the cases discussed in the preceding section, make it clear that there is no general, common law tort claim available for negligent investigation, and no investigative body has a broad duty to conduct reasonable investigations that is actionable by all potential claimants, Washington courts have determined that: “[RCW 26.44, et. seq.] creates an actionable duty that flows from DSHS to both children and parents<sup>8</sup> who are harmed by DSHS negligence that results in wrongfully removing a child from a nonabusive home, placing a child into an abusive home, or allowing a child to remain in an abusive home (emphasis added).” *M.W. v. Department of Social and Health Services*, 149 Wn.2d at 597 (relying generally on *Tyner v. Department of Social and Health Services*, 141 Wn.2d at 77-82). As it has been defined by

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<sup>8</sup> RCW 13.04.011(5) specifies that: “Parent” or “parents”, as used in chapter 13.34 RCW, means the biological or adoptive parents of a child ....

Washington's courts, this duty is limited to "children and parents."<sup>9</sup> As a brief analysis of Washington cases that have defined DSHS's duty to "children and parents" and the public policy underpinning those cases makes clear, Mr. Ducote errs in concluding that under Washington court interpretations of RCW 26.44.010<sup>10</sup> and 26.44.050<sup>11</sup>, DSHS had an actionable duty to a stepparent.

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<sup>9</sup> The Supreme Court's analysis in *M.W. v. Department of Social and Health Services* was based, in part, upon the examination of the twelve Washington cases (all of the cases decided prior to *M.W.*) analyzing DSHS liability under RCW 26.44, et seq. and dividing them into three factual categories that was conducted by Judge Morgan in his lengthy dissent to *M.W. v. Department of Social and Health Services*, 110 Wn. App. 233, 255-6, 39 P.3d 993 (2002) (Morgan, J., dissenting). 149 Wn.2d at 594-5. All of the cases discussed by Judge Morgan focus on the duty owed by DSHS to parents and children.

<sup>10</sup> RCW 26.44.010 provides as follows:

The Washington state legislature finds and declares: The bond between a child and his or her parent, custodian, or guardian is of paramount importance, and any intervention into the life of a child is also an intervention into the life of the parent, custodian, or guardian; however, instances of nonaccidental injury, neglect, death, sexual abuse and cruelty to children by their parents, custodians or guardians have occurred, and in the instance where a child is deprived of his or her right to conditions of minimal nurture, health, and safety, the state is justified in emergency intervention based upon verified information; and therefore the Washington state legislature hereby provides for the reporting of such cases to the appropriate public authorities. It is the intent of the legislature that, as a result of such reports, protective services shall be made available in an effort to prevent further abuses, and to safeguard the general welfare of such children: PROVIDED, That such reports shall be maintained and disseminated with strictest regard for the privacy of the subjects of such reports and so as to safeguard against arbitrary, malicious or erroneous information or actions: PROVIDED FURTHER, That this chapter shall not be construed to authorize interference with child-raising practices, including reasonable parental discipline, which are not proved to be injurious to the child's health, welfare and safety.

<sup>11</sup> RCW 26.44.050 provides as follows:

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.

A law enforcement officer may take, or cause to be taken, a child into custody without a court order if there is probable cause to believe that the child is abused or neglected and that the child would be injured or could not be taken into custody if it were

## 2. Applicable Law

In *Lesley v. Department of Social and Health Services*, 83 Wn. App. 263, 273, 921 P.2d 1066 (1996), this court held, for the first time, in a case brought by the parents of a child who had been removed from her home for six days after caseworkers mistakenly concluded that her birthmarks were bruises indicative of abuse, that “a specific statute (RCW 26.44.050) provides that DSHS caseworkers have a duty to investigate” and, consequently, “[a] cause of action for negligent investigation thus exists against DSHS caseworkers.” In reaching this conclusion, this court relied upon *Babcock v. State*, 116 Wn.2d 596, 610-12, 809 P.2d 143 (1991)<sup>12</sup>, which determined that DSHS caseworkers were entitled to qualified rather than absolute immunity, but implicitly recognized that the gravamen of the plaintiffs’ complaint was negligent investigation.

This court affirmed *Lesley’s* interpretation of DSHS’s duty in *Yonker v. Department of Health and Social Services*, 85 Wn. App. 71, 930 P.2d 958 (1997), a case brought against DSHS by a biological mother who alleged DSHS caseworkers had negligently failed to investigate her

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necessary to first obtain a court order pursuant to RCW 13.34.050. The law enforcement agency or the department of social and health services investigating such a report is hereby authorized to photograph such a child for the purpose of providing documentary evidence of the physical condition of the child.

<sup>12</sup> Mr. Ducote correctly notes that the plaintiffs in *Babcock* were three children, their biological father, and their father’s parents. The grandparents standing to sue for negligent investigation was not challenged by DSHS (or affirmed by the Court). The case focuses entirely on the availability of absolute immunity to social workers and qualified immunity to the State.

reports that her ex-husband was sexually abusing their two-and-a-half year old son. In *Yonker*, this court considered the issue, for the first time, under the public duty doctrine<sup>13</sup>, finding that the circumstances of the *Yonker* case fell within the legislative intent exception to the public duty doctrine, specifically, that in RCW 26.44.010, the Legislature had expressed by statute “an intent to identify and protect a particular and circumscribed class of persons.”<sup>14</sup> In reaching its conclusion that RCW 26.44.010 identified a “particular and circumscribed class of persons,” this court noted:

In Ch. 26.44 RCW, the Legislature addressed abuse of children and DSHS's responsibility in regard to those children. In its declaration of purpose, *the Legislature emphasized the importance of the bond between parents and their children*, but noted that when parents cause nonaccidental injuries or sexually abuse or neglect their children, the State may intervene. RCW 26.44.010.

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We conclude the public duty doctrine does not shield DSHS from [the mother's] claim, because she and her son fall within the particular and circumscribed class of individuals the Legislature intended to protect in enacting RCW 26.44.

*Yonker*, 85 Wn. App. at 78, and 81-2 (emphasis added).

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<sup>13</sup> “A government official’s negligence does not expose the government to tort liability unless the plaintiff can show that a duty was owed to the plaintiff, as opposed to the public in general.” *Yonker*, 85 Wn. App. at 76 (citing *Taggart v. State*, 118 Wn.2d 195, 217, 822 P.2d 243 (1992)).

<sup>14</sup> In *Bailey v. Forks*, 108 Wn. 2d 262, 268, 737 P.2d 1257 (1987), the Supreme Court identified four exceptions to the public duty doctrine: (1) legislative intent; (2) failure to enforce; (3) the rescue doctrine; and (4) special relationship.

In *Tyner v. Department of Social and Health Services*, 141 Wn.2d 68, 76, 1 P.3d 1148 (2000), the Supreme Court specifically considered the question of “whether the State, acting through CPS caseworkers, owes a duty of care in conducting an investigation of parental child abuse to the parent suspected of such abuse.” As this court did in *Yonker*, the Supreme Court analyzed the issue in terms of the Legislature’s intent in enacting RCW 26.44, et seq.

In *Yonker*, this court considered the legislature’s intent in enacting RCW 26.44 as an exception to the public duty doctrine. But, in *Tyner*, the Supreme Court applied the test articulated in *Bennett v. Hardy*, 113 Wn.2d 912, 919, 784 P.2d 1258 (1990) for determining whether a legislative enactment may be the foundation of a right of action. 141 Wn.2d at 77-82.

In *Bennett*, the Supreme Court outlined when a cause of action will be implied from a statute, requiring that a court ask the following questions:

[F]irst, whether the plaintiff is within the class for whose "especial" benefit the statute was enacted; second, whether legislative intent, explicitly or implicitly supports creating or denying a remedy; and third, whether implying a remedy is consistent with the underlying purpose of the legislation.

113 Wn.2d at 920-21.

In applying the first prong of the *Bennett* test, the *Tyner* court found that a parent was within the class for whose “especial” benefit the statute was enacted, specifically contrasting the interests of a parent (and a parent’s membership in that special class) with the interests of non-parent third parties, like Mr. Ducote:

The interests of a parent are significantly greater than those of a third party in this context. As one court noted, “[c]harges of child abuse leveled against a parent and ineptly handled strike at the core of a parent’s basic emotional security, providing ample justification for the imposition of liability.” *Gray v. State*, 624 A.2d 479, 485 (Me.1993). We find the first prong of the *Bennett* test is met.

*Tyner*, 141 Wn.2d at 80.

In concluding that the second prong of the *Bennett* test was met under the facts of *Tyner*, the Supreme Court noted:

RCW 26.44.050 places an affirmative duty of investigation on the State. At the same time, the Legislature has emphasized that the interests of a child and parent are closely linked. RCW 26.44.010. *Thus, by recognizing the deep importance of the parent/child relationship, the Legislature intends a remedy for both the parent and the child if that interest is invaded.*

*Tyner*, 141 Wn.2d at 80 (emphasis added).

Finally, in concluding that the third prong of the *Bennett* test was satisfied, the Supreme Court observed:

An implied tort remedy *in favor of a parent* is also consistent with the underlying purposes of RCW 26.44.050, thereby satisfying the third prong of the *Bennett* test.

*Tyner*, 141 Wn.2d at 80 (emphasis added).

In *Tyner*, on the basis of the *Bennett* test, the Supreme Court held:

We conclude that under RCW 26.44.050, CPS owes a duty of care to a child's parents, even those suspected of abusing their own children, when investigating allegations of child abuse.

*Tyner*, 141 Wn.2d at 82 (emphasis added).

Application of the *Bennett v. Hardy* test to Kent Ducote's negligent investigation claim makes it clear that, by contrast with David *Tyner*, a biological father investigated by CPS for having abused his two minor children, there is no basis for implying a cause of action from RCW 26.44.010 and 26.44.050 to benefit Mr. Ducote. There is also no foundation in the case law for expanding DSHS's duty to stepparents.

*Pettis v. DSHS*, *supra*, is one of two primary cases considering whether RCW 26.44 creates a duty to parties other than an allegedly abused child and his / her parent. In *Pettis*, the director of a school district's licensed day care facility, who had been investigated by DSHS for alleged physical child abuse based on a complaint made by a member of her staff, asked this court "to extend the duty that is owed to parents and children" under RCW 26.44 to "child care workers" and, thus, to allow her

to bring a claim for negligent investigation against DSHS. 98 Wn. App. at

560. This court declined to do so, concluding:

If the duty of care is to be extended to child care workers, the proper body to make that decision is the Legislature. The state Legislature has thus far declined to do so. In RCW 26.44.010, the Legislature specifically recognized the unique relationship between parent and child and made clear that the State may interfere with that relationship in only the most urgent situations. *That legislative intent is inconsistent with extending a duty of care to nonparental relationships.* In balancing the need to investigate abuse complaints with the protection of the parent-child relationship, *the Legislature acknowledged that a unique relationship exists between parents and their children, and it did not include caretakers within that classification. That balance was not ascribed to other relationships.* We hold that the statute as it existed at the time of the investigation<sup>15</sup> provided no duty of care to Pettis.

*Pettis*, 98 Wn. App. 560.<sup>16</sup>

In *Blackwell v. Department of Social and Health Services*, *supra*, Miller and Mary Blackwell were the long term foster parents of five children, including one whom they had discussed adopting. The Blackwells urged this court to extend DSHS's statutory duty to investigate child abuse under RCW 26.44.050—and the cause of action for “negligent investigation” it implies for “children and parents”—to them, either as

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<sup>15</sup> The 1997 amendments to RCW 26.44 require that an alleged perpetrator receive notice of the allegations against him or her at the earliest point in the investigation. Although those amendments were at issue in *Pettis*, they are not at issue in the present case.

<sup>16</sup> After quoting this passage in its entirety, the *Blackwell* court concluded: “With regard to foster parents, we hold the same is true.” 131 Wn. App. at 377.

foster parents, or as psychological or *de facto* parents. 131 Wn. App. at 377-78. This court declined to do so, holding: “There is no case law supporting the expansion of DSHS’s duty beyond biological parents and children.” 131 Wn. App. at 376.

Thus, whether the matter is analyzed under the public duty doctrine, or the *Bennett* test, Washington courts have been consistent in their determination that under RCW 26.44, DSHS’s duty to conduct a reasonable investigation of allegations of child abuse is owed to a “particular, circumscribed class” that is limited to the children who are alleged to be abused and their parents. The expansion of this “particular circumscribed class” to a third party—in this instance a stepparent—runs directly counter to the case law authorizing a cause of action for negligent investigation and should be denied by this court.

**3. Because DSHS Has No Statutory Duty to Step-Parents under RCW 26.44, et seq., Mr. Ducote Does Not Have Standing to Claim Negligent Investigation**

While RCW 26.44.050 announces only a general duty of investigation on the part of the State, RCW 26.44.010, the declaration of purpose section, makes it clear that only clearly defined legal relationships have been deemed to be of paramount importance by the legislature:

The bond between a child and his or her *parent, custodian, or guardian* is of paramount importance, and any intervention into the life of a child is also an

intervention into the life of the *parent, custodian, or guardian* ....

*See, Tyner v. Department of Social and Health Services*, 141 Wn.2d at 78

(emphasis added). In *Tyner*, on the basis of RCW 26.44.010, the Court announced that a claim against DSHS for negligent investigation was available to *parents, custodians, guardians* and children under certain limited situations (emphasis added). *Id.*

The pertinent definitions of these terms are found in RCW 13.04.011(5), (6) and 13.34.030(7):

“Parent” or “parents”, as used in chapter 13.34 RCW, means the biological or adoptive parents of a child ...;

“Custodian” means that person who has the legal right to custody of the child.

“Guardian” means the person or agency that (a) Has been appointed as the guardian of a child in a legal proceeding other than a proceeding under this chapter; and (b) has the legal right to custody of the child pursuant to such appointment. The term “guardian” shall not include a “dependency guardian” appointed pursuant to a proceeding under this chapter.

RCW 13.34.011(5), (6) and 13.34.030(7).

Under the plain language of these statutes, the legislature specifically excluded stepparents. Furthermore, Washington courts have not interpreted the provisions under RCW Chapters 13.34 and 26.44 as extending benefits to non-parents. A non-parent is not a proper party to a

child dependency proceeding. *In re the Dependency of M.R.*, 78 Wn. App. 799, 899 P.2d 1286 (1995) (an individual who claimed to be a “psychological parent” is not a parent under RCW 13.04.011(4)<sup>17</sup>--which defines a parent as the biological or adoptive parent of a child--and, consequently, is not a proper party to a dependency proceeding under RCW 13.34).

The conclusion that the Legislature specifically excluded stepparents from the reach of DSHS’s duty under RCW 26.44.010 and .050, is given further credence by the interplay between chapters 13.34 and 26.10 RCW. As outlined above, the focus of chapter 13.34 RCW is on biological or adoptive parents. Conversely, the focus of chapter 26.10 RCW is on non-parents. Specifically, the Legislature affords non-parents (e.g., a stepparent, *de facto* parent or psychological parent) the ability to petition for custody of children under RCW 26.10 ( Non-parental Actions for Child Custody). Furthermore, in delineating permanent plan options for dependent children, under RCW 13.34.145, the Legislature clearly distinguishes between parents and non-parents, providing only for: “return

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<sup>17</sup> Now RCW 13.04.011(5)

of the child to the home of the child's parent, guardian, or legal custodian; adoption; guardianship; [and] permanent legal custody...."<sup>18</sup>

Finally, under RCW 13.34.155, the Legislature even provides for a dependency action (chapter 13.34 RCW) to be consolidated with a non-parental custody action (chapter 26.10 RCW). The interplay of these statutes demonstrates that the Legislature has purposefully separated parents from non-parents in the two different statutes.

Mr. Ducote, a stepfather, seeks to extend the reach of DSHS's duty. He is not the biological parent of Dixie Ducote's three children. He had lived with Dixie's children for more than six years prior to the dependency proceedings at issue in this case, yet there is no evidence he made any attempt to adopt her children prior to the year 2000. He was not their legal custodian. He was not their legal guardian. There is simply no statutory support for Ducote's argument that he is among the particular, circumscribed class to which DSHS owes a duty under RCW 26.44, *et seq.* and, consequently, has standing to pursue a negligent investigation claim against DSHS.

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<sup>18</sup> "Permanent legal custody" means "legal custody pursuant to chapter 26.10 RCW or equivalent laws of another state or of a federally recognized Indian tribe." RCW 13.34.145(d)(ii),(iii).

**4. Mr. Ducote Errs When He Argues That “The Stepparent Relationship, Established By Marriage to a Child’s Parent, Creates Rights and Obligations That Support [His] Claim In This Case.”<sup>19</sup>**

Mr. Ducote relies upon a variety of cases and statutes in support of his claim to have standing to sue DSHS for negligent investigation. None of the authorities he relies upon is relevant to establishing that the stepparent relationship—like biological or adoptive parenthood, or the narrowly defined legal roles of “custodian” and “guardian”—was deemed to be “of paramount importance” when the legislature provided for a cause of action for negligent investigation under RCW 26.44, *et seq.*

Mr. Ducote relies upon RCW 26.16.205 in support of his claim for standing, but the statute only undercuts his claim. It provides that:

*The expenses of the family and the education of the children, including stepchildren, are chargeable upon the property of both husband and wife, or either of them, and they may be sued jointly or separately. When a petition for dissolution of marriage or a petition for legal separation is filed, the court may, upon motion of the stepparent, terminate the obligation to support the stepchildren. The obligation to support stepchildren shall cease upon the entry of a decree of dissolution, decree of legal separation, or death (emphasis added).*

Parents, custodians, and guardians all have extensive legal obligations to the children in their homes. The ability of a stepparent to end all financial responsibility for a stepchild merely by petitioning the court after a legal

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<sup>19</sup> Br. Of Appellant, p.18.

separation makes it clear that a stepparent, who has chosen not to adopt his spouse's child, necessarily plays a different role in a that child's life. The Supreme Court's decision in *Harmon v. Department of Social and Health Services*, 134 Wn.2d 523, 951 P.2d 770 (1998), one of the cases relied upon by Mr. Ducote, only emphasizes the difference between the responsibilities assumed by natural parents and the minimum required of a stepparent. In *Harmon*, the Court found that:

With respect to the language regarding termination of a stepparent's obligation under the family expense statute [RCW 26.19.075], we believe the Legislature intended only to distinguish between parents and stepparents to the extent that the obligation, once assumed, would not continue for stepparents beyond the termination of the marriage. *The parent's obligation for the support of a child continues and is not dependent on the continuation of the marital relationship.*

134 Wn.2d at 542 (emphasis added). Expanding upon the language of RCW 26.16.205, the *Harmon* Court added an additional limitation on the stepparents' role, finding that the stepfather who filed the case was not required to legally separate from his wife in order to petition the court to free him from financial responsibility for his stepchildren. The Supreme Court majority held Edward Harmon had no financial responsibility to his wife's children after they were placed in their natural father's custody.

134 Wn.2d at 542-3. The other precedents Mr. Ducote relies upon are similarly inadequate for his purpose.

In *Washington Statewide Organization of Stepparents v. Smith*, 85 Wn.2d 564, 565, 536 P.2d 1202 (1975), stepparents filed a class action asking the Supreme Court to hold that the provisions of RCW 26.16.205 which required them to provide financial support to their stepchildren did not apply to those members of the class who were married prior to 1969 (when the statutes were amended). The Supreme Court denied their request. Other than demonstrating the clear distinction between stepparents who choose to adopt their children and those who do not, it is unclear how stepparents' interest in avoiding any financial responsibility for their stepchildren, as it was demonstrated in this case, serves Mr. Ducote's argument.

In *Magnuson v. O'Dea*, 75 Wn. 574, 578-79, 135 Pac. 640 (1913), an unusual kidnapping case prosecuted against Edward J. O'Dea, the Catholic bishop of Seattle, by "an immoral woman...unfit to be intrusted [sic] with the custody of her daughter," the Court entered the following finding regarding the stepfather of Ms. Magnuson's sixteen-year old daughter:

It follows, we think, that where the stepfather has received the child into his home and has supported her he is entitled to the services and earnings of the child. In short, when he assumes the duties of a parent, the corresponding benefits follow, and the rights of the mother and stepfather in respect to the child are then equal before the law (Rem. &

Bal. Code, § 5932), and the stepfather must join in any action waged by the mother to recover for loss of services.

*Magnuson*, like any common law action, has long been supplanted by statute and bears no relevance to the issue before this court.<sup>20</sup>

Mr. Ducote's reliance on the statutes and case law that define the limited--easily abandoned--responsibilities of stepparents does nothing to enhance his claim that he is a member of the particular, circumscribed class to which DSHS owes a duty under RCW 26.44, *et seq.* and does nothing to establish that he has standing to challenge a DSHS child abuse investigation.

**5. Ducote's Claim to Be a *De Facto* Parent Should Be Denied Because It Is Not Supported by the Record and Was Not Made at the Time the Trial Court Awarded Summary Judgment**

Mr. Ducote's Motion for Reconsideration argued that he should be considered a *de facto* or psychological parent, as those terms are discussed

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<sup>20</sup> More recent common law actions suggest that *Magnuson's* assignment of responsibility to a stepfather may have been rare. In *Taylor v. Taylor*, 58 Wn.2d 510, 364 P.2d 444 (1961), the Supreme Court held that a stepfather who stood in loco parentis to his wife's illegitimate son, could abandon that relationship when the parties were divorced and could not be compelled to contribute to the child's support. In *State v. Brown*, 52 Wn.2d 92, 323 P.2d 239 (1958), a prosecution for nonsupport, it was held that a natural father's failure to support his child was not excused by a showing that the child was being supported by his stepfather, since the stepfather had no legal duty to support the child and the evidence did not show that he had undertaken or consented to relieve the natural father of his statutory duty.

in *In re Parentage of L.B.*, 155 Wn.2d 679, 122 P.3d 117 (2006)<sup>21</sup> and *Blackwell v. Department of Social and Health Services*, *supra*, and, on the basis of that claim, should be considered to be within the class of persons to whom DSHS owes a duty under RCW 26.44.050. CP 174. Mr. Ducote did not argue that he was a *de facto* or psychological parent in his memorandum in opposition to DSHS's motion for summary judgment.<sup>22</sup> CP 78-88. At the time the trial court awarded summary judgment in this case, the Declarations of Kent and Dixie Ducote were not in evidence. As the trial court noted when it ruled on Mr. Ducote's Motion for Reconsideration:

At the - the time of the Motion for Summary Judgment the information that the - Mr. Ducote was a psychological parent or de facto parent, or that he had adopted one child, or that the accused - accuser had taken his name were not before the Court. The issue before the Court was whether a stepparent had standing under the statute....

CP (1/18/07) 10-11.

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<sup>21</sup> *L.B.* was a case brought by Sue Ellen Carver against Page Britain, L.B.'s biological mother, seeking the right to establish co-parentage for L.B., a minor child the two women had parented together during their 12-year, intimate domestic relationship.

<sup>22</sup> Mr. Ducote raised the issue briefly at oral argument and again in an improper motion for reconsideration. But when a party moves for reconsideration under CR 59, the court must base its decision on evidence heard at the summary judgment hearing, unless the evidence was unavailable at the time of the summary judgment hearing. *Holiday v. Merceri*, 49 Wn. App. 321, 330, 742 P.2d 127, *review denied*, 108 Wn.2d 1035 (1987); *Meridian Minerals Company v. King County*, 61 Wn. App. 195, 202-203, 810 P.2d 31 (1991), *citing Felsman v. Kessler*, 2 Wn. App. 493, 498, 468, P.2d 691, *review denied*, 78 Wn.2d 994 (1970).

Issues and contentions neither raised by the parties nor considered by the trial court when ruling on a motion for summary judgment may not be considered for the first time on appeal. *Ferrin v. Donnellefeld*, 74 Wn.2d 283, 285, 444 P.2d 701 (1968); *Green v. Normandy Park*, 137 Wn. App. 665, 151 P.3d 1038 (2007); *Concerned Coupeville Citizens v. Town of Coupeville*, 62 Wn.App. 408, 413, 814 P.2d 243 (1991); *Ashcraft v. Wallingford*, 17 Wn.App. 853, 860, 565 P.2d 1224 (1977). Mr. Ducote's argument that he is a *de facto* parent is not properly before this court and should not figure in this court's decision.

**6. Even if Ducote's Claim to Be a *De Facto* Parent Had Been Raised Prior to Summary Judgment, It Is Not Supported By the Record and Does Not Give Him Standing to Claim Negligent Investigation Under RCW 26.44, *et seq.***

Mr. Ducote also suggests that even if this court were to find that the particular, circumscribed class to which a DSHS investigator owes a statutory duty is limited to allegedly abused children and their parents that he is, nevertheless, a member of that class because he was Brittney, Cole, and Morgan's *de facto* or psychological parent. But employing the test for determining whether an individual is a *de facto* parent articulated in *L.B.* and discussed in *Blackwell* shows that assertion to be inaccurate, since Mr. Ducote is unable to satisfy criteria (1) and (4) of the required test:

To establish standing as a *de facto* parent we adopt the following criteria ... (1) *the natural or legal parent consented to and fostered the parent-like relationship*, (2) the petitioner and the child lived together in the same household, (3) the petitioner assumed obligations of parenthood without expectation of financial compensation, and (4) *the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship, parental in nature....* In addition, recognition of a *de facto* parent is "limited to those adults who have fully and completely undertaken a permanent, unequivocal, committed, and responsible parental role in the child's life.... A *de facto* parent is not entitled to any parental privileges, as a matter of right, but only as determined to be in the best interests of the child at the center of any such dispute." *Blackwell v. DSHS*, 131 Wn. App. at 378 (quoting *L.B.*, 155 Wn.2d at 708-9) (emphasis added).

The record available to the trial court at the time it granted summary judgment made it impossible for Mr. Ducote to establish the first element of the *de facto* parent test: (1) the natural or legal parent consented to and fostered the parent-like relationship.

During the period just prior to the dependency proceedings, Dixie Ducote did many things that demonstrated she was not fostering a parent-like relationship between Kent and her children, most notably the fact that she regularly reported Kent Ducote to DSHS and to the San Juan County Sheriff's Office for various forms of physical and sexual abuse. Specifically, Dixie reported to the police that Kent had spanked Cole with a wooden spoon, leaving a mark (CP 126); reported to CPS that she was

uncomfortable with Morgan regularly “cuddling” with Kent (CP 126); and sought assistance from domestic violence counselor Castle, reporting numerous incidents when Kent had been physically abusive toward her and her children (CP 126). See, Section IIIA, above.

The record available to the trial court at the time it granted summary judgment also made it impossible for Mr. Ducote to establish the fourth element of the *de facto* parent test: (4) the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship, parental in nature....

Although Mr. Ducote had lived with Dixie and her children for six years, at the time the trial court decided DSHS’s motion for summary judgment there was no evidence Kent had “a bonded, dependent relationship, parental in nature” with Dixie’s children, particularly with Brittney and Cole. See Section IIIA, above. At the time the Sherriff’s Office took Brittney into custody after she alleged Mr. Ducote had been sexually abusive, she told both the investigating detectives and CPS that she did not feel safe in her home, that her mother did not believe her, and that her mother could not protect her. CP 126. At the same time, Brittney told investigators that Mr. Ducote hit Cole and that she had witnessed Kent throw Cole on the floor. CP 126. All parties agreed Cole had held a knife to his throat, though they disagreed on the seriousness of the action.

CP 126. There was evidence in the record to suggest Morgan had a “bonded, dependent relationship with Kent” though Dixie’s reports regarding the relationship to DSHS, and her continuing discomfort with it, suggested that she did not find Kent’s relationship with Morgan “parental in nature.”

Even if this court were to consider Mr. Ducote’s claim to have been a *de facto* parent for his stepchildren from 1998 to 2000, the record of his behavior during that period makes it impossible for him to establish such a claim.

Mr. Ducote’s reliance on *Custody of Shields*, 157 Wn.2d 126, 136 P.3d 117 (2006) is similarly misplaced. In *Shields*, stepmother Jenny Shields did not claim to be a *de facto* parent, nor did she attempt to make claims that exceeded her legal role. 157 Wn.2d at 131, fn 1. Ms. Shields did exactly what Mr. Ducote was entitled to do here: she filed a non-parental custody petition pursuant to RCW 26.10.030(1) in order to obtain custody of her stepson after the death of the boy’s natural father. 157 Wn.2d at 131. Had Mr. Ducote filed (and been granted) nonparental custody of Dixie’s children under RCW 26.10.030(1), he would have had the binding, legal relationship with Dixie’s children required under RCW 26.44, *et seq.* and, arguably, had standing to pursue his claim for negligent investigation. Nothing in *Shields* reinforces Mr. Ducote’s claim

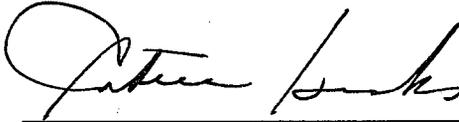
to have standing to pursue a negligent investigation claim against DSHS merely because he is a stepparent.

**V. CONCLUSION**

DSHS respectfully requests that this court affirm that Mr. Ducote, as a stepfather who chose not to adopt or seek legal custody of his stepchildren, did not have standing to pursue a claim for negligent investigation against the Department because he is not a member of the particular, circumscribed class to which DSHS owes a duty under RCW 26.44, *et seq.*

RESPECTFULLY SUBMITTED this 29<sup>th</sup> day of June, 2007.

ROBERT M. MCKENNA  
Attorney General



CATHERINE HENDRICKS, WSBA #16311  
Senior Counsel  
Attorneys for Respondent State of Washington  
Department of Social & Health Services

**CERTIFICATE OF SERVICE**

I certify under penalty of perjury in accordance with the laws of the State of Washington that the original and one copy of the preceding Brief of Respondent were filed by messenger at the following address:

Court of Appeals of Washington, Division I  
One Union Square  
600 University Street  
Seattle, WA 98101

And that a copy of the Brief of Respondent was served on appellate counsel for Plaintiff/Appellant Ducote by messenger at the following address:

Catherine W. Smith  
Edwards, Sieh, Smith & Goodfriend, P.S.  
1109 First Avenue, Suite 500  
Seattle, WA 98101-2988

And that one copy was served on trial counsel for Plaintiff/Appellant Ducote by First Class U.S. Mail at the following address:

Carla Jean Higginson  
Attorney at Law  
175 2nd St N  
Friday Harbor WA 98250-7949

DATED this 29<sup>th</sup> day of June, 2007 at Seattle, Washington.

  
PATTI L. VINCENT

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## Appendix A

COUNTY CLERKS OFFICE  
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MARY JEAN CAHILL  
SAN JUAN COUNTY, WASHINGTON

SUPERIOR COURT OF WASHINGTON FOR SAN JUAN COUNTY  
JUVENILE COURT

In Re Dependencies of:

BRITTNEY L. MAXEY,  
D.O.B.: 1-21-86

COLE MAXEY,  
D.O.B.: 3-18-91

MORGAN MAXEY  
D.O.B.: 11-27-92

NO. 00-7-05002-9 ✓  
00-7-05003-7  
00-7-05004-5

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW

THIS MATTER having come on for trial, commencing on the 17<sup>th</sup> day of October, 2000 before the undersigned Court upon three Petitions for Dependency, the Department of Social and Health Services appearing both in person through caseworker David Parks and through its counsel of record KATHERINE E. BLAINE, the Guardian ad Litem for the minor children Sarah Forster appearing both in person and by and through her counsel of record FRANK V. LASALATA, the minor child Brittney L. Maxey appearing by and through her counsel of record JOAN ELIZABETH PEDRICK, and the mother and step-father of the minor children Dixie Lee Ducote and Kent Ducote appearing both in person and by and through their counsel of record Carla J. Higginson of HIGGINSON LAW OFFICES, and the Court having heard testimony and argument of counsel and being otherwise fully informed in the premises, makes the following:

Findings of Fact and  
Conclusions of Law - 1

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1 FINDINGS OF FACT

2 1. All parties hereto are residents of San Juan County or a Washington State  
3 agency doing business in San Juan County, and subject to the jurisdiction of this  
4 court.

5 2. Kent and Dixie Ducote were married in 1994. Dixie has three children  
6 from previous relationships: Brittney, age 14, Cole, age 9, and Morgan, age 8.

7 3. The Department of Social and Health Services ("DSHS") has alleged that  
8 Brittney is a dependent child under RCW 13.34.030(4)(b) and (c). DSHS has alleged  
9 that Cole and Morgan are dependent children under RCW 13.34.030(4)(c). RCW  
10 13.34.030(4)(b) provides that a dependent child is one who is abused or neglected as  
11 defined in Chapter 26.44 RCW by a person legally responsible for the care of the  
12 child. RCW 13.34.030(4)(c) provides that a dependent child is one who has no  
13 parent, guardian, or custodian capable of adequately caring for the child, such that the  
14 child is in circumstances which constitute a danger of substantial damage to the child's  
15 psychological or physical development.

16 4. DSHS has provided services to the family off and on since 1989, primarily  
17 in the form of home support services. Since their marriage, Kent and Dixie  
18 experienced occasional problems in their relationship with each other and in their  
19 relationships with the children. These led to various referrals and allegations:

20 (a) In March 1998, there were two referrals from DSHS, one from Dixie and  
21 one from her counselor involving allegations of Kent's anger toward Dixie and the  
22 children, but not necessarily at a dangerous level;

23 (b) There were allegations that Morgan was coming in to sleep with Kent in the  
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27 Findings of Fact and  
Conclusions of Law - 2

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1 bed of Kent and Dixie, although there were no allegations of any sexual misconduct;

2 (c) In November 1998, Dixie reported that Kent had spanked Cole with a  
3 wooden spoon leaving a mark. A police report was made, and DSHS followed up  
4 with further investigation and discussion with both Dixie and Kent. DSHS found that  
5 Kent was genuinely interested in resolving the ongoing differences with Dixie and the  
6 children;

7 (d) In August 1999, Brittney wrote a note indicating possible suicidal ideation  
8 or a concern about possible harm to her by Kent;

9 (e) Sometime shortly before September 22, 1999, there was an incident in  
10 which Kent barged into the bathroom while Brittney was in the bathroom. Although  
11 Brittney claimed that she was sitting on the toilet at the time, the Court finds she was  
12 not in fact on the toilet but was standing at the mirror "picking her zits;"

13 (f) In October 1999, there was a referral regarding an incident in which it was  
14 alleged that Kent pulled Cole out of the car by his coat and scruff of the neck, and  
15 shook him. DSHS investigated, but no finding of abuse was made, and there was no  
16 family intervention;

17 (g) In December 1999, there were additional referrals with allegations that Cole  
18 was being verbally abused by Kent and that Dixie was unable to protect the children  
19 1999. There was also mention of Brittney's note, of Brittney wanting Dixie to leave  
20 Kent, and of the bathroom incident;

21 (h) During about the same time, Dixie was receiving support from Anita  
22 Castle, of the local domestic violence support agency;

23 (i) Some time later, Brittney reported that Cole had placed a knife to his throat  
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Findings of Fact and  
Conclusions of Law - 3

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1 in about February 2000. Brittney described it as a very serious incident in which Cole  
2 was using a sharp knife and actually drew blood. However, Dixie disputed Brittney's  
3 account, testifying that she had been present during the incident. She stated that Cole  
4 had used a butter knife, did not break the skin, and that the Cole had not been  
5 threatening any significant harm.

6 5. On March 28, 2000, Brittney met with middle school counselor Gail  
7 Leschine, reiterating allegations of Kent striking Cole, the knife incident, and the  
8 bathroom incident. Brittney also told Ms. Leschine that Kent had made her sit on his  
9 lap and had touched her buttocks. Brittney expressed fear of repercussions at home  
10 for revealing this information.

11 6. In connection with this referral, David Parks of DSHS interviewed Brittney,  
12 and during the course of this interview, she alleged the voyeurism incident by Kent,  
13 stating that she had recently seen Kent watching her through her bedroom window  
14 while she disrobed to shower. Based on her allegations, Brittney was placed in  
15 emergency temporary shelter care, and these dependency proceedings were  
16 commenced.

17 7. At trial, Elizabeth Nyblade, Ph.D., testified as an expert regarding the  
18 psychological testing she performed on both Kent and Dixie. David Parks provided  
19 the initial information regarding this case to Dr. Nyblade. This skewed Dr.  
20 Nyblade's interpretation of the test results.

21 8. Dr. Nyblade diagnosed Kent as having a Personality Disorder Not  
22 Otherwise Specified with antisocial features under Axis II of the Diagnostic and  
23 Statistical Manual, Fourth Edition (DSM-IV). It was her opinion that Kent had a 45  
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27 Findings of Fact and  
Conclusions of Law - 4

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1 Global Assessment of Functioning in daily functioning which indicated severe  
2 difficulty in functioning, and that he had other possible psychological diagnoses or  
3 problems. She recommended a full psychosexual evaluation be performed on Kent.  
4 However the results of Kent's tests were essentially within normal limits and he was  
5 very cooperative in the test taking. His scores on the Child Abuse Potential Inventory  
6 were within the normal range, indicating no resemblance between Kent and child  
7 abusers, and his validity scales were within the normal range in connection with that  
8 test.

9 9. Dr. Nyblade diagnosed Dixie as having Major Affective Disorder,  
10 recurrent; major depression, on Axis I of the DSM with four other possible acute  
11 mental illness diagnoses. Dr. Nyblade diagnosed Borderline Personality Disorder on  
12 Axis II , and it was her opinion that Dixie had a 35 Global Assessment of  
13 Functioning. Dr. Nyblade also was concerned that Dixie did not feel adequate to the  
14 burden of parenting, that her parenting models growing up were poor, and that she is  
15 impaired in her perception of reality, and that she is too submissive to Kent, along  
16 with other concerns. Dr. Nyblade did state her opinion that Dixie does have the  
17 ability to parent her children, although she has problems doing so.

18 10. Dr. David Eden testified as an expert on behalf of Kent and Dixie, after he  
19 had reviewed the same raw test data analyzed by Dr. Nyblade. He testified that there  
20 was nothing in the test data to conclude that Kent and Dixie had lied, and that the  
21 information that Dr. Nyblade had obtained from Mr. Parks beforehand had likely  
22 made her biased against the Ducotes.

23 11. Dr. Eden took issue with Dr. Nyblade's Axis II diagnosis for Kent, and  
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27 Findings of Fact and  
Conclusions of Law - 5

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1 did not see anything in the data that would call for a psychosexual evaluation of Kent.  
2 Dr. Eden pointed out some of the obvious innocent explanations for some of the  
3 concerns about Kent's allegedly inappropriate sexual behavior, and Dr. Eden  
4 diagnosed a generalized anxiety disorder for Kent and testified that it was  
5 understandable given what he has been through over the last few months. It was Dr.  
6 Eden's opinion that Kent's Global Assessment for Functioning was more likely in the  
7 61 to 70 range and that the Global Assessment for Functioning for Dixie was more  
8 likely in the 51 to 60 range. The Court finds Dr. Eden's opinions to be credible in  
9 light of the evidence in this case as a whole.

10 12. Dr. Eden testified that Dixie was suffering from depression but not that  
11 she was suffering from some Major Affective Disorder under Axis I. It was his  
12 opinion that there was no dissociative or thought disorder on the part of Dixie. He  
13 testified there was perhaps a histrionic disorder under Axis II for Dixie. Those  
14 diagnoses are not as serious as the diagnoses of Dr. Nyblade.

15 13. Dr. Eden further testified that assuming Kent was in counseling (as Kent  
16 testified he was), that there was no history of violence or arrests (and there was not,  
17 other than the referrals that implicated him in some allegedly inappropriate physical  
18 discipline of the children), and assuming that neither Kent nor Dixie had a thought  
19 disorder that required medication (which they do not) and that neither was abusing  
20 alcohol or drugs (which they are not), that there was no likelihood of abuse or neglect  
21 in the household with regard to the children.

22 14. Brittney has presented allegations of a series of circumstances that appear  
23 to have led her to the conclusion that Kent was viewing her through her bedroom  
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Findings of Fact and  
Conclusions of Law - 6

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1 window in a voyeuristic way. These allegations included that Kent required her to  
2 undress in her bedroom before showering, that he required her to shower at night, and  
3 that he required her to keep the curtain on her window above the bottom of the  
4 window, leaving a few inches of glass exposed. It was alleged that there was a  
5 discernible path around the house that ended at about the location of her window.  
6 Brittney testified about an incident on April 3, 2000, in which Kent had told her to  
7 take a shower, and that while she undressed in her room, she saw Kent's face outside  
8 the window. She further testified that it was dark outside at the time, that the light  
9 was on in the room, that she left the bedroom wearing a towel or blanket around her  
10 and that she was scared and confused.

11 15. With regard to Brittney's claim that Kent was watching her through her  
12 bedroom window, Brittney alleged that the curtain on her window was required to be  
13 left up, and that she was required to take her showers at night. She stated that on  
14 April 3, 2000, Kent told to her to take a shower, and that as she undressed, she saw  
15 Kent's face in her window. However, there is also a conflict in the evidence as to  
16 whether Brittney was undressed and standing at the mirror, tending to her acne, or  
17 whether she was disrobing.

18 16. The curtain was put up five to six months prior to the date of Brittney's  
19 allegations. She testified that she had originally put up the curtain and that Kent had  
20 changed it so the glass was exposed. She said that clear plastic had been put on the  
21 window by Kent to keep the moisture off, but that there was a rip in the plastic and  
22 she had no problem seeing out of the window. She stated that she was certain that she  
23 saw Kent's face in the window.

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27 Findings of Fact and  
Conclusions of Law - 7

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1 17. Brittney testified that the day after she thought she saw Kent's face in the  
2 window, he told her to take a shower or go to her room, and that he was going out to  
3 talk to Eleanor, who was living in a trailer on the Ducote property. Brittney said she  
4 was suspicious and watched out the laundry room window, but she did not see Kent  
5 go to the trailer. She went to her room, got her clothes and changed in the bathroom.

6 18. There were incidents which were not voyeuristic or sexual in nature:

7 (a) Kent entered the bathroom while Brittney occupied it;

8 (b) On the evening of the bathroom incident, Kent gave Brittney what she  
9 characterized as a "bear hug." She told him to get off and called him by his first  
10 name, which he did not like. He became angry, and according to Brittney, threatened  
11 to kill her.

12 (c) Kent made various crude remarks to Brittney in the presence of Brittney  
13 and her friends Paula and Beth Leggett;

14 (d) Brittney stated that she found Playboy magazines under Kent and Dixie's  
15 mattress when she was required to flip the mattress.

16 19. Other evidence reveals problems with the voyeurism theory and the theory  
17 that Kent was grooming Brittney, and perhaps Morgan, for sexual abuse:

18 (a) Brittney is nearsighted, and she was not wearing her glasses at the time she  
19 claimed to have seen Kent at her window;

20 (b) Brittney was jealous of the relationship between Kent and Morgan, and  
21 thought it was unfair that Morgan could do certain things she could not, and that this  
22 was a way of getting back at Kent and Dixie;

23 (c) In spite of the evidence presented by Kent and Dixie that a number of items  
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27 Findings of Fact and  
Conclusions of Law - 8

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1 had been scorched from the heater in her room (a stuffed bear, dolls clothes, and  
2 pillow) to indicate the fire hazard of the curtain being close to the heater, Brittney  
3 denied that the doll was scorched and that the other items were hers. The Court finds  
4 that Brittney was incorrect in her testimony.

5 (d) Brittney had problems living in the household: she resented picking up  
6 Morgan from day care as she was required to do from time to time; she did not get  
7 along with Kent and wanted Dixie to leave Kent; she believed Kent and Dixie were  
8 too strict in their punishments and chores they required of her. She told her friends  
9 that she did want to leave the house and wanted to live with them (the friends). She  
10 also talked about the possibility of running away.

11 (e) The search warrant that the police obtained to search the Ducote household  
12 failed to produce anything to indicate that Kent had an interest in child pornography or  
13 that there were any lewd or sexually inappropriate pictures in the residence. The only  
14 items discovered were a few Playboy magazines, which in and of themselves are not  
15 evidence of anything.

16 (f) Evidence from the photographs, among other testimony, of the pinholes  
17 along side the window where the curtain was tacked did not indicate that the curtain  
18 was tacked in any particular position, but that it had been tacked a number of times  
19 over the course of months. This undermines the idea that Kent had a rule that the  
20 curtain had to be tacked at a certain level so that some of the window was exposed.

21 (h) Brittney alleged that she was afraid of Kent because of statements made by  
22 him that indicated he was a dangerous person. There is no credible evidence to  
23 support any such allegation.

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Findings of Fact and  
Conclusions of Law - 9

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1           20. The evidence as a whole does not support Brittney's allegation that Kent  
2 had masturbated in her presence. Brittney testified about an incident where she came  
3 into the room where Kent was watching television, and made a statement to him to  
4 stop or other words to that effect. She was accompanied at the time by her friends  
5 Paula and Beth Leggett, who testified that they did not see anything being done by  
6 Kent, and that they thought Brittney was joking. Brittney also testified in her  
7 deposition, which was reiterated at trial, that Kent was watching the Discovery or  
8 History Channel at the time, which is an unlikely scenario for masturbation.

9           21. The evidence as a whole does not support Brittney's allegations of Kent's  
10 voyeurism:

11           (a) Brad Welch provided significant and un rebutted testimony relating to the  
12 voyeurism allegation. He testified about demonstrations he had conducted to  
13 determine the visibility of a person outside Brittney's window. With no curtain on the  
14 window, at a time when it was dark outside and light inside the room, a person  
15 standing inside the room, particularly at a point where Brittney was likely to be  
16 standing, could not see a person standing outside three feet from the window. He also  
17 testified that under the same circumstances, with the curtain at a level that exposed the  
18 glass as alleged by Brittney, a person standing outside as close as possible to the  
19 window could not be seen. This significantly undermines the idea that Brittney would  
20 have been able to see Kent's face on the evening in question.

21           (b) Kent testified that he stored construction materials from time to time  
22 behind the house, in the vicinity of the children's bedroom windows. This is  
23 supported by photographs introduced into evidence showing construction materials in  
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27 Findings of Fact and  
Conclusions of Law - 10

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1 that vicinity. The path to the back of the house is not a well-worn path and is  
2 consistent with the idea that a person would have gone back there to place materials.

3 (c) Brittney's allegation that Kent imposed a rule that required her to dress and  
4 undress in her bedroom is not supported by the evidence. Brittney acknowledged that  
5 she did tend to leave her clothes in the bathroom. Both Kent and Dixie testified that  
6 there had been a statement to the children not to leave the clothes in the bathroom.  
7 Dixie testified that she had been the one to impose the rule about dressing in  
8 bedrooms so that clothes did not get left in the bathroom. Dixie also testified as to her  
9 awareness of the need to keep the curtain off the heater, but that there was no rule that  
10 the curtain had to be kept a certain distance above the bottom of the window such that  
11 glass would be exposed.

12 22. Dixie testified that Brittney had given away or thrown away many of her  
13 clothes shortly before she was removed from the family home; that she had taken  
14 down posters, given away some of her memorabilia, and had generally left her room  
15 in a stark condition just before her removal. Dixie testified that this was very  
16 unusual. This was an indication that Brittney may have been planning to leave the  
17 home under circumstances that would cause authorities to believe that she needed to  
18 be taken out of the home.

19 23. Adolescent girls such as Brittney are generally extremely concerned about  
20 their personal appearance and privacy, sometimes becoming hypersensitive about it.  
21 There is evidence that such is the situation with Brittney.

22 24. Brittney had a motive to prevaricate, or at least read things into various  
23 situations that were not warranted. She did not like Kent, and she did not like  
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27 Findings of Fact and  
Conclusions of Law - 11

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1 living with Kent and Dixie. There was a lack of bonding between Brittney and Kent.  
2 She thought Kent and Dixie were unfair and overly strict with their discipline and  
3 rules for behavior. She had expressed her desire to live elsewhere, and she wanted  
4 Kent to be out of the household. The Court recognizes that adolescent girls are  
5 capable of prevaricating and devising schemes to get what they want.

6 25. The other allegations against Kent with regard to Brittney have equally  
7 persuasive explanations that Kent was not acting in a sexually inappropriate way  
8 towards her:

9 (a) With regard to Kent placing his hand on Brittney's buttocks while she was  
10 sitting on his lap, Kent and Dixie testified that it was rare that Brittney would do that.  
11 This may have been Kent's crude attempt to develop rapport with Brittney, especially  
12 after having gotten angry with her. The hand on or near her buttocks could certainly  
13 have been an innocent part of holding her up on his lap. Photographs were introduced  
14 into evidence showing pictures of Kent with the children on his lap, as well as a  
15 photograph of Brittney sitting on the lap of Kent's brother, Keith.

16 (b) Dixie testified that following the bathroom incident, Brittney had disclosed  
17 to her that she wasn't really on the toilet at the time it occurred. Brittney testified that  
18 Kent was angry when he came into the bathroom, and Kent's testimony agreed,  
19 indicating that he and the others were waiting to use the bathroom, and that Brittney  
20 tended to dominate the bathroom. The anger in this context is not consistent with the  
21 grooming of a young girl for sexual abuse. Brittney also testified that Kent had asked  
22 her during the incident why she always looked into the mirror, which would be more  
23 consistent with the idea that Brittney was not on the toilet when Kent came in. It is

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Findings of Fact and  
Conclusions of Law - 12

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1 unlikely that Kent went into the bathroom for reasons of sexual gratification.

2 (c) With regard to the crude remarks made by Kent, the evidence as a whole  
3 indicates that Brittney and her friends were discussing another girl's sexual  
4 orientation, and that Kent joined in the conversation. Kent acknowledged in his  
5 testimony that this was inappropriate, but that he did so in an effort to agree with  
6 Brittney about her remarks about another. The Court finds such remarks were not  
7 part of an ongoing pattern of grooming Brittney or other adolescent girls by Kent.

8 (d) Any crude remarks that Kent may have made about Brittney's body, as  
9 alleged, would have been inappropriate in the context of a developing adolescent girl,  
10 but were not done for the purpose of present or future sexual gratification.

11 (e) With regard to the bear hug incident, there is no evidence that indicates  
12 that it was for the purpose of grooming her for sexual abuse.

13 (f) After the bear hug, if Kent threatened to kill Brittney as she alleged, such a  
14 statement would not be consistent with sexual grooming behavior.

15 (g) The evidence as a whole does not show or establish that Kent was actually  
16 masturbating at any of the times as alleged by Brittney. If Kent was in fact moving  
17 his hands in the vicinity of his abdomen, it may have been to alleviate pain he was  
18 experiencing as referred to in the medical reports regarding Kent.

19 (h) There is no evidence whatsoever that any sexual improprieties were  
20 committed by Kent upon Morgan as a result of her sleeping in the bed with him.  
21 Dixie had expressed her concern and reported it to the authorities. This indicates her  
22 concern and shows that she is capable of making reports when she thinks it is in the  
23 best interests of her children. It does not, however, show any inappropriate or illicit  
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Findings of Fact and  
Conclusions of Law - 13

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Exhibit  
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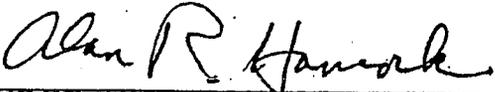
1 sexual desire for Morgan by Kent, and these were merely innocent incidents when  
2 looked at as a whole.

3 CONCLUSIONS OF LAW

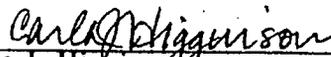
4 Based on the foregoing, the court makes the following conclusions of law:

- 5 1. Kent Ducote has not engaged in any act of voyeurism with regard to  
6 Brittney Maxey;
- 7 2. Neither Brittney Maxey, Cole Maxey and Morgan Maxey are an abused or  
8 neglected child as that term is defined by the law;
- 9 3. Dixie Ducote is capable of adequately caring for her three children, and the  
10 Court cannot find that the children are in circumstances which constitute a danger of  
11 substantial damage to their psychological or physical development;
- 12 4. Although DSHS established a prima facie case in its case in chief, the  
13 petitions for dependency have not been proven by a preponderance of the evidence,  
14 and all petitions in this matter should be dismissed.

15 DONE IN OPEN COURT this 25th day of January, 2001.

16  
17   
18 ALAN R. HANCOCK  
19 JUDGE

20 Presented by:  
21 HIGGINSON LAW OFFICES

22   
23 Carla J. Higginson  
24 WSBA #10653  
25 Attorney for Kent Ducote and  
26 Dixie Lee Ducote

27 Findings of Fact and  
Conclusions of Law - 14

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