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SUPREME COURT
STATE OF WASHINGTON

2008 NOV -4 P 3: 59
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No. 81714-6

SUPREME COURT
OF THE STATE OF WASHINGTON

KENT DUCOTE,

Petitioner,

vs.

STATE OF WASHINGTON DEPARTMENT OF SOCIAL &
HEALTH SERVICES,

Respondents.

SUPPLEMENTAL BRIEF OF PETITIONER

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FILED AS
ATTACHMENT TO EMAIL

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A. Issue Presented For Review.

This Court's website frames the question presented for review in this manner:

Whether a stepparent has standing to sue the Department of Social and Health Services for negligent investigation of a report that the stepparent abused a stepchild?

B. Statement of Facts.

As petitioner's claims were dismissed on summary judgment, the facts are presented in a light most favorable to him:

- 1. Petitioner Lived With And Supported His Step-Children *In Loco Parentis* For Six Years Before DSHS Had Him Removed From The Family Home As A Result Of Its Negligent Investigation Of Allegations He Had Abused His Step-Daughter.**

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) When Kent and Dixie began dating in 1992, Dixie was pregnant with Morgan, Cole was 14 months old, and Brittney was six years old. (CP 108-09) Kent and Dixie began living together in August 1994, and married on September 30, 1994. (CP 65, 110) Until the Department obtained restraining orders preventing him from residing in the family home or having

any contact with his step-children, Kent, Dixie, and the children lived in their family home together for six years. (CP 132) The State concedes, and the Court of Appeals held, that Kent, Dixie, and her three children "have lived together as a family since 1994, when Kent and Dixie married." 144 Wn. App. at 533, ¶ 3.

Kent's relationship with Brittney deteriorated once she became a teenager. Brittney was jealous of Kent's close relationship with Morgan, believed that Kent was unduly strict, and wanted her mother to leave Kent. (CP 71-72) In a March 2000 conference with a school counselor, Brittney accused Kent of watching her disrobe and of masturbating in her presence. (CP 66-67) The counselor referred the matter to CPS. Based solely on its caseworker's interview with Brittney, and making no attempt to corroborate Brittney's allegations, 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)

The dependency petition referred to Kent both as a "step-parent" and as one of Brittney's "parents." (CP 132) The Department served Kent with a summons providing notice of the dependency action and informing him that finding "the child

dependent, could result in substantial restriction or permanent loss of your parental rights.” (CP 87) On April 10, 2000, the Department obtained a Shelter Care Order placing Brittney in the custody of the Department, over Kent and Dixie's objection. (CP 134-36) The Department also filed dependency petitions as to Cole and Morgan (CP 137-43), and 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 family home and if Dixie Ducote is not prohibited from removing children from jurisdiction . . .*” (CP 142) (emphasis added) The orders barred Kent from having any contact with Cole or Morgan (CP 24, 28), and prohibited him “from entering the family home.” (CP 24, 28)

2. Petitioner's Lawsuit Was Dismissed On The Grounds He Had No Standing To Sue For The Department's Negligent Investigation Of Alleged Abuse In The Family Home.

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

materials. The criminal complaint was eventually dismissed. (CP 72, 155-59)

The Department pursued its dependency allegations against Kent and Dixie in a 14-day trial before San Juan County Superior Court Judge Alan Hancock. Judge Hancock ruled at the conclusion of trial on November 27, 2000, that the Department had failed to meet its burden of proving that Kent posed any threat of danger to the children, and *sua sponte* authorized Kent to immediately return to the family home, from which he had been excluded and denied contact with his step-children for over eight months. (CP 34) Judge Hancock thereafter dismissed all three dependency petitions, finding that the alleged voyeurism did not occur, that the children were not at risk, and that that Brittney's allegations of physical and verbal abuse were "overblown" and driven by Brittney's desire for her mother to leave Kent because he was "too strict." (CP 59-62)

Mr. Ducote sued the State for negligent investigation of child abuse. San Juan County Superior Court Judge Vickie Churchill dismissed the lawsuit on the Department's second motion for summary judgment. Division One affirmed. *Ducote v. State*, 144 Wn. App. 531, 186 P.3d 1081 (2008). In the published portion of its

decision, the Court of Appeals rejected a statutory duty of reasonable investigation protecting the integrity of the family and all family members, holding that the cause of action for negligent investigation of child abuse is available only to a “parent, custodian, or guardian” because the “the plain language of the statute does not include stepparents,” 144 Wn. App. at 535-36, ¶¶ 9, 10, *quoting* RCW 26.44.010. In the unpublished portion of its decision, the Court of Appeals held that the trial court did not abuse its discretion in rejecting an argument on reconsideration that plaintiff had standing to sue for negligent investigation as a *de facto* parent. 144 Wn. App. at 537, ¶¶ 15-16. This Court accepted review.

C. Supplemental Argument.

1. The Tort of Negligent Investigation, Based On The Legislature’s Directive That Child Abuse Investigations Be Conducted To Protect The Integrity of The Family, Extends To Step-Parents *In Loco Parentis* In The Family Home.

The tort of negligent investigation protects the rights of all family members in the family home. The Court of Appeals’ narrow focus on the statutory purpose section of RCW ch. 26.44.010 to limit the cause of action to a legal “parent, custodian or guardian,” ignores the specific investigative duties imposed not only by RCW 26.44.050 but by the other statutes governing the State’s duties in

investigating a report of abuse, RCW 74.13.031 and RCW 13.34.020, which together protect the integrity of the family unit. Properly read together, this suite of statutes governing the Department's investigative duty clearly protects and provides a cause of action for a step-parent acting *in loco parentis* who has been excluded from the family home based on negligent investigation of abuse of a family member.

a. **Narrowing The Scope Of The State's Duty Of Investigation To Exclude Step-Parents Misreads The Operative Statutes.**

In determining whether "a legislative enactment may be the foundation of a right of action," *Bennett v. Hardy*, 113 Wn.2d 912, 919, 784 P.2d 1258 (1990), this Court looks to whether the plaintiff falls in the class for whose benefit the statute was created, whether legislative intent supports creating or denying a remedy, and whether the remedy is consistent with the statutory purpose. *Bennett*, 113 Wn.2d at 920-21, *quoted in Tyner v. Department of Soc. & Health Servs.*, 141 Wn.2d 68, 77-78, 1 P.3d 1148 (2000). While the statutory purpose stated in RCW 26.44.010, and relied on by the Court of Appeals to hold that petitioner did not have "standing" to pursue his claim, is certainly proof that the Legislature intended to protect legal "parents, guardians, and custodians" from

harmful investigations, it does not in any way limit the other statutory language that imposes upon the Department a duty to "act reasonably in relation to all members of the family." *Tyner*, 141 Wn.2d at 79. Narrowing the scope of the State's investigation to exclude step-parents *in loco parentis* misreads the operative statutes.

RCW 26.44.050 imposes on the Department the investigatory duty that gives rise to the tort of negligent investigation:

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.

RCW 26.44.050. See 144 Wn. App. at 534-35, ¶ 8.

RCW ch. 74.13, which is incorporated in RCW 26.44.050, further defines the Department's investigative duty. RCW 74.13.031 provides that the duty is owed not just to a "parent, custodian or guardian," but to the family unit, including "persons serving *in loco parentis*:"

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). "*In loco parentis*" means "in the place of a parent." *In the Parentage of L.B.*, 155 Wn.2d 679, 691 n.7, 122 P.3d 161 (2005). A step-parent is acting *in loco parentis* when his step-child lives with and is supported by him, imposing a common law obligation to support and educate the child. *Van Dyke v. Thompson*, 95 Wn.2d 726, 729, 630 P.2d 420 (1981).

Finally, RCW ch. 13.34, which governs the State's obligations in commencing dependency proceedings, is also part of the statutory scheme defining the State's investigatory duties. As this Court recognized in *Tyner*, RCW 13.34.020 "evinces the Legislature's strong views" that "the family unit is a fundamental resource of American life which should be nurtured." RCW 13.34.020, *quoted in Tyner*, 141 Wn.2d at 78-79.

All of these chapters of the Revised Code of Washington “set forth the statutory scheme for State intervention as *parens patriae* when child abuse has been reported.” See *Tyner*, 141 Wn.2d at 77 n.3. Taken together, these statutory provisions provide that it is the “family unit,” not just legal parents, custodians, or guardians, who may be foreseeably harmed as a result of a negligent child abuse investigation.

2. Case Law Confirms That The Parental Role Of A Step-Parent Serving *In Loco Parentis* In The Family Home Should Be Protected From Negligent Investigation.

This Court first addressed the tort of negligent investigation of child abuse in *Babcock v. State*, 116 Wn.2d 596, 809 P.2d 143 (1991), rejecting the State’s attempt to assert a defense of immunity to a claim of negligent investigation brought by the father and paternal grandparents of children who claimed that the Department negligently placed the children with a foster parent who had raped them. 116 Wn.2d at 612. Nine years later, in *Tyner*, this Court held that the Department’s tort duty extended to a parent suspected of abusing his child,, noting that “this Court implicitly approved a negligent investigation claim . . . brought by the paternal grandparents and father of the foster children” in *Babcock*. 141 Wn.2d at 79-81.

This Court rejected the Department's argument in *Tyner* that its tort duty does not extend to a parent suspected of child abuse because the Department's statutory investigatory obligations have 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. This Court held, as a consequence, that “[d]uring its investigation [of child abuse] the State has the duty to act reasonably in relation to *all members of the family*.” *Tyner*, 141 Wn.2d at 79 (emphasis added).

More recently, this Court has held that the tort of negligent investigation is limited to those family members who suffer damages from unwarranted interference in the family as a result of harmful placement decisions. These cases too make clear that it is the integrity of the family that is key to the negligent investigation tort, and to determining who has standing to bring such a claim:

In *M.W. v. Department of Social and Health Servs.*, 149 Wn.2d 589, 592, 70 P.3d 954 (2003), this 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 because the plaintiff could not establish that “DSHS conduct[ed] a biased or faulty investigation *that leads to a harmful placement decision. . .*” *M.W.*, 149 Wn.2d at 591 (emphasis added). As the family unit remained intact, the plaintiff had no cause of action.

In *Roberson v. Perez*, 156 Wn.2d 33, 123 P.3d 844 (2005), this Court relied on *M.W.* to hold that a mother and step-father 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 an investigation involving children not in the mother’s care 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 (emphasis added).

None of these more recent cases supports the lower courts’ determination that petitioner did not have standing to assert a claim for negligent investigation of allegations of abuse within the family home that resulted in petitioner’s banishment from the family home and denial of any contact with his step-children. The Court of Appeals erroneously equated the role of a step-parent who has assumed a parental role *in loco parentis* with that of a foster parent,

citing *Blackwell v. Dept. of Social and Health Services*, 131 Wn. App. 372, 127 P.3d 752 (2006).

In *Blackwell*, the Court of Appeals rejected a foster parent's claim for negligent investigation of child abuse. 144 Wn. App. at 534. Notably, the *Blackwell* court suggested that foster parents could fall within the scope of the protected class if they could establish that they were de facto or psychological parents under the multi-part test set forth in *Parentage of L.B.*, 155 Wn.2d 679, 122 P.3d 161 (2005). But as foster parents, they have diminished expectations, and therefore diminished legal rights, based on their temporary relationship with foster children. *In re Dependency of J.H.*, 117 Wn.2d 460, 469, 815 P.2d 1380 (1991) (relationship between foster parent and "child is by its very nature temporary, transitional and for the purpose of supporting reunification with the legal parents."). See also *In re Adoption of R.L.M.*, 138 Wn. App. 276, 287, 156 P.3d 940 (2007) ("Foster parents have no due process right to participate in proceedings determining the custody of children placed in their care, even if they have become a child's psychological parent."), *rev. denied*, 162 Wn.2d 1023 (2008), *cert. denied*, ___ S.Ct. ___, 2008 WL 4454259 (Oct. 6, 2008).

As a step-parent, to the contrary, Kent had a statutory financial obligation of support, not an expectation of compensation, 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). The courts of this state have long, and recently, recognized the special status of a step-parent who has undertaken a parental role in the family *in loco parentis*. See, e.g., **Zellmer v. Zellmer**, 164 Wn.2d 147, 188 P.3d 497 (2008); **Marriage of Allen**, 28 Wn. App. 637, 626 P.2d 16 (1981). Although a step-parent's support obligation may terminate upon divorce, 144 Wn. App. at 535-36, ¶ 10, this in no way supports a diminished right or expectation of family integrity while the step-parent remains married and living with his step-children serving *in loco parentis* in the family home – particularly, as here, where the Department's negligent investigation and consequent harmful placement decision *depended upon* the step-parent's serving *in loco parentis* in the family home.

Kent's parental role in the Ducote family, and the State's unwarranted interference in that family, have never been in dispute.

The State in its motion for summary judgment established that Kent's parental role had already been conceded by the State, and confirmed by Judge Hancock, in the dependency proceedings. See CP 33 (in dependency proceedings, the State argued that "[i]f [the mother] is conceding that parenting to him, he is responsible."), CP 87 (dependency summons served on Kent stated that "if the Court finds the child dependent, [it] could result in substantial restriction or permanent loss of your parental rights.").

Here, the Department's negligent investigation, and the resulting intervention in the family, were directed toward the children's step-father as a member of their family. The Department's negligent investigation resulted in a harmful placement decision, removing petitioner from the family home and preventing him from having any contact with his step-children. Case law confirms that the parental role of a step-parent living in the family home should be protected from negligent investigation.

D. Conclusion.

A step-parent who has been a party to the State's dependency proceedings and excluded from the family home and prevented from having contact with his step-children as a result of the Department's negligent investigation should have standing to

sue. In summoning Kent Ducote into dependency proceedings, ordering him out of the family home, and directing him to undergo psychological evaluation, the State treated him no differently than any parent defending against allegations that his step-children were dependent. This Court should reverse the Court of Appeals, and remand this negligent investigation claim for trial.

Dated this 4th day of November, 2008.

HIGGINSON LAW OFFICES

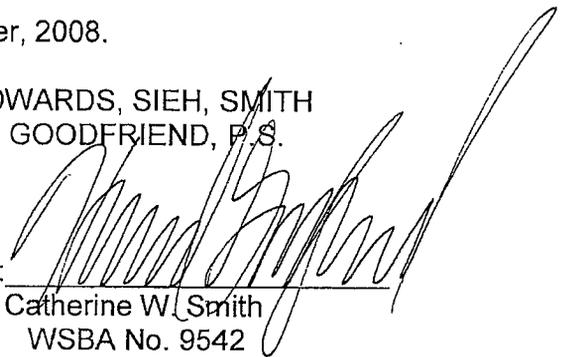
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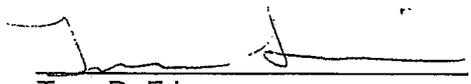
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The undersigned declares under penalty of perjury, under
the laws of the State of Washington, that the following is true and
correct:

That on November 4, 2008, I arranged for service of the
Supplemental Brief of Petitioner, to the courts and to counsel for
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DATED at Seattle, Washington this 4th day of November,
2008.


Tara D. Friesen