

NO. 83516-1

SUPREME COURT OF THE STATE OF WASHINGTON

IN RE THE WELFARE OF:

K.N.J.,

A Minor Child.

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STATE OF WASHINGTON

ANSWER TO MOTION FOR DISCRETIONARY REVIEW

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I. IDENTITY OF ANSWERING PARTY

The Department of Social and Health Services is the Respondent and custodian¹ of K.N.J., the child whose welfare is at issue in this appeal. The Department asks the Court to deny review for the reasons stated below.

II. DECISION OF THE COURT OF APPEALS

The father of K.N.J., Michael Jenkins, seeks review of a Court of Appeals ruling affirming the trial court's decision terminating his parental rights. The published decision In re the Dependency of K.N.J., ___ Wn. App. ___, 211 P.3d 483, was issued on July 20, 2009.

III. ISSUE PRESENTED

As stated below, the issues in this case do not meet the criteria of RAP 13.4(b). However, if review were accepted, the issue would be whether the Court of Appeals erred when it concluded that regardless of the invalidity of the initial pro tem judge's order of dependency, the subsequent dependency review hearings by elected judges provided continued and implicit findings of dependency that met the requirements of RCW 13.34.180 for purposes of finding and concluding Mr. Jenkins' parental rights to K.N.J. should be terminated.

¹ The child has since been adopted. However, the Department was the child's custodian at the time of the termination trial.

IV. RESTATEMENT OF THE CASE

Mr. Jenkins is the biological father of K.N.J., the young child whose welfare is the subject of this appeal.²

A dependency petition was filed on February 16, 2006, in Snohomish County, alleging that K.N.J., then a four-month old infant, was taken to the hospital in the State of Oregon by relatives after the mother and father had traveled to Oregon for a funeral. Doctors rushed the child to the Pediatric Critical Care Unit after discovering that K.N.J. had a broken tibia in her left leg, broken bones in her right wrist, clavicle, right shoulder and ribs, a deep scar over her right eye, scars on the infant's upper lip, the bridge of the nose and scalp, a sore on her tongue, and found to be dehydrated and underweight at only eight pounds. CP 260-267. The horrific injuries were inflicted by the infant's mother, M.E. CP 260-267. The father reported to the assigned social worker, Tammy Howard, that he had been residing with the mother and child during the time period leading up to the removal. RP 1, pgs. 125, 136. The mother was later convicted of Assault of a Child, Second Degree, and served prison time at the Women's Correctional Facility in Pierce County, Washington. CP 233-

² The mother's parental rights were previously terminated and she is not a party to these proceedings. Additionally, Mr. Jenkins has failed to raise any issues regarding the decision affirming the termination of K.M.J., the sibling of K.N.J. and consolidated in the underlying appeal; K.M.J.'s termination is therefore final.

250.

Dependency and dispositional orders as to K.N. J. were entered on February 22, 2006, and signed by Snohomish County Superior Court Judge Pro Tempore Kathryn Trumbull. CP 225-232. The order was agreed to by the mother and entered by default as to Mr. Jenkins. Mr. Jenkins had been personally served in Snohomish County on January 24, 2006, but failed to appear, retain counsel or plead in the proceeding. CP 225-232. The mother consented in writing to the appointment of Judge Trumbull, as did the Department. Mr. Jenkins was not present and did not consent or otherwise participate in the hearing. In re K.N.J., Slip Op. pg. 3.

While incarcerated, the mother, M.E. gave birth to another child, K.M.J., on September 28, 2006. CP 309-324. A dependency petition was filed in Pierce County, alleging the child had no parent capable of adequately caring for her as M.E. was not scheduled to be released from prison until 2008, and Mr. Jenkins had not made sufficient progress in the dependency of K.N.J. and was not available to care for his child. CP 309-324.

Dependency and dispositional orders were entered on November 13, 2006, as to K.M.J., signed by Pierce County Superior Court Commissioner H. Edward Haarmann. CP 309-324. Mr. Jenkins was

again found to be in default, after being personally served on October 5, 2006, and failing to appear, retain counsel or plead in the proceeding. CP 309-324. Venue was transferred to Snohomish County in February 2007.

The Department filed a termination petition on K.N.J. on February 12, 2007. CP 406-420. The mother remained incarcerated for Assault of K.N.J., and the father had failed to substantially participate in services, including attending drug and alcohol treatment, domestic violence treatment, a psychological evaluation and failed to resolve or refrain from criminal involvement. RP 1, pg. 137. The assigned social worker opined that termination was in the children's best interests. RP 1, 136-137.

On July 5, 2007, a consolidated review hearing was held on both children in Snohomish County before Superior Court Judge Ellen Fair. CP 121-127. The review orders affirmed the dependency orders and continued the out-of-home placement of the children. CP 121-127. The court found that with the exception of establishing paternity, Mr. Jenkins had failed to comply with his service plan. CP 121-127. Additionally, the court again entered a dispositional plan with service requirement for Mr. Jenkins. CP 121-127.

The Department filed a petition to terminate parental rights regarding K.M.J. on September 25, 2007. The assigned social worker, Tammy Howard, personally served Mr. Jenkins while he was in the

Snohomish County Jail in September, 2007. RP 1 pg. 129. The parents had still failed to make any significant progress with the case plan. RP 1, pg. 136, CP 342-352, CP 406-420.

Mr. Jenkins formally appeared in the matters through counsel on September 13, 2007. Mr. Jenkins had been contacted in Snohomish County Jail by the assigned social worker, who allowed him to use her phone to call the Office of Assigned Counsel and request an attorney. RP 1 pg. 129-130.

A permanency planning hearing was held on November 21, 2007, and the orders were signed by Snohomish County Superior Court Judge David Kurtz. CP 81-91. Mr. Jenkins appeared at the hearing through counsel. CP 81-91. The permanency planning hearing orders again affirmed the dependency orders and continued the out-of-home placement of the children. CP 81-91. The court found that Mr. Jenkins had partially complied with the service plan, but approved a sole permanent plan of adoption for both K.N.J. and K.M.J. CP 81-91.

A trial on the petitions for termination was held on May 5-7, 2008 in Snohomish County before Judge Kenneth Cowsert. RP 1-3. On the morning of trial, Mr. Jenkins made a motion to vacate the Dependency Order in K.N.J.'s case. RP1 pg. 5-10. The Superior Court denied the motion to vacate K.N.J.'s dependency and dispositional order. CP 309-

327, 358-361. Additionally, Mr. Jenkins argued that the Department could not prove termination as to K.N.J. because the dependency and dispositional orders were not valid as to Mr. Jenkins. CP 309-327, 358-361. The Superior Court granted the Department's Petition for Termination of Parental Rights, and entered Findings of Fact and Conclusions of Law in K.N.J.'s case as well as sibling K.M.J.'s case on August 12, 2008. CP 309-327, 358-361. Mr. Jenkins appealed these three orders. CP 4-38, 270-308. The termination was affirmed by the Court of Appeals, Division One.

V. REASONS WHY REVIEW SHOULD BE DENIED

This matter is before the court as a Motion for Discretionary Review as set forth in RAP 13.5A(a)(3).³ The father cites the following RAP 13.4(b),(1), (3) and (4) as the basis for allowing review. This rule states that review will only be granted by the Supreme Court if:

- (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
- (2) [Omitted]
- (3) If a significant question of law under the Constitution of the State of Washington or of the United States Constitution is involved; or
- (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

³ This matter was incorrectly filed as a Petition for Review but has since been redesignated as a Motion for Discretionary Review by the Court. The considerations for the acceptance of review are the same as a Petition for Review. RAP 13.5A(b).

Mr. Jenkins fails to satisfy the criteria as set forth in RAP 13.4(b)(1), (3) and (4). The court of appeals ruling in K.N.J. is entirely consistent with well-settled Washington appellate decisions and there is no conflict between that decision and any prior decision of this Court or the Court of Appeals that warrants review under RAP 13.4(b). Moreover, the motion does not raise any specific question of constitutional law supported by argument and authority, nor does the motion allege an issue of substantial public interest. The motion for discretionary review should accordingly be denied.

A. The Decision in In re K.N.J. is Consistent with In re Chubb, In re A.W., In re A.S. and In re the Welfare of Henderson

The court of appeals decision is based on well settled law, properly applied to the particular facts of this case. The court of appeals decision does not conflict with this court's prior ruling in In re Chubb (1989), and is entirely consistent with various court of appeals decisions issued before and after In re Chubb, including In re the Welfare of Henderson (Division II, 1981), In re A.W. (Division I, 1989), In re H.S. (Division III, 1999), and In re A.S. (Division I, 2000).⁴

⁴ In re Dependency of Chubb, 112 Wn.2d 719, 773 P.2d 851 (1989); In re the Dependency of Henderson, 29 Wn. App. 748, 630 P.2d 944 (1981); In re the Dependency of A.W., 53 Wn. App. 22, 765 P.2d 307 (1988); In re the Dependency of H.S. 94 Wn. App. 511, 973 P.2d 474 (1999), *rev. denied*, 138 Wn.2d 1019, 989 P.2d 1140 (1999); In re the Dependency of A.S., 101 Wn. App. 60, 6 P.3d 11 (2000), *rev. denied*, 141 Wn.2d

The court of appeals affirmed the trial court's decision terminating Mr. Jenkins' parental rights. Specifically, the court determined that while the initial dependency order was void as to the father due to his lack of consent to the Judge Pro Tempore, RCW 13.34.180(1)(a) had been met, in that the child was determined to be a dependent child at the review hearing and permanency planning hearing following the initial dependency hearing. K.N.J. Slip Op. at pg. 4, 7-8. The court of appeals reviewed and analyzed existing case law, including In re Chubb, and determined that such a finding was consistent and appropriate with existing law.

1. There is No Conflict With In re Chubb

Mr. Jenkins cites dicta from In re Chubb as a basis for this court to find that a dependency is not reestablished at each review hearing. Petitioner's Motion, pg. 5-6, citing In re Dependency of Chubb, 112 Wn.2d 719, 773 P.2d 851 (1989). Specifically, Mr. Jenkins includes the following quote from In re Chubb to support his argument that review is warranted under RAP 13.4(b):

The juvenile court is not required to make the determination of dependency anew at each hearing. Its function is to determine whether court supervision should continue. Essentially, if this supervision is to continue, then what the juvenile court has decided is to abide by the status quo: the determination of dependency.

1030, 11 P.3d 825 (2000), cert. denied, Safouane v. Washington, 532 U.S. 930, 121 S.Ct. 1377, 149 L.Ed.2d 303 (2001).

...This review process continues until either the status quo changes and the court decides that its supervision should not continue or until a petition for termination is made. Because they take place in an ongoing process, the review hearings and orders issued from them are interlocutory, they are not final, but await possible revision at the next hearing.

In re Chubb, 112 Wn.2d at 724.

However, as stated by the court of appeals, Chubb was a decision on whether or not the issue of dependency was appealable as of right at a dependency review hearing, not whether dependency could be reestablished at a review hearing. See K.N.J. Slip Op., pg. 8-9, In re Dependency of Chubb, 112 Wn.2d 719, 773 P.2d 851 (1989). Dependency review orders are interlocutory in nature, as the process itself is one of continual review and monitoring of the court because of the important and evolving nature of each case involving the welfare of a vulnerable child. Review of right on every superior court decision, even those that change the status quo, in these cases would clog the court system.⁵ Each review hearing, however, does establish the continuing jurisdiction and supervision of the court, could result in dismissal of the

⁵ The court of appeals decision in this case is consistent with a prior decision issued by this court as to the holding in Chubb. See In re the Dependency of Brown, 149 Wn.2d 836, 72 P.3d 757 (2003), where this court corrects the Court of Appeals in relying on dicta to preclude an appeal as of right: "In Chubb, we held only that an order of continued dependency following a dependency review hearing is not appealable as a matter of right. We did not consider whether the original finding of dependency may be reviewed pursuant to an appeal from the dispositional order."

case, and does result in a dependency finding to allow court supervision to continue. See RCW 13.34.138, 13.34.145. The Supreme Court has had several opportunities to clarify Chubb if this were in fact necessary, and has declined to do so.⁶

Read in the limited context of the Chubb decision on appealability, the language cited by Mr. Jenkins does not preclude the determination that a superior court is making a finding of dependency and jurisdiction by issuing a valid review order. Instead, Mr. Jenkins's claim of conflict reflects an untenable and unworkable interpretation of Chubb. To interpret Chubb as proposed by Mr. Jenkins would preclude the court from making any significant changes to the child's legal status or status quo at a review hearing⁷, and result in disruption to a child's permanency, as proposed here, where a parent can challenge an underlying dependency order years after it has been entered despite the fact that the court has continued to review and issue valid orders in the case and the parent has followed these orders and not challenged the court's authority to act until the day of the termination trial.

⁶ See In re the Dependency of A.S., 101 Wn. App. 60, 6 P.3d 11 (2000), rev. denied, 141 Wn.2d 1030, 11 P.3d 825 (2000), cert. denied, Safouane v. Washington, 532 U.S. 930, 121 S.Ct. 1377, 149 L.Ed.2d 303 (2001), and In re the Dependency of H.S. 94 Wn. App. 511, 973 P.2d 474 (1999), rev. denied, 138 Wn.2d 1019, 989 P.2d 1140 (1999).

⁷ A notion that has previously been rejected, see Footnote 5.

Finally, there is ultimately no conflict between the court of appeals decision and the language quoted by Mr. Jenkins because the language is dicta; it is not the court's holding on appealability. "Dicta is language not necessary to the decision in a particular case." In re the Marriage of Roth, 72 Wn. App. 566, 570, 865 P.2d 43 (1994), citing Pedersen v. Klinkert, 56 Wn.2d 313, 317, 320, 352 P.2d 1025 (1960). This court should not accept review simply to comment on dicta that has previously been reviewed by this court and has been correctly interpreted by the court of appeals in this case and several court of appeals cases in all three divisions of the court of appeals.

2. **There is No Conflict As Shown By In re Henderson and In Re A.W.**

Mr. Jenkins states that "Henderson and A.W. also contain language in dicta to suggest dependency review hearing[s] could establish a dependency[, h]ence, they too ignore Chubb." Petitioner's Motion pg. 8, fn 1. In fact, both In re the Welfare of Henderson and In re A.W. were issued prior to this court's decision in In re Chubb.⁸ This court presumably had the opportunity to comment on these inconsistencies when Chubb was issued if there was in fact some conflict or error made by the court of appeals, but declined to do so.

⁸ In re the Dependency of Henderson, 29 Wn. App. 748, 630 P.2d 944 (1981); In re the Dependency of A.W., 53 Wn. App. 22, 28, 765 P.2d 307 (1988).

In In re the Welfare of Henderson, the court reviewed a parent's challenge to a termination finding based upon a dependency proceeding that predated the Juvenile Justice Act of 1977. The Court of Appeals in Henderson determined that a review order entered in 1979, after the change in law, was "an implicit finding of dependency under RCW 13.34.030." In re the Dependency of Henderson, 29 Wn. App. 748, 630 P.2d 944 (1981). Henderson was decided eight years prior to Chubb.

In re A.W. was decided just prior to Chubb, but this court in Chubb did not comment on the alleged inconsistency now argued by Mr. Jenkins. Dependency review and permanency planning statutes require hearings at a minimum of every six months following dependency and dispositional hearing, with the initial hearing happening within six months of removal or three months of disposition, whichever is first. See RCW 13.34.138 and RCW 13.34.145. One of the decisions to be made at a dependency review hearing is whether or not the child's dependent status should continue. "This results in the court effectively making a new finding of dependency at each review hearing." In re the Dependency of A.W., 53 Wn. App. 22, 28, 765 P.2d 307 (1988). This court does not comment on A.W. in Chubb, despite the fact that Chubb was issued after A.W.

Additionally in A.W., the court determined that "any error which affected the dependency determination and review had no prejudicial

effect on the subsequent termination of [the parent's] rights." In re the Dependency of A.W., 53 Wn. App. 22, 28, 765 P.2d 307 (1988). The court in A.W. determined that any error in the dependency was "made harmless by the nature of the termination action" which requires proof by "clear, cogent and convincing evidence" that the parent has parental deficiencies that still exist and were not likely to be remedied so that the child could be returned in the near future. In re the Dependency of A.W., 53 Wn. App. 22, 28-29, 765 P.2d 307 (1988).

3. Subsequent Court of Appeals Decisions Show That Jenkins's Reading Of Chubb Is Incorrect And That There Is No Conflict Among The Courts

Court of appeals decisions issued after Chubb have correctly continued Chubb's holding on the right to appellate review should not be extended to exclude the possibility of reestablishing dependency at a review hearing. In In re H.S., issued in 1999, the court of appeals stated that "the review process results in repeated, updated findings of dependency." In re the Dependency of H.S. 94 Wn. App. 511, 973 P.2d 474 (1999), rev. denied, 138 Wn.2d 1019, 989 P.2d 1140 (1999).

In In re A.S., the court of appeals stated that "termination proceedings are not a relitigation of the dependency issues, and the accuracy of the facts underlying the original dependency adjudication is not deemed critical." In re the Dependency of A.S., 101 Wn. App. 60, 6

P.3d 11 (2000), rev. denied, 141 Wn.2d 1030, 11 P.3d 825 (2000), cert. denied, Safouane v. Washington, 532 U.S. 930, 121 S.Ct. 1377, 149 L.Ed.2d 303 (2001), citing Krause v. Catholic Community Services, 47 Wn. App. 734, 737 P.2d 280 (1987).

The court of appeals decision in this case is consistent with existing case law and not contradictory to the holding or dicta in Chubb. In this case, the superior court made more than an “implicit” finding of dependency that goes along with continuing the status of the child as a dependent child at review hearings. In that review order, the court found that “[t]he child remains a dependent child pursuant to RCW 13.34.030,” in addition to finding that court supervision should continue. Ex 18, pg. 7, Section 3.1. At the review hearing and permanency planning hearing held in K.N.J.’s case, the court made such a determination at each hearing, finding that the child was a dependent child and court supervision should continue. This finding at each hearing establishes dependency and jurisdiction over the child and parent, otherwise the case would have been dismissed and the child returned home if the court lacked jurisdiction to proceed. Mr. Jenkins’ motion for discretionary review should be denied as K.N.J. is consistent with existing case law and not contradictory to the dicta in Chubb.

B. The Motion for Discretionary Review Does Not Raise Any Issue of Public Interest or Significant Question of Law Under the State or Federal Constitutions

In passing, Mr. Jenkins suggests there is a constitutional question regarding due process and a question of substantial public interest based on his assertion that “Division I significantly impacts the due process rights of parents without any recognition of those rights.” Petitioner’s Motion at 8. Mr. Jenkins fails to specify any specific bases for these arguments beyond what may be interwoven in the arguments interwoven in the attempt to show conflict between K.N.J. and In re Chubb. “Lack of clear legal argument with cited authority is grounds for dismissing an argument on appeal.” In re Chubb, citing Griffin v. Dep’t of Social and Health Services, 91 Wn.2d 616, 590 P.2d 816 (1979); State v. Kroll, 87 Wn.2d 829, 558 P.2d 173 (1976).

Mr. Jenkins has not demonstrated that his due process rights have been violated. The essential requirements of procedural due process are notice and an opportunity for a meaningful hearing. In re Myricks Welfare, 85 Wn.2d 252, 254, 533 P.2d 841 (1975). In determining whether a procedure adequately protects a parent’s due process rights in a juvenile dependency or termination proceeding, the court balances three factors: (1) the private interests at stake, (2) the government’s interest, and (3) the risk that the procedures used will lead to an erroneous decision.

Lassiter v. Dep't of Soc. Servs. of Durham Cy., 452 U.S. 18, 27, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1991).

The parent, the child and the state all share an interest in an accurate and just decision in proceedings to terminate the parent-child relationship. Lassiter, 452 U.S. at 27. The child also has "the right to establish a strong, stable, safe, and permanent home in a timely manner." In re Dependency of A.G., 93 Wn. App. 268, 968 P.2d 424 (1998).

Here, Mr. Jenkins was personally served in the dependency and termination proceedings, was aware of his service obligations, appeared through counsel at a review hearing, and was represented and involved with the termination proceedings. In addition, in this matter, a review hearing and a permanency planning hearing were held following the initial dependency order, repeatedly finding that the child was dependent, and no issue has been raised that there are any procedural defects based on the judge who signed these orders. CP 81-91, CP 39-48. Mr. Jenkins also has an unchallenged dependency and dispositional order regarding a sibling of K.N.J. in November 2007, which also outlined Mr. Jenkins' service requirements. CP 309-324. Mr. Jenkins was appointed counsel upon his request, and was represented at least one review hearing and the termination pre hearing and trial. This case does not present adequate

argument on a due process violation or other issue of substantial public interest.

VI. CONCLUSION

Mr. Jenkins' Motion for Discretionary Review should be denied.

RESPECTFULLY SUBMITTED this 8th day of September, 2009.

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NO. 83516-1

SUPREME COURT OF THE STATE OF WASHINGTON

In re the Matter of K.N.J.

Minor Child.

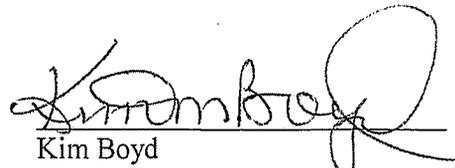
CERTIFICATE OF SERVICE

I, Kim Boyd, certify and declare under penalty of perjury under the laws of the state of Washington, that the following is true and correct:

1. I am over the age of eighteen years, not a party to this action, and competent to be a witness herein.
2. I am a legal assistant employed by the Washington State Attorney General's Office located at 103 E. Holly, Suite 310, Bellingham, Washington.
3. On September 8, 2009, I caused a copy of the Answer to Motion for Discretionary Review to be emailed as an attachment to opposing counsel, as agreed upon by Dana Lind, at the email address listed below:

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In Re the Welfare of: K.N.J.

#83516-1

Answer to Motion for Discretionary Review

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