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NO. 61849-1-I

**COURT OF APPEALS FOR DIVISION I
STATE OF WASHINGTON**

In re the Dependency of K.N.J. and K.M.J., Minors

STATE OF WASHINGTON,

Respondent

v.

MICHAEL JENKINS,

Appellant.

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COURT OF APPEALS DIV. #1
STATE OF WASHINGTON

AMENDED BRIEF OF RESPONDENT

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PRELIMINARY STATEMENT

These are consolidated appeals by the father, Michael Jenkins, from three orders of the Superior Court for Snohomish County, terminating his parental rights as to K.N.J. and K.M.J., and a decision in the underlying dependency case denying Mr. Jenkins' Motion to Vacate Dependency Order regarding child K.N.J. only.

Mr. Jenkins argues K.N.J.'s dependency order was improperly entered by a judge pro tempore without his consent. Mr. Jenkins initially raised this argument on the morning of the termination trial more than two years after the dependency order was entered, one year after the termination petition was filed, and after Mr. Jenkins' participation and appearance through counsel at a dependency review hearing.

Mr. Jenkins assigns no error to any of the findings in the case involving K.M.J.

Based upon the argument set forth below, Mr. Jenkins' challenges are without merit, the trial court orders should be affirmed, and the appeals dismissed.¹

¹ Throughout this brief, the Department of Social and Health Services will be referred to as "the Department." The Report of Proceedings for May 5, 2008, will be referred to as "RP 1." The Report of Proceedings for May 6, 2008, will be referred to as "RP 2." The report of Proceedings for May 7, 2008, will be referred to as "RP 3." Clerk's Papers will be referred to as "CP".

COUNTERSTATEMENT OF ISSUES

1. Should the Trial Court's Decision to Terminate Mr. Jenkins' Parental Rights to K.M.J. Be Affirmed As Mr. Jenkins' Has Failed to Assign Error to Any Findings Of Fact Involving K.M.J. And Substantial Evidence Supports the Trial Court's Findings?
2. Should the Trial Court's Decision to Deny Mr. Jenkins' Motion to Vacate Dependency Order More than Two Years After it was Entered be Affirmed, in That Mr. Jenkins Waived Any Personal Jurisdiction Arguments Through His Participation in Services and the Proceedings?
3. Should the Trial Court's Decision to Deny Mr. Jenkins' Motion to Vacate Dependency Order Be Affirmed Based Upon the Renewed Dependency Findings That Occurred at Subsequent Review and Permanency Planning Hearings?
4. Should the Trial Court's Decision to Grant the Department's Termination of Parental Rights Petition Be Affirmed Based Upon Dependency As A Status to the Child, and/or Based Upon a Valid Dependency Finding As Set Forth in Counterstatement of Issues 2 and 3?

COUNTERSTATEMENT OF FACTS

Michael Jenkins is the father of K.N.J. and K.M.J., the young children 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, and doctors rushed the

² The mother's parental rights were previously terminated and she is not a party to these proceedings.

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 233-250.

Dependency and dispositional orders were entered on February 22, 2006, as to K.N.J., signed by Snohomish County Superior Court Judge Pro Tempore Kathryn Trumbull. CP 225-232. The order was agreed 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.

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 was 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 had him call the Office of Assigned Counsel using her phone to request counsel. 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 Cowser. RP 1-3. Mr. Jenkins made a motion to vacate the Dependency Order in K.N.J.'s case on the morning of trial. 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 appeals these three orders. CP 4-38, 270-308.

ARGUMENT

A. The Appellant has Failed To Assign Error or Brief Any Issues Regarding K.M.J., Therefore the Termination Order as to this Child Should be Affirmed

Mr. Jenkins' "Brief of Appellant" fails to assign any error or argue any grounds that would challenge the termination order of the youngest of the two children at issue, K.M.J. Failing to raise an issue in the

assignments of error in violation of RAP 10.3(a)(3) and failing to present any argument on the issue will preclude an appellate court from reviewing the issue. See State v. Olson, 126 Wn.2d 315, 893 P.2d 629 (1995) and State v. Ross, 141 Wn.2d 304, 4 P.3d 130 (2000).

As described above, there are no issues with the dependency order of K.M.J., which was entered in Pierce County by a Superior Court Commissioner. No other issues have been raised by Mr. Jenkins in his brief. These unchallenged findings of fact are verities on appeal. In re P.D., 58 Wn. App. 18, 30, 792 P.2d 159 (1990), citing Sherwood v. Bellevue Dodge, 35 Wn. App. 741, 669 P.2d 1258 (1983), and see In re the Dependency of S.M.H., 128 Wn. App. 45, 115 P.3d 990 (2005). Accordingly, K.M.J.'s termination order should be affirmed.

B. Requirements For Termination Of Parental Rights

Each of the following elements set forth in RCW 13.34.180(1) must be established by clear, cogent, and convincing evidence in order for a court to terminate parental rights:

- (a) That the child has been found to be a dependent child;
- (b) That the court has entered a dispositional order pursuant to RCW 13.34.130;
- (c) That the child has been removed or will, at the time of the hearing, have been removed from the custody of the parent for a period of at least six months pursuant to a

finding of dependency;

(d) That the services ordered under RCW 13.34.136 have been expressly and understandably offered or provided and all necessary services, reasonably available, capable of correcting the parental deficiencies within the foreseeable future have been expressly and understandably offered or provided;

(e) That there is little likelihood that conditions will be remedied so that the child can be returned to the parent in the near future . . .; and

(f) That continuation of the parent and child relationship clearly diminishes the child's prospects for early integration into a stable and permanent home.

RCW 13.34.180.

If the Department proves that all necessary services reasonably capable of correcting parental deficiencies in the foreseeable future were offered or provided, and the deficiencies remain substantially unimproved after twelve months of dependency, a rebuttable presumption arises that there is little likelihood that conditions would be remedied to allow return of children in the near future. RCW 13.34.180(1)(e).

In addition, the termination order must be in the best interest of the child. RCW 13.34.190. This finding need only be supported by the preponderance of the evidence. In re A.V.D., 62 Wn. App. 562, 571, 815 P.2d 277 (1991).

C. The Findings Of The Trial Court Should Not Be Disturbed If They Are Supported By Substantial Evidence

In an appeal from a termination order, the findings of the trial court should not be disturbed if they are supported by substantial evidence. In re Hall, 99 Wn.2d 842, 849, 664 P.2d 1245 (1983); In re Dependency of C.B., 79 Wn. App. 686, 692, 904 P.2d 1171 (1995). The appellate court is not entitled to “second guess the trial court,” or to weigh either the evidence or the credibility of witnesses. In re Interest of Pawling, 101 Wn.2d 392, 401, 679 P.2d 916 (1984). This strong deference is based on the trial court’s advantage in having the witnesses before it, with the concomitant ability to observe demeanor and evaluate credibility. In re Sego, 82 Wn.2d 736, 739-40, 513 P.2d 831 (1973).

In termination proceedings, because the Department is required to prove each of the statutory allegations by clear, cogent and convincing evidence, the evidence must be substantial enough to allow the appellate court to conclude that the allegations are “highly probable.” Sego, 82 Wn.2d at 739; accord A.V.D., 62 Wn. App. at 568. Thus, in reviewing the trial court’s termination under RCW 13.34.180, this Court must determine whether the Department presented substantial evidence from which the trial court could find the existence of all statutory elements for termination on a highly probable basis.

In the present case, the Department presented substantial evidence that provides the basis for the trial court's findings that the allegations were proven by clear, cogent, and convincing evidence. These findings necessarily led to the trial court's conclusion that Mr. Jenkins' parental rights should be terminated. Mr. Jenkins has not assigned error to any of the trial court's findings beyond the dependency order challenge in K.N.J.'s case.

Of the six elements required for termination of parental rights, the father appeals only the trial court's findings of fact concerning RCW 13.34.180(1)(a). The father does not challenge on appeal the trial court's findings concerning elements (b), (c), (d), (e), or (f) of RCW 13.34.180(1). Since the findings are not challenged by the mother, they are verities on appeal. In re J.F., 109 Wn. App. 718, 722, 37 P.3d 1227 (2001). The trial court's findings regarding these elements should therefore be upheld upon review.

D. Mr. Jenkins Has Waived His Challenge To The Court's Personal Jurisdiction Over Him In This Matter Through His Appearance And Participation In The Subsequent Dependency Review Hearing That Provided An Updated Finding of Dependency.

While Mr. Jenkins did not consent to Judge Trumbull (ret.) to sit as a Pro Tem Judge at the February 22, 2006 dependency fact finding hearing in K.N.J.'s case, this fact in itself should not be a basis to deny the

termination of parental rights petition as to K.N.J. While Mr. Jenkins cites the issue as one of subject matter jurisdiction, it instead appears to be a question of personal jurisdiction. Accordingly, Mr. Jenkins' subsequent actions should be constituted as a waiver to personal jurisdiction, and the denial of the motion to vacate the dependency order and the termination order should be affirmed.

“The issue whether a court has jurisdiction is a question of law subject to de novo review.” Crosby v. County of Spokane, 137 Wn.2d 296, 971 P.2d 32 (1999), citing State v. Squally, 132 Wn.2d 333, 937 P.2d 1069 (1997). A motion to vacate under CR 60(b) will be reviewed by the Court of Appeals under the abuse of discretion standard. C. Rhyne & Associates v. Swanson, 41 Wn. App. 323, 704 P.2d 164 (1985).

1. Subject Matter Jurisdiction is Established With the Filing of a Petition.

Subject matter jurisdiction is invoked not at the time dependency is established, but rather at the outset of the filing of the case. “Juvenile court jurisdiction is invoked over dependency proceedings by filing a petition.” JuCR 3.1. Additionally, RCW 13.04.030(1)(b) and (c) provide the juvenile court with “exclusive original jurisdiction” over proceedings “relating to children alleged or found to be dependent and relating to the termination of a parent and child relationship.”

“Subject matter jurisdiction is the authority to hear and determine the class of action to which the case belongs, not the authority to grant the relief requested, or the correctness of the decision.” Bour v. Johnson, 80 Wn. App. 643, 910 P.2d 548 (1996). In K.N.J.’s case, a dependency petition was filed and served on the parties, as was a termination petition. Juvenile court clearly had subject matter jurisdiction to hear the dependency and termination matters in this case.

A challenge to the qualifications of a judicial officer acting as a pro tem does not appear to be a valid subject matter jurisdiction challenge. In State v. Hastings, a defendant challenged the authority of pro tem judge to serve in District Court without the consent of the defendant, stating that the District Court “lacked personal jurisdiction.” State v. Hastings, 115 Wn.2d 42, 44, 793 P.2d 956 (1990). The Washington State Supreme Court, in deciding that there were no specific requirements for consent in District Court, stated that “there is no constitutional mandate which requires consent for the pro tempore judge to have personal jurisdiction over the defendant.” State v. Hastings 115 Wn.2d 42,46 (1990). In Oregon State, a Court of Appeals decision on the challenge to a pro tem judge was additionally described not to be a valid subject matter jurisdiction issue when declining to review the issue for the first time on appeal. “A challenge to the authority of a judge to act in a particular

matter does not go to the subject matter jurisdiction of the court.” State v. Piskorowski, 138 Or. App. 497, 909 P.2d 897, 900 (1996).

Comparatively, the Uniform Child Custody Jurisdiction Act (UCCJA) provides that certain child custody/divorce proceedings are proceedings effecting status, and that personal jurisdiction over an affected parent is not a requirement for decisions. See In re the Marriage of Tsarbopoulos, 125 Wn. App. 273, 104 P.3d 692 (2004). Issues such as child support and property dispositions require personal jurisdiction over the affected spouse, however, a court may dissolve a marriage and decide child custody without personal jurisdiction over both parents. See In re the Marriage of Tsarbopoulos, 125 Wn. App. 273 (2004).

When extrapolated to a dependency court context, the Juvenile court has subject matter jurisdiction to decide placement and custody matters of a child, even if without personal jurisdiction over a particular parent, so long as the subject matter jurisdictional requirements are met. This is demonstrated in the authority of the Juvenile Court to enter shelter care with attempted notice to the parents (RCW 13.34.060) and the ability to establish dependency as a status of the child, even when procedural defects to the other parent are alleged. See In re the Welfare of Fisher, 31 Wn. App. 550, 643 P.2d 887 (1982) and In re the Dependency of A.W., 53 Wn. App. 22, 765 P.2d 307 (1988).

2. Mr. Jenkins' Actions in the Dependency and Termination Case Waived Any Proper and Timely Objections to Personal Jurisdiction.

Mr. Jenkins' participation in the dependency review hearing process, service participation, and notice of appearance in the dependency and termination should be construed as a waiver to any timely objection to lack of personal jurisdiction.

Generally, a defense of lack of personal jurisdiction must be made in a responsive pleading in the matter. See CR 12(b) and CR 12(h)(1). CR 60, the rule governing motions to vacate, additionally finds that a motion "shall be made with a reasonable time" although there is not a specific one year time limit if the order is alleged to be void. CR 60(b) and CR 55(c). A defense of lack of personal jurisdiction may be "waived as a matter of law if the defendant's assertion of the defense is inconsistent with previous behavior, or if defendant's counsel has been dilatory in asserting the defense." Boyd v. Kulczyk, 115 Wn. App. 411, 63 P.3d 156 (2003). This rule also applies to dependency proceedings. See In re the Dependency of A.W., 53 Wn. App. 22, 26, 765 P.2d 307 (1988).

In In re the Dependency of A.W., the Court of Appeals considered similar issues in ruling that a father had waived any personal jurisdiction challenges by his participation in the dependency process. See In re the Dependency of A.W., 53 Wn. App. 22, 765 P.2d 307 (1989). The Court

of Appeals reasoned:

“Parties, attorneys and the court have an obligation to expedite resolution of child custody and parental rights issues, and to thereby limit the period during which children face an uncertain future. It is therefore of paramount importance that the trial court be apprised of alleged errors so that it can make corrections, if necessary, and thereby avoid an appeal and consequent new proceedings.”

In re the Dependency of A.W. 53 Wn. App. 22 at 26, citing State v. Scott, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). In A.W., the record was not clear that the father had been served with the final date of the dependency and dispositional hearing prior to the orders being entered. See In re the Dependency of A.W., 53 Wn. App. 22, 765 P.2d 307 (1988). The father challenged the termination of the child by arguing that this failure to notify him of the dependency proceeding was a violation of his procedural due process rights. The court found that the father in A.W. waived his right to argue a notice issue under CR12(h)(1) by not timely raising this issue before the trial court. In re the Dependency of A.W., 53 Wn. App. 22, 765 P.2d 307 (1988). The court found the father’s delay in raising the issue until the appeal unacceptable and held that “one who participates as a party in at least some dependency review hearings and in the termination adjudication waives appellate review of venue, process and personal jurisdiction challenges not timely raised in the trial court.” In re the

Dependency of A.W., 53 Wn. App. 22, 27.

In K.N.J.'s case, despite participating in a dependency review hearing through counsel and termination hearings leading up to the termination trial date in May 2008, and having a valid dependency and dispositional order requiring services in the case involving a sibling (K.M.J.), the father did not raise a jurisdictional issue until the morning of the termination trial, not allowing time for correction, and potentially delaying permanency for a child who had spent the majority of her life in out-of-home care.

Mr. Jenkins' active participation in the dependency case, including participation in services and his acknowledged decision to not participate in court-ordered services he did not feel were appropriate, should be construed to constitute a waiver to any contest about personal jurisdiction regarding the initial dependency and disposition orders.

3. Dependency was reaffirmed at the review and permanency planning hearings without challenge.

The 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).

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).

In K.N.J.'s case, the matter was raised before the trial court, however, it was raised on the morning of the termination trial, on May 5, 2008, despite the fact that the dependency order being challenged had been entered on February 22, 2006, the termination petition had been filed on February 12, 2007, and Mr. Jenkins had formally appeared in the dependency matter through his attorney by the November 21, 2007 review hearing. CP 81-91. In that review order, the court found that "The child remains a dependent child pursuant to RCW 13.34.030." CP 81-91.

The father 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. The father 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 has not demonstrated any prejudicial effect by any alleged irregularities in the initial dependency order on K.N.J.

In In re the Dependency of 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] parental rights." In re the Dependency of A.W., 53 Wn. App. 22, 28, 765 P.2d 307 (1988). The Court in A.W., citing the Chubb Court of Appeals decision, stated that "[u]nlike a termination of parental rights, a dependency determination is reversible, and does not sever all contacts between a parent and child." In re the Dependency of A.W., 53 Wn. App. 22, 28, 765 P.2d 307 (1988). Ultimately, 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).

Mr. Jenkins cites In re Chubb as a basis that a dependency is not reestablished upon each review hearing. Appellant’s Brief, pg. 14-15, citing In re Dependency of Chubb, 112 Wn.2d 719, 773 P.2d 851 (1989). However, 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 In re Dependency of Chubb, 112 Wn.2d 719, 773 P.2d 851 (1989). The Supreme Court in Chubb found that a parent could not appeal the underlying dependency as a matter of right from a review hearing order, as the statute only required the court to determine whether continued supervision is necessary and the court rules only provided a review of right following a dispositional hearing. In re Dependency of Chubb, 112 Wn.2d 719, 773 P.2d 851 (1989).

Other Washington law indicates that Chubb’s holding on the right to appellate review should not be extended to mean that a dependency review hearing may not reestablish dependency. In In re H.S., the Court of Appeals commented 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). In In re A.S., the Court of Appeals commented that “termination proceedings are not a relitigation 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), citing Krause v. Catholic Community Services, 47 Wn. App. 734, 737 P.2d 280 (1987).

Finally, in the case at hand, 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 “The 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.

E. Dependency Is A Status That Applies To The Child, Rather Than The Parent, And The Superior Court Properly Determined That K.N.J. Was A Dependent Child Based On The Prior Dependency, Disposition And Review Order Findings Made In This Case.

The dependency status of the child was reaffirmed in this case in subsequent review hearings, and those orders were unchallenged. Dependency is a status that applies to the child, and does not require a finding “as to mother” or “as to father.” K.N.J. was a dependent child, and the court properly denied the motion to vacate the dependency order

and granted the termination petition.

In In re the Welfare of Fisher, a father unsuccessfully argued that the child was not “dependent as to the father” and therefore the termination of parental rights as to him should not have been granted. Dependency “relates to the child’s status of being abandoned, abused or neglected by its parent guardian or other custodian. There is no specific requirement that an order of dependency specifically state that the child is found to be dependent as to a particular parent, guardian or custodian. Such a determination is implicit in a finding of dependency.” In re the Welfare of Fisher, 31 Wn. App. 550, 643 P.2d 887 (1982).

Likewise, the termination statute does not explicitly require a finding of dependency as to a particular parent. RCW 13.34.180(1)(a) requires that the state prove “that the *child* has been found to be a *dependent child*.” (emphasis added). This is consistent with the purpose of RCW 13.34:

“The purpose behind the statute defining dependency is to allow a court to assert protective custody over a child and to terminate all parental rights if it would serve in the best interests of the child.”

In re the Dependency of Henderson, 29 Wn. App. 748, 630 P.2d 944 (1981).

The determination that dependency is a status of the child supports

the Department's contention that the court has subject matter jurisdiction over the child, even if lacking personal jurisdiction over a parent at the time the order is entered. This situation that exists in dependency law is consistent with what can occur in child custody cases when child abuse and neglect is not an issue. See In re the Marriage of Tsarbopoulos, 125 Wn. App. 273, 104 P.3d 692 (2004).

CONCLUSION

Mr. Jenkins has not assigned error to the termination of the youngest child, K.M.J., and accordingly this order of termination should be affirmed.

Even if the initial dependency order was invalid in part to the father, for lack of personal jurisdiction, the father's conduct, appearance and actions in the case, coupled with his delay in raising the challenge to personal jurisdiction should be constituted as a waiver of any personal jurisdiction challenges two years after dependency was established.

In addition, dependency was reestablished in subsequent review orders by the court, and signed by an elected judge or appointed commissioner. Mr. Jenkins appeared in the case, participated in at least one review hearing through counsel, and did not contest the court's decision that the child was a "dependent child."

Finally, dependency is a status that applies to the child. The

termination statute does not require dependency over a particular parent, and the dependency order entered with the mother's consent provided the court with a basis for determining that RCW 13.34.180(1)(a) had been met by clear, cogent and convincing evidence.

Thus, the Department respectfully asks this Court to affirm the trial court's order terminating the father's parent-child relationship with both K.N.J. and K.M.J., and to affirm the order denying the motion to vacate the dependency order of K.N.J.

RESPECTFULLY SUBMITTED this 2 day of July, 2009.

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PROOF OF SERVICE

I certify that I served a copy of this document on all parties or their counsel of record on the date below as follows:

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

DATED this 2nd day of July, 2009, at Bellingham, Washington.



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