

No. 84458-5

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

---

In Re the Dependency of Peter T. (dob 9/12/2000), Jaycob I. (dob 2/21/2005), and Oscar T. (dob 8/17/2006)

---

PETITIONER'S REPLY TO STATE'S ANSWER TO PETITION FOR REVIEW

---

LILA J. SILVERSTEIN  
Attorney for Petitioner Peter Tsimbalyuk

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 701  
Seattle, Washington 98101  
(206) 587-2711

**FILED**  
MAY 04 2010  
CLERK OF THE SUPREME COURT  
STATE OF WASHINGTON

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON  
10 MAY -4 PM 3:45  
BY RONALD R. CARPENTER  
CLERK

ORIGINAL

FILED AS  
ATTACHMENT TO EMAIL

TABLE OF CONTENTS

A. PROCEDURAL HISTORY..... 1

B. ARGUMENT..... 1

**This Court should grant Mr. Tsimbalyuk’s petition for  
review because both parties agree that the published Court  
of Appeals’ opinion involves matters of substantial public  
interest.**..... 1

C. CONCLUSION..... 4

**TABLE OF AUTHORITIES**

**Washington Supreme Court Decisions**

In re Dependency of J.C., 130 Wn.2d 418, 924 P.2d 21 (1996)..... 3

In re J.H., 117 Wn.2d 460, 815 P.2d 1380 (1991)..... 2

In re the Interest of Silva, 166 Wn.2d 133, 206 P.3d 1240 (2009)..... 2

**Statutes**

RCW 13.34.020 ..... 2

RCW 13.34.180 ..... 3

**Rules**

RAP 13.4(b) ..... 2

RAP 13.4(d) ..... 1

A. PROCEDURAL HISTORY

On March 16, 2009, Peter Tsimbalyuk filed a petition for review, asking this Court to review the opinion of the Court of Appeals reversing the juvenile court's denial of the State's petition to terminate his relationship with his children.

In the meantime, the State and CASA moved to publish the Court of Appeals' opinion, arguing that publication was appropriate because the case involved an issue of substantial public interest. Appendix A. The Court of Appeals granted that motion and published the opinion.

Appendix B.

The State then filed an Answer to Mr. Tsimbalyuk's petition for review, arguing that the petition should be denied as moot. Answer at 20.

Pursuant to RAP 13.4(d), Mr. Tsimbalyuk submits this reply. Because the Court of Appeals published its opinion based on the fact that the case involves issues of substantial public interest, this Court should grant review.

B. ARGUMENT

**This Court should grant Mr. Tsimbalyuk's petition for review because both parties agree that the published Court of Appeals' opinion involves matters of substantial public interest.**

Respondents ask this Court to deny review on the basis of mootness. Answer at 20. However, as respondents acknowledged in their

motion to publish the Court of Appeals' opinion, this case involves a matter of substantial public interest. Therefore, review should be granted. RAP 13.4(b)(4).

This Court accepts review of cases that are technically moot if they involve matters of continuing and substantial public interest. In re the Interest of Silva, 166 Wn.2d 133, 137 n.1, 206 P.3d 1240 (2009). In deciding whether an issue of substantial public interest is involved, the court considers three factors: (1) the public or private nature of the question presented, (2) the desirability of an authoritative determination that will provide future guidance to public officers, and (3) the likelihood that the question will recur. Id.

All three criteria are satisfied here. First, Respondents have already acknowledged that the issues in this case are "unquestionably a matter of public interest and importance." Appendix A at 9. Indeed, "the public has a great interest in the protection of juveniles." Silva, 166 Wn.2d at 137 n.1. Our legislature has declared that the family unit is a "fundamental resource of American life which should be nurtured." RCW 13.34.020. And "[t]he parents' right to custody of their children is described as being rooted in the natural and the common law, and as being a sacred right that is more precious than the right to life itself." In re J.H., 117 Wn.2d 460, 473, 815 P.2d 1380 (1991). Respondents agree with

petitioner that “any clarification of law in this area is a matter of public interest and importance because termination cases concern matters of compelling state interests and fundamental rights of children.” Appendix A at 3.

Second, an authoritative determination on the application of RCW 13.34.180(1)(f) will provide future guidance to juvenile courts. Mr. Tsimbalyuk submits that the Court of Appeals misused dicta from this Court’s decision in In re Dependency of J.C., 130 Wn.2d 418, 924 P.2d 21 (1996) to read 13.34.180(1)(f) out of existence. This misreading exacerbates the problem of DSHS’s all-or-nothing, terminate-or-return view of child welfare – an ultimatum that the juvenile court properly rejected in order to protect the children’s best interests. Respondents already conceded that “a published decision addressing the proper interpretation and application of RCW 13.34.180(1)(f) would be helpful to practitioners and the lower bench.” Appendix A at 3; see also id. at 8 (a published decision “would be of significant help in clarifying existing principles of law” and “will provide guidance to both trial and appellate courts and practitioners”). Indeed, respondents agree that an opinion “regarding the relationship of RCW 13.34.180(1)(f) to RCW 13.34.180(1)(c) will be highly beneficial to courts and practitioners.” Appendix A at 8-9.

Third, the issue is likely to recur. Again, respondents have already conceded this point based on their extensive experience with dependency cases. Appendix A at 7 (“This case addresses a recurrent issue”). Accordingly, Mr. Tsimbalyuk respectfully requests that this Court grant review.

C. CONCLUSION

Petitioner and father Peter Tsimbalyuk asks this Court to grant review of this case involving constitutional issues of substantial public interest.

DATED this 4th day of May, 2010.

Respectfully submitted,



Lila J. Silverstein – WSBA 38394  
Washington Appellate Project  
Attorney for Petitioner

## APPENDIX A

NO. 63551-4-I  
COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I

IN RE DEPENDENCY OF:

P.P.T., J.J.I., AND O.L.T., Minor Children,

STATE OF WASHINGTON, DSHS, and  
COURT APPOINTED SPECIAL  
ADVOCATE ("CASA") FOR CHILDREN

Appellants

v.

PETER TSIMBALYUK,

Respondent.

RECEIVED

MAR 3 2010

Washington Appellate Project

JOINT  
MOTION TO PUBLISH

**1. IDENTITY OF MOVING PARTY:**

This is the joint motion of the Department of Social and Health Services ("the Department" or "DSHS") of the State of Washington, and the Court Appointed Special Advocate ("CASA") for the children which are the appellant/petitioners herein. The Department was the petitioner in the proceedings below.

**2. STATEMENT OF RELIEF SOUGHT:**

The Department and CASA request that this court publish in its entirety the court's opinion filed on February 16, 2010. A majority of the

COPY

panel determined that this opinion would not be printed in the Washington Appellate Reports pursuant to RCW 2.06.040.

**3. FACTS RELEVANT TO THE DEPARTMENT'S MOTION:**

This case concerns whether a trial court erred in dismissing a termination petition filed regarding three young children after it concluded that some other alternative plan such as dependency guardianship or third party custody would better serve the children's best interest. The Department and CASA sought review of the decision and this court granted discretionary review, and ultimately reversed the ruling, finding that the court committed obvious error in its interpretation and application of RCW 13.34.180(1)(f).

**4. GROUNDS FOR RELIEF AND ARGUMENT:**

Under RAP 12.3(e), a party may request that the court publish an opinion that has been filed for the public record. An opinion should be published if 1) the decision determines an unsettled or new question of law or constitutional principle; 2) the decision modifies, clarifies or reverses an established principle of law; 3) the decision is of general public interest or importance; or 4) the decision conflicts with a prior opinion of the court of Appeals. RAP 12.3(d).

The present case meets at least two of the above criteria for

publication. First, this decision clarifies an established principle of law because it appears to be the only Washington appellate opinion to specifically address the issue of whether the trial court commits legal error when it finds that parental deficiencies remain and are unlikely to be corrected in the near future, but erroneously focuses on what it believes constitutes a stable and permanent home for the children when determining whether continuation of the parent-child relationship diminishes the children's prospects for early integration into a permanent home. The only other case involving the *state's* challenge to an order denying termination on this element of the statute was In re the Dependency of A.G., 127 Wn. App. 801, 112 P. 3d 588 (2005), but in that case this court denied discretionary review before reaching the merits. As indicated by the attached declarations of Senior Counsel Steve Hassett and CASA program attorney Heidi Nagel, misinterpretation of this statutory element occurs with some regularity, and therefore a published decision addressing the proper interpretation and application of RCW 13.34.180(1)(f) would be helpful to practitioners and the lower bench.

Second, any clarification of law in this area is a matter of public interest and importance because termination cases concern matters of compelling state interests and fundamental rights of children. Since the

state may not appeal an order denying termination as a matter of right, the inherent delays of having to seek discretionary review means that permanency for these children is significantly delayed. In this case, almost a year has passed since the trial court erroneously denied termination. The Court's published guidance will help future trial courts avoid making such mistakes, which in turn will protect the lives of countless children and their right to timely permanency.

**5. CONCLUSION**

All children who are the subject of termination proceedings have an interest in avoiding erroneous determinations and they have a right to a strong, stable, and safe home provided in a timely manner. The decision in this case clarifies existing law and addresses a vital public interest. Publishing the decision will provide much needed guidance to lower courts and to all participants involved in these cases.

DATED this 22<sup>nd</sup> day of February, 2010.

ROBERT M. MCKENNA  
Attorney General

By *Trisha L. Mcardle*  
TRISHA L. MCARDLE  
Senior Counsel  
WSBA # 16371

800 Fifth Ave., #2000  
Seattle, WA 98104

And By:

*Amanda J. Beane* WSBA # 41109

---

AMANDA J. BEANE  
KAREN BRUNTON  
Attorneys for CASA

PERKINS COIE, LLP  
1201 3<sup>rd</sup> Ave. Ste. 4800  
Seattle, WA. 98101

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I

IN RE THE DEPENDENCY OF )  
 )  
P.P.T., J.J.L., AND O.L.T., ) NO. 63551-4-I  
 )  
Minor Children, ) DECLARATION OF  
 ) STEVE HASSETT, SENIOR  
 ) COUNSEL, IN SUPPORT OF  
 ) PUBLICATION  
 )  
\_\_\_\_\_ )

I, Steve Hassett, hereby declare as follows:

1. I am a Senior Counsel with the Washington State Attorney General's Office and work in the Social and Health Services Division in Olympia. Since October 2000 my primary duties have been as lead counsel to the Children's Administration of the Department of Social and Health Services (DSHS) and as juvenile litigation coordinator for the Attorney General's Office.
2. In the latter capacity, I coordinate the activities of approximately 95 Assistant Attorneys General in eleven offices who represent DSHS in juvenile cases, primarily in dependency and termination cases pursuant to Chapter 13.34 RCW. I also coordinate contracts with prosecuting attorneys and Special Assistant Attorneys General for juvenile court representation of DSHS in eight rural counties. In recent years, there have been approximately 4,500 dependency

petitions and approximately 2,000 termination of parental rights petitions filed each year in Washington State.

3. I have read this Court's decision in *In re the Welfare of P.P.T., J.J.I., and O.L.T.*, docket # 63551-4-I, and have also read the Motion to Publish Decision filed by Senior Counsel Trisha McArdle and request that this Court accept this declaration as additional support to the motion to publish this decision.

4. In my capacity as juvenile litigation coordinator, I receive copies of decisions and orders from across the state from both juvenile and superior court proceedings and administrative proceedings involving questions about the health, safety, and welfare of children. Most are sent to me by Assistant Attorneys General who are concerned about the decisions and wish to staff the case regarding their options. I and other Assistant Attorneys General also regularly staff cases with DSHS social workers both prior to and after the filing of dependency petitions. My office also develops training and best practices as necessary for AAGs and social workers consistent with those legal decisions that establish legal precedent.

5. This case addresses a recurrent issue faced by DSHS social workers, Assistant Attorneys General, and the Juvenile Courts in the various counties: the application of the sixth element of the termination of parental rights statute, RCW 13.34.180(1)(f), when substantial evidence establishes that a parent will not be able to care for his or her child in the foreseeable future but there is additional evidence before the court that the parent has an ongoing relationship with the child. While the P.P.T. case may not by itself determine a new question of law, it

does provide additional authority and guidance on this issue, which is of fundamental concern to those involved in Washington's child protection and juvenile court systems.

6. This Court may order that a decision be published if it meets the criteria set forth in RAP 12.3(d):

(1) Whether the decision determines an unsettled or new question of law or constitutional principle; (2) Whether the decision modifies, clarifies or reverses an established principle of law; (3) Whether a decision is of general public interest or importance; or (4) Whether a case is in conflict with a prior opinion of the Court of Appeals.

Publication of the decision would be of significant help in clarifying existing principles of law and would clearly meet the criteria of RAP 12.3(d)(2). As juvenile dependency and termination of parental rights cases deal with matters of compelling state interest and fundamental rights, any clarification of law in this area is a matter of public interest and importance, an additional criteria for publication pursuant to RAP 12.3(d)(3).

7. Publication of this decision will provide guidance to both trial and appellate courts and practitioners by helping to clarify existing principles of law in dependency cases. Such cases are highly fact specific and this Court's detailed discussion and analysis of the application of existing legal principles as they apply to the question of the application of RCW 13.34.180(1)(f) in termination of parental rights cases will provide essential guidance in future cases to both courts and practitioners. In addition, the court's discussion and holding regarding the relationship of RCW 13.34.180(1)(f) to RCW 13.34.180(1)(e) will be highly

beneficial to courts and practitioners. While there are a few cases on these issues, as noted by the court, none of them address these issues in as detailed a fashion as this decision.

7. While termination of parental rights cases are largely driven by factually specific issues, they may recur in similar form in many cases. Resolution of these issues requires balancing the existing and potential liberty interests of the alleged parent with the right of the child "to a safe, stable and permanent home and a speedy resolution of any proceeding under [chapter 13.34 RCW]". RCW 13.34.020. Additional case law on the issues addressed in this Court's decision will offer valuable clarification and guidance and publication of this case will be of great value to the courts and practitioners handling dependency and termination of parental rights cases. Publication will have significant impact in clarifying established principles of law in dependency cases pursuant to RAP 12.3(d)(2) and is unquestionably a matter of public interest and importance pursuant to RAP 12.3(d)(3). The undersigned respectfully requests that this Court's opinion be published.

///

///

///

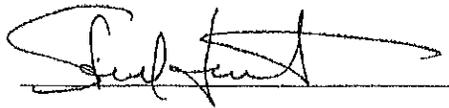
///

///

///

I hereby declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED the 23<sup>rd</sup> day of February 2010 at Tumwater, Washington.

A handwritten signature in black ink, appearing to read "Steve Hassett", written over a horizontal line.

STEVE HASSETT, WSBA# 15780  
Senior Counsel  
PO Box 40124  
7141 Cleanwater Dr. SW  
Olympia, WA 98504-0124

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I

IN RE THE DEPENDENCY OF )  
 )  
P.P.T., J.J.I., AND O.L.T., ) NO. 63551-4-I  
 )  
Minor Children, ) DECLARATION OF  
 ) HEIDI NAGEL, DEPENDENCY  
 ) CASA PROGRAM ATTORNEY,  
 ) IN SUPPORT OF  
 ) PUBLICATION

I, Heidi L. Nagel, hereby declare as follows:

1. I am a staff attorney for the Dependency CASA Program of King County Superior Court. I have been employed in this capacity since 1998, advocating for the best interests of dependent children in King County. I was trial counsel for CASA volunteer Lori Reynolds on behalf of the children in this matter.
2. The Dependency CASA Program of King County in 2009 had approximately 420 volunteers advocating for the interests of 1,550 dependent children. Across the State in 2009 there were 2,255 volunteers serving 7,441 dependent children.
3. I have read this Court's decision in In re the Welfare of P.P.T., J.J.I., and O.L.T., docket # 63551-4-I, and have also read the Motion to Publish Decision filed jointly by DSHS and the CASA, and request that this Court accept this

declaration as additional support to the motion to publish this decision.

4. In my capacity as CASA Program Attorney, I advise CASA volunteers in all aspects of dependency litigation. I review decisions and orders daily involving questions about the health, safety, and welfare of children. Together with my colleagues, I also train CASA volunteers in King County on legal issues and best practices to assist them in performing their duties in a manner consistent with statutory and case law. Annually I also teach for and consult with the Washington State CASA Association, providing support to CASA Program staff and volunteers throughout the state.

5. This case addresses two issues that we are particularly interested in: (1) the application of the sixth element of the termination of parental rights statute, RCW 13.34.180(1)(f), when substantial evidence establishes that a parent will not be able to care for his or her child in the foreseeable future but there is evidence before the court that the parent has an ongoing relationship with the children and the children are stable in relative placements; and (2) clarification of the conditions under which the Department (and potentially a CASA) may successfully petition for discretionary review of the loss of a termination of parental rights trial. While the P.P.T. case may not by itself determine a new question of law, it does provide additional authority and guidance on these issues, which are of fundamental concern to those involved in Washington's child protection and juvenile court systems.

6. This Court may order that a decision be published if it meets the criteria set forth in RAP 12.3(d):

(1) Whether the decision determines an unsettled or new question of law or constitutional principle; (2) Whether the decision modifies, clarifies or reverses an established principle of law; (3) Whether a decision is of general public interest or importance; or (4) Whether a case is in conflict with a prior opinion of the Court of Appeals.

Publication of the decision would be of significant help in clarifying existing principles of law and would clearly meet the criteria of RAP 12.3(d)(2). As juvenile dependency and termination of parental rights cases deal with matters of compelling state interest and fundamental rights, any clarification of law in this area is a matter of public interest and importance, an additional criteria for publication pursuant to RAP 12.3(d)(3).

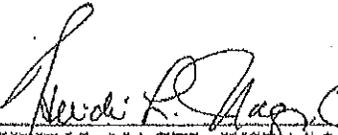
7. Publication of this decision will provide guidance to both trial and appellate courts and practitioners by helping to clarify existing principles of law in dependency cases. Such cases are highly fact specific and this Court's detailed discussion and analysis of the application of existing legal principles as they apply to the question of the application of RCW 13.34.180(1)(f) in termination of parental rights cases will provide essential guidance in future cases to both courts and practitioners. In addition, the court's discussion and holding regarding the relationship of RCW 13.34.180(1)(f) to RCW 13.34.180(1)(e) will be highly beneficial to courts and practitioners. While there are a few cases on these issues, as noted by the court, none of them address these issues in as detailed a fashion as this decision.

7. While termination of parental rights cases are largely driven by factually specific issues, they may recur in similar form in many cases. Resolution of these

issues requires balancing the existing and potential liberty interests of the alleged parent with the right of the child "to a safe, stable and permanent home and a speedy resolution of any proceeding under [chapter 13.34 RCW]". RCW 13.34.020. Additional case law on the issues addressed in this Court's decision will offer valuable clarification and guidance and publication of this case will be of great value to the courts and practitioners handling dependency and termination of parental rights cases. Publication will have significant impact in clarifying established principles of law in dependency cases pursuant to RAP 12.3(d)(2) and is unquestionably a matter of public interest and importance pursuant to RAP 12.3(d)(3). The undersigned respectfully requests that this Court's opinion be published.

I hereby declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED the 1st day of March, 2010 at Seattle, Washington.

  
HEIDI L. NAGEL, WSPA# 24160  
Program Attorney  
Dependency CASA Program  
King County Superior Court  
1401 East Jefferson Street, Suite 500  
Seattle, WA 98122

## APPENDIX B

FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON

2010 APR -5 AM 10:55

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Dependency of )

P.P.T., d.o.b. 9/12/2000; )  
J.J.I., d.o.b. 2/21/2005; )  
O.L.T., d.o.b. 8/17/2006. )

) NO. 63551-4-I  
) (Consolidated with  
) 63393-7-I, 63394-5-I, 63552-2-I,  
) 63553-1-I, 63395-3-I)

) ORDER GRANTING MOTION  
) TO PUBLISH OPINION  
)

Appellants Department of Social and Health Services and the Court Appointed Special Advocate having filed a joint motion to publish opinion, and the hearing panel having reconsidered its prior determination and finding that the opinion will be of precedential value; now, therefore it is hereby:

ORDERED that the unpublished opinion filed February 16, 2010, shall be published and printed in the Washington Appellate Reports.

Done this 5<sup>th</sup> day of April, 2010.

FOR THE COURT:

  
\_\_\_\_\_  
Judge



**OFFICE RECEPTIONIST, CLERK**

**To:** Maria Riley  
**Cc:** McArdle, Trisha (ATG); kbrunton@perkinscoie.com; kosullivan@perkinscoie.com; abeane@perkinscoie.com  
**Subject:** RE: Tsimbalyuk 84458-5

Rec'd 5/4/2010

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

**From:** Maria Riley [mailto:maria@washapp.org]  
**Sent:** Tuesday, May 04, 2010 3:37 PM  
**To:** OFFICE RECEPTIONIST, CLERK  
**Cc:** McArdle, Trisha (ATG); kbrunton@perkinscoie.com; kosullivan@perkinscoie.com; abeane@perkinscoie.com  
**Subject:** Tsimbalyuk 84458-5

**IN RE P.T., ET AL**  
**No. 84458-5**

Please accept the attached documents for filing in the above-subject case:

**PETITIONER'S REPLY TO STATE'S ANSWER TO PETITION FOR REVIEW**

<<Tsimbalyuk\_84458-5.pdf>>

Lila J. Silverstein - WSBA 38394  
Attorney for Petitioner  
Phone: (206) 587-2711  
E-mail: lila@washapp.org

By

**Maria Arranza Riley**

**Staff Paralegal**

**Washington Appellate Project**

**Phone: (206) 587-2711**

**Fax: (206) 587-2710**

**www.washapp.org**

Please consider the environment before printing this e-mail