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**SUPREME COURT OF THE STATE OF WASHINGTON**

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In re the Dependency of:

J.H.,

A Minor Child.

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**DEPARTMENT'S SUPPLEMENTAL BRIEF**

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**ORIGINAL**

**TABLE OF CONTENTS**

I. INTRODUCTION.....1

II. STATEMENT OF THE CASE.....1

III. ARGUMENT .....6

    A. The Court Should Vacate the Court of Appeals’  
        Dismissal and Remand for Consideration of the Merits.....6

    B. Mr. Hyde Is An Aggrieved Party .....7

    C. It is Uncontested that Mr. Hyde’s Appeal of the Order  
        Dismissing the Dependency is Appealable as a Matter of  
        Right and It is Unnecessary for this Court to Address.....14

IV. CONCLUSION .....15

## TABLE OF AUTHORITIES

### Cases

<i>In re Dependency of J.B.S.</i> , 123 Wn.2d 1, 863 P.2d 1344 (1993).....	8
<i>In re Dependency of R.L.</i> , 123 Wn. App. 215, 98 P.3d 75 (2004).....	8
<i>In re Hansen</i> , 24 Wn. App. 27, 599 P.2d 1304 (1979).....	10, 11
<i>In re Welfare of Sumey</i> , 94 Wn.2d 757, 621 P.2d 108 (1980).....	7, 8
<i>In the Matter of the Dependency of J.W.H.</i> , 106 Wn. App. 714, 24 P.3d 1105 (2001), <i>reversed on other grounds</i> , 147 Wn.2d 687, 57 P.3d 266 (2002) ..	10, 11
<i>Lindsey M. v. Arizona Department of Economic Security</i> , 212 Ariz. 43, 127 P.3d 59 (2006) .....	12
<i>Santosky v. Kramer</i> , 455 U.S. 745, 102 S. Ct. 1399, 71 L. Ed.2d 599 (1982).....	7
<i>State v. Taylor</i> , 150 Wn.2d 599, 80 P.3d 605 (2003).....	7, 8, 9, 13

### Statutes

RCW 13.34.020 .....	8
RCW 13.34.030 .....	10
RCW 13.34.090 .....	8

**Rules**

RAP 2.2..... 14

RAP 3.1..... 7, 14

## I. INTRODUCTION

Appellant Gregory Hyde is incarcerated for almost 50 years and, therefore, is unavailable to personally care for his eight-year-old son, J.H. That fact does not negate the father's recognized constitutional interest in the care and control of his son. Mr. Hyde has the right to appeal the dismissal of his son's dependency. The Court of Appeals erred in dismissing his appeals and finding him not to be an aggrieved party. While a parent may not often be an aggrieved party when a dependency is dismissed, the facts in the present case establish that Mr. Hyde was aggrieved by the court's decision to dismiss the dependency. Those facts include that Mr. Hyde is unable to avail himself of other remedies such as petitioning for custody of the child, that he was a party to the dependency and objected to the dismissal of the dependency, and that he identified a particular concern over the safety and welfare of his son in the home of the mother without the oversight of the dependency court.

## II. STATEMENT OF THE CASE

J.H. was born on May 20, 2003, to Jennifer Ludwig and Gregory Hyde. The child's parents are not married to each other. On November 10, 2008, law enforcement placed J.H. into protective custody upon the arrest of his mother and stepfather for dealing cocaine and having weapons in their possession. CP at 3.

Mr. Hyde was incarcerated at the time. CP at 85. He was serving an exceptional sentence of 579 months for Rape in the First Degree with Aggravating Circumstances and Kidnapping in the First Degree with Sexual Motivation and Aggravating Circumstances. CP at 55-79. Mr. Hyde had not had contact with J.H. since his arrest in 2005, when the child was just two years old. CP at 109.

The dependency court initially placed J.H. with his maternal grandmother. CP at 19. On December 17, 2008, the mother agreed to the establishment of a dependency and the court returned J.H. to her care, provided she abide by a number of conditions. CP at 43-37.

Mr. Hyde also agreed to the dependency on January 21, 2009. CP at 80-86. On the same date, the dependency court held a contested hearing about visits and denied any visits between J.H. and Mr. Hyde. CP at 87. Later, Mr. Hyde moved to vacate his agreed dependency order, but the Commissioner denied his motion and the superior court denied the father's motion for revision.<sup>1</sup> CP at 385-90, 449-51; 540-42.

When the mother tested positive for codeine and morphine on February 13, 2009, and for cocaine on March 2, 2009, the Department asked the court to remove J.H. from his mother's care. CP at 198-205.

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<sup>1</sup> On July 31, 2009, the father filed a Notice of Discretionary Review of the superior court's July 30, 2009 Order Denying Revision of Order Denying Motion to Vacate Dependency and Disposition Order. CP at 578-82. (Ct. App. No. 28314-3).

Mr. Hyde supported the Department's motion, which was heard at the first dependency review hearing on March 25, 2009. CP at 209-11, 316.

The Commissioner denied the motion to remove J.H., noting that while the court had concerns about the situation, the Guardian ad Litem for the child and the in-home service provider did not support removal and reported that J.H. was doing well in his mother's care. CP at 319-20. Mr. Hyde moved for revision and the superior court denied his motion.<sup>2</sup> CP at 325, 428-30.

The mother filed a motion to dismiss the dependency in June 2009. CP at 452-53. Both the Department and Mr. Hyde opposed the motion as the mother had just begun substance abuse treatment. CP at 478-80, 481-83. At the hearing on the mother's motion, the Commissioner ordered that the "dependency will be dismissed on July 31, 2009 as long as the mother continues to participate and is in compliance with treatment and continues to UA without any positives, no shows, stalls, or dilutes."<sup>3</sup> CP at 493.

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<sup>2</sup> On May 22, 2009, the father filed a Notice of Discretionary Review of the superior court's May 20, 2009 Order Denying Revision of Order Denying the State's Motion to Place Child in Foster Care. CP at 440-46. (Ct. App. No. 28127-2).

<sup>3</sup> On July 2, 2009, the father filed a Notice of Discretionary Review of the court's July 1, 2009 Order Regarding Motion to Dismiss Dependency. CP at 503-07. (Ct. App. No. 28226-1).

At the July 15, 2009 dependency review hearing, the court ruled, over the objection of Mr. Hyde, that the dependency would be dismissed on July 31, 2009.<sup>4</sup> CP at 523.

The court held another dependency review hearing on July 29, 2009, and found that the mother had been discharged from outpatient treatment after missing a group session on July 22, 2009. CP at 533. However, the court also found there was “no connection between mother’s missed treatment group and any harm or danger to child” and found the mother was in substantial compliance with services. CP at 535. The court reiterated that the dependency would be dismissed on July 31, 2009.<sup>5</sup> CP at 538.

On August 5, 2009, the court entered an order dismissing the dependency.<sup>6</sup> CP at 603-04.

As noted above, Mr. Hyde appealed numerous orders in the dependency, including the following six orders that were consolidated into the case before this Court:

1. May 20, 2009 Order Denying Revision of Order Denying Department’s Motion to Place Child in Foster Care (No. 28127-2);

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<sup>4</sup> On July 31, 2009, the father filed a Notice of Appeal of the July 15, 2009 Dependency Review Hearing Order. CP at 561-69. (Ct. App. No. 28313-5).

<sup>5</sup> On July 31, 2009, the father filed a Notice of Appeal of the July 29, 2009 Dependency Review Hearing Order. CP at 591-99. (Ct. App. No. 28315-1).

<sup>6</sup> On September 2, 2009, the father filed a Notice of Appeal of the August 5, 2009 Order Dismissing the Dependency. CP at 608-610. (Ct. App. No. 28416-6).

2. July 1, 2009 Order Regarding Motion to Dismiss (No. 28226-1);
3. July 15, 2009 Dependency Review Hearing Order ordering dismissal of dependency on July 31, 2009 (No. 28313-5);
4. July 29, 2009 Dependency Review Hearing Order ordering dismissal of dependency on July 31, 2009 (No. 28315-1);
5. July 30, 2009 Order Denying Revision of Order Denying Motion to Vacate Dependency and Disposition Order (No. 28314-3); and,
6. August 5, 2009 Order Dismissing Dependency (No. 28416-6).

The Court of Appeals sent an August 4, 2009 letter to the parties consolidating the first two appeals. The Court noted that a final order dismissing the dependency was entered, and the matters were therefore appealable as a matter of right. Letter from Renee S. Townsley, Clerk/Administrator of the Court of Appeals, Division III, to Counsel (August 4, 2009) (Ct. App. No. 28127-2). The letter also requested that counsel for each party file a memorandum on whether the father is an aggrieved party as required by RAP 3.1. In memoranda filed in response to this request, Mr. Hyde contended that he was an aggrieved party while the Department contended he was not. The mother has not taken part in any of the appeals.

On October 23, 2009, a Commissioner of the Court of Appeals held that the father was not an aggrieved party and therefore dismissed the two appeals. The Commissioner also consolidated the four other appeals listed above and dismissed those appeals for the same reason. Mr. Hyde filed a Motion to Modify the Commissioner's Ruling and the Court of Appeals denied the motion.

Mr. Hyde then filed a Motion for Discretionary Review in this Court. This Court granted review on January 10, 2011. The Department then moved the Court to remand the case to the Court of Appeals for a decision on the merits as the Department now agrees that Mr. Hyde is an aggrieved party, and there is thus no controversy for the court to decide. This Court denied the motion on June 10, 2011.

### **III. ARGUMENT**

#### **A. The Court Should Vacate the Court of Appeals' Dismissal and Remand for Consideration of the Merits**

The Department previously moved this Court to remand the case to the Court of Appeals for consideration of the merits of Mr. Hyde's appeal because the Department now agrees that Mr. Hyde is an aggrieved party. Motion for Order Remanding to the Court of Appeals, March 24, 2011. The Department and Mr. Hyde are in apparent agreement with regard to the sole actual issue raised in Mr. Hyde's motion for discretionary review,

and no other parties are present to argue a contrary position. Moreover, the substantive merits of the underlying appeals have not been raised nor briefed to this court. Notwithstanding the Court's denial of the Department's motion, the Department respectfully submits that this case is proper for summary reversal and remand to the Court of Appeals for consideration of the merits of Mr. Hyde's appeal.

**B. Mr. Hyde Is An Aggrieved Party**

Only an aggrieved party may seek review by the appellate court. RAP 3.1. An aggrieved party is one whose personal rights or pecuniary interests have been affected. *State v. Taylor*, 150 Wn.2d 599, 603, 80 P.3d 605 (2003). An aggrieved party is not one whose feelings have been hurt or one who is disappointed over a certain result. *Id.* Mr. Hyde is an aggrieved party here. The juvenile court's order dismissing the dependency over his objection sufficiently affects the father's fundamental liberty interest in the care and control of his son to make him aggrieved.

Natural parents have a fundamental liberty interest in the care, custody, and management of their child. *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S. Ct. 1399, 71 L. Ed.2d 599 (1982); *In re Welfare of Sumey*, 94 Wn.2d 757, 762, 621 P.2d 108 (1980). This interest is protected by the Due Process Clause of the Fourteenth Amendment. *Santosky*, 455 U.S. at 753; *Sumey*, 94 Wn.2d at 762.

Parents involved in a dependency action do not lose this protected interest, but a child's rights to basic nurture and safety take priority over the conflicting rights of the parents. RCW 13.34.020; *In re Sumey*, 94 Wn.2d at 762; *In re Dependency of J.B.S.*, 123 Wn.2d 1, 8-10, 863 P.2d 1344 (1993).

The father in this case has a fundamental interest in the care, custody, and management of his child. While the father's lengthy incarceration prevents him from directly caring for his son, his parental rights remain intact and therefore he still has a protected interest in the care of his son.

The father raised concerns over the welfare of J.H. in the care of the mother who had tested positive for drugs. He also raised concerns over the welfare of his son without the continued oversight of the dependency court as the mother was slow to enter treatment and quick to be unsuccessfully discharged from treatment. Due to his incarceration, he had no ability to seek custody of J.H. The father has a due process right to be heard in the dependency action on these matters. RCW 13.34.090(1); *In re Dependency of R.L.*, 123 Wn. App. 215, 98 P.3d 75 (2004). His personal interests are affected by the dependency court's orders and he therefore is an aggrieved party. *Taylor*, 150 Wn.2d at 603. He therefore has a right to appeal adverse decisions on these matters.

Although Mr. Hyde is an aggrieved party in this case, it is unusual for a parent to be aggrieved by dismissal of a dependency. When a dependency is dismissed due to a child successfully reunifying with a parent there are generally no aggrieved parents, as parents rarely invite continued intervention by the Department or the court.

However, in rare cases where a non-custodial parent is concerned about the welfare of the child in the custodial parent's care and is unable to seek custody of the child, the parent may oppose dismissal of the dependency and seek ongoing State involvement to ensure the safety of the child. In such instances, like the one here, the non-custodial parent's constitutional interests in the control of the child have been negatively affected and the parent is "aggrieved." *See Taylor*, 150 Wn.2d at 603. The parent thus has a right to challenge the order dismissing the dependency and the right to argue that the juvenile court abused its discretion in granting the motion to dismiss.

Aggrieved party status should not extend to parents whose objection to the dependency dismissal is based on something other than concern over the safety of the child, such as a desire for ongoing services or support. Nor should the aggrieved party status extend to parents who have the ability to avail themselves of family court to pursue the safety of their child. Dependencies are for situations of abuse, neglect, or having no

parent capable of caring for the child such that the child is placed at substantial risk of harm. RCW 13.34.030(6). Appeals of dependency dismissals should not become a proxy for disputes over parenting practices that are more properly heard in family court.

While Washington appellate courts have not previously considered who is an aggrieved party in regards to a dismissal of a dependency, they have considered who is an aggrieved party in the context of the determination of a dependency. The Court of Appeals has held both ex-guardians bringing a dependency action and temporary custodians to be aggrieved parties in regards to an order finding a child dependent. *In re Hansen*, 24 Wn. App. 27, 599 P.2d 1304 (1979); *In the Matter of the Dependency of J.W.H.*, 106 Wn. App. 714, 24 P.3d 1105 (2001), *reversed on other grounds*, 147 Wn.2d 687, 57 P.3d 266 (2002).

In *Hansen*, a Washington couple who were guardians of a child for over eight years filed a dependency petition when the mother of the child obtained a California court order terminating the guardianship. The trial court found the child dependent and placed her with the ex-guardians. However, the trial court also expressed its intent to reunify the child with her mother and ordered visitation. Both the mother and the guardians appealed. The guardians' appeal challenged the trial court's refusal to hear additional evidence they proposed to introduce. The Court of

Appeals found them to be aggrieved parties as their personal rights were directly affected by the dependency court's order, especially in light of the judge's expressed intent to effect an eventual reunification between the child and her mother. *In re Hansen*, 24 Wn. App. at 35.

In *J.W.H.*, temporary custodians who had intervened in the dependency action objected to the entry of agreed orders of dependency by the parents. The Court of Appeals found the custodians were aggrieved parties because they were parties to the dependency, the issue of whether the children were dependent affected the custodians' third party custody action, and they had an interest in preserving their established and loving relationships with the children. *In re J.W.H.*, 106 Wn. App. at 719. While the Supreme Court overturned the Court of Appeals' decision about the merits of the case, it allowed the custodians to pursue the appeal, essentially affirming the finding that they were aggrieved parties. *In re J.W.H.*, 147 Wn.2d 687, 57 P.3d 266 (2002).

These two cases are not directly applicable as they are focused on the potential loss of a custodial relationship between the custodian and the child, which is not at stake in this case due to the father's long imprisonment. However, the cases are significant for their expansiveness in determining who qualifies as an aggrieved party in the dependency context. Not only were permissive interveners found to be aggrieved

parties, so were ex-guardians. Also, the custodians and ex-guardians were found to be aggrieved parties not in regards to a dependency finding against them; but, rather they each wanted to add further evidence for a dependency finding against the parents. The criteria to be an aggrieved party in the dependency context appear low as the interests at stake are so critical.

The Arizona Court of Appeals addressed a situation comparable to the situation here. See *Lindsey M. v. Arizona Department of Economic Security*, 212 Ariz. 43, 127 P.3d 59 (2006). The court found an incarcerated mother to be an aggrieved party in regards to a dependency disposition placing the children in foster care even though the mother could not have the children with her. *Id.* The court found that the mother's important and fundamental right to raise her children was sufficient to make her an aggrieved party, even though she could not regain custody of her children while incarcerated. *Id.* at 46.

Similarly, Mr. Hyde cannot have custody or even a relationship with J.H. due to his extended incarceration. However, the dependency court's decision to dismiss the dependency directly affected his fundamental interest as J.H.'s parent as he had no other means to ensure the safety of his son. Thus, Mr. Hyde should be considered an aggrieved party.

The Department acknowledges that it originally took the position that the father was not an aggrieved party. The Department reasoned that just like a defendant cannot be aggrieved by the dismissal of a criminal charge, a father cannot be aggrieved by the dismissal of the dependency action filed against him. *See State v. Taylor*, 150 Wn.2d at 603. The removal of State intervention and oversight and the elimination of court-ordered service requirements seemingly frees the parents to take full advantage of their liberty interest in their children. If parents disagree as to who is the more appropriate custodian, they can pursue an action in family court – parent versus parent – rather than submit to a dependency action.

Upon further consideration and based on the facts in this case, the Department believes the focus should shift from the removal of legal constraints on the father to question whether the dependency court order directly affected the father's interest in the care, custody, and management of his son. The focus in a criminal case is the defendant, while the focus of the dependency is the child. A dismissal of a dependency, unlike a dismissal of a criminal charge, therefore may affect a parent's significant interest in his or her child. In circumstances where a parent raises concerns over the welfare of the child without ongoing court oversight and the parent has no ability to pursue another remedy to protect the child, that

parent should be considered an aggrieved party due to the dismissal of the dependency.

**C. It is Uncontested that Mr. Hyde's Appeal of the Order Dismissing the Dependency is Appealable as a Matter of Right and It is Unnecessary for this Court to Address**

Mr. Hyde raised a second issue, contending that he has the independent right to appeal the order dismissing the dependency as a matter of right and need not meet the requirements for discretionary review.<sup>7</sup> Motion for Discretionary Review at 8-9; Answer to State's Motion Seeking Remand at 7-8. The Court should not consider this issue. The Court of Appeals already concluded that Mr. Hyde's appeals were appealable as a matter of right pursuant to RAP 2.2(a)(1) because a final order dismissing the dependency was entered in Superior Court. Letter from Renee S. Townsley, Clerk/Administrator of the Court of Appeals, Division III, to Counsel (August 4, 2009) (Ct. App. No. 28127-2). Accordingly, with respect to this issue, Mr. Hyde is not an aggrieved party because the Court of Appeals has already granted the relief he seeks. The Department respectfully submits that the Court should decline Mr. Hyde's request for an advisory opinion on this issue.

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<sup>7</sup> If Mr. Hyde is contending that his "independent" right to appeal as a matter of right does not require him to be an aggrieved party, he is incorrect. RAP 2.2 addresses what decisions of the superior court are reviewable as of right or at the court's discretion and does not address which parties may seek review. RAP 3.1, on the other hand, governs which parties may appeal a court decision, and applies whether the decision of the trial court is appealable by right or at the discretion of the court.

#### IV. CONCLUSION

The father's fundamental interest in the care and control of his son was directly affected by the dismissal of the dependency. Therefore the father is an aggrieved party. The dismissal of the father's appeals should be reversed and the cases remanded to the Court of Appeals.

RESPECTFULLY SUBMITTED this 11 day of August, 2011.



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**CERTIFICATE OF SERVICE**

I hereby certify that on the 11TH day of August, 2011, I served a copy of the DEPARTMENT'S SUPPLEMENTAL BRIEF on the following by US Mail via Consolidated Mail Service and/or via e-mail/.pdf:

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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 11TH day of August, 2011 at Spokane, Washington.

  
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Dear Clerk,

Please file the attached Department's Supplemental Brief and Certificate of Service in the matter of:

**In re: the Dependency J.H.**

**Supreme Court No. 84916-1**

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Thank you.

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